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Rafael Gely

University of Missouri School of Law, gelyr@missouri.edu

Paul L. Caron

University of Cincinnati College of Law, paul.caron@uc.edu

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Book Review Essay

What Law Schools Can Learn from Billy Beane and the Oakland Athletics*

MONEYBALL: THE ART OF WINNING AN UNFAIR GAME. By Michael Lewis.
New York: W.W. Norton & Company, 2003. Pp. xv, 288. \$24.95.

Reviewed by Paul L. Caron** and Rafael Gely***

I. Introduction

In *Moneyball*, Michael Lewis writes about a story with which he fell in love, a story about professional baseball and the people that play it.¹ A surprising number of books and articles have been written by law professors who have had long love affairs with baseball.² These books and articles are a two-way street, with baseball and law each informing and enriching the other. For example, law professors versed in antitrust,³ labor,⁴ property,⁵

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In light of the subject of this Review Essay, we want to make two disclosures. On the law school side, we collectively have taught at nine different law schools, and the views expressed in this Review Essay do not necessarily relate specifically to any one of these institutions. On the baseball side, neither of us has entirely shifted our allegiance to the Cincinnati Reds from, respectively, the Boston Red Sox and Chicago Cubs. We leave it to others to decide if our teams' spectacular (and in-character) flame-outs in the 2003 major league baseball playoffs colored the views expressed in this Review Essay.

** Charles Hartsock Professor of Law and Director of Faculty Projects, University of Cincinnati College of Law. LL.M. (Taxation) 1988, Boston University School of Law; J.D. 1983, Cornell Law School. paul.caron@law.uc.edu.

*** Professor of Law, University of Cincinnati College of Law. Ph.D. (Labor and Industrial Relations) 1992 and J.D. 1987, University of Illinois. rafael.gely@uc.edu.

1. MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* xiv (2003) [hereinafter LEWIS, *MONEYBALL*].

2. A February 1, 2004 search of the Westlaw JLR database of law journals located 277 articles that contain the word "baseball" in the title. For an excellent collection of articles on baseball and law, see *BASEBALL AND THE AMERICAN LEGAL MIND* (Spencer W. Waller et al. eds., 1995).

3. See, e.g., Thane N. Rosebaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729 (1987); Larry C. Smith, *Beyond Peanuts and Cracker Jack: The Implications of Lifting Baseball's Antitrust Exemption*, 67 U. COLO. L. REV. 113 (1999); Morgen A. Sullivan, "A Derelict in the Stream of the Law": *Overruling Baseball's Antitrust Exemption*, 48 DUKE L.J. 1265 (1999).

tax,⁶ and tort⁷ law have brought their legal training to bear on particular aspects of baseball.⁸ Law professors also have mined their passion for baseball in extracting from the diamond lessons for the law in areas as diverse as *The Common Law Origins of the Infield Fly Rule*⁹ (and the almost cult-like following it spawned),¹⁰ statutory construction,¹¹ legal theory,¹² comparisons of Supreme Court Justices to famous baseball players,¹³ and, our favorite, *The Jurisprudence of Yogi Berra*.¹⁴ Indeed, one commentator has called baseball and law “America’s Two National Pastimes.”¹⁵

Yet missing in this cacophony of law professor voices on baseball and law is any discussion of what could be called our sandlot: legal education.¹⁶

4. See, e.g., Roger I. Abrams, *Sports Labor Relations: The Arbitrator’s Turn at Bat*, 5 ENT. & SPORTS L.J. 1 (1988); Robert A. McCormick, *Baseball’s Third Strike: The Triumph of Collective Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131 (1982).

5. See, e.g., Paul Finkleman, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?*, 23 CARDOZO L. REV. 1609 (2002); Steven Semeraro, *An Essay on Property Rights in Milestone Home Run Baseballs*, 56 SMU L. REV. 2281 (2003).

6. See, e.g., Joseph M. Dodge, *Accessions to Wealth, Realization of Gross Income, and Dominion and Control: Applying the “Claim of Right Doctrine” To Found Objects, Including Record-Setting Baseballs*, 4 FLA. TAX REV. 685 (2000); Lawrence A. Zelenak & Martin J. McMahon, Jr., *Taxing Baseballs and Other Found Property*, 84 TAX NOTES 1299 (1999).

7. See, e.g., J. Gordon Hylton, *A Foul Ball in the Courtroom: The Baseball Spectator Injury as a Case of First Impression*, 38 TULSA L. REV. 485 (2003).

8. See also ROBERT I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* (1998); COURTING THE YANKEES: *LEGAL ESSAYS ON THE BRONX BOMBERS* (Ettie Ward ed., 2003).

9. 123 U. PA. L. REV. 1474 (1975).

10. See, e.g., Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FED. SENTENCING REP. 96 (1992); Mark W. Cochran, *The Infield Fly Rule and the Internal Revenue Code: An Even Further Aside*, 29 WM. & MARY L. REV. 567 (1988); John J. Flynn, *Further Aside: A Comment on “The Common Law Origins of the Infield Fly Rule”*, 4 J. CONTEMP. L. 241 (1978); Eldon L. Hamm, *Aside the Aside: The True Precedent of Baseball in Law: Law, The Residue of Luck—Or Who’s Not on First?*, 13 MARQ. SPORTS L. REV. 213 (2003).

11. See, e.g., Donald J. Rapson, *A “Home Run” Application of Established Principles of Statutory Construction: U.C.C. Analogies*, 5 CARDOZO L. REV. 441 (1984).

12. See, e.g., Paul Finkelman, *Baseball and the Rule of Law Revisited*, 25 T. JEFFERSON L. REV. 17 (2002); Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987); Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17 (1994); Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227 (1994).

13. Sandra Goldsmith, *What Do Babe Ruth and John Marshall Have in Common?*, in *BASEBALL AND THE AMERICAN LEGAL MIND*, *supra* note 2, at 434; see also Find Law & The Oyez Project, at <http://baseball.oyez.org> (last visited Feb. 1, 2004) (allowing the user to build “Supreme Court knowledge through America’s favorite pastime” by comparing Supreme Court justices with baseball players).

14. William D. Ariza et al., *The Jurisprudence of Yogi Berra*, 46 EMORY L.J. 697 (1997).

15. Cleta D. Mitchell, *The Rise of America’s Two National Pastimes: Baseball and the Law*, 97 MICH. L. REV. 2042 (1999) (reviewing ABRAMS, *supra* note 8).

16. Cf. Jonathan D. Rowe, *“It Gets Late Early Out There”*: *Yogi Berra Tours the Law Schools*, 77 MICH. B.J. 664 (1998) (applying Yogi Berra’s maxims to law and legal education). Rowe notes that “no one ever summed up the Law and Economics movement better—or faster—than Yogi, when he observed: ‘a nickel ain’t worth a dime anymore.’” *Id.* at 665–66. He also points out that

In their review of *Moneyball*, Richard Thaler and Cass Sunstein argue that the book has “large and profound implications” for professions other than baseball.¹⁷ In this Review Essay, we explore *Moneyball*’s “large and profound implications” for law schools. In particular, we focus on the lessons law professors can draw from Lewis’s tale of Major League Baseball players¹⁸ and the organizations for which they play.¹⁹

We begin in Part II by telling the story of baseball and how one man, Billy Beane, a baseball player who “failed” despite marvelous physical talents, became general manager of the Oakland Athletics and challenged what until then had been considered the eternal themes of baseball. Beane ruthlessly exploited inefficiencies in the baseball market caused by the inability to properly measure individual player contributions to the success of a baseball team. By chucking traditional subjective measurements of players in favor of new objective methods of player evaluation developed by baseball outsiders and abetted by advances in computer technology and the Internet, Beane and the Oakland A’s have enjoyed amazing success in recent years competing against larger-market teams.

In Part III, we tell the parallel story of legal education. We explain that, in many ways, legal education is teeming with more inefficiencies than those Billy Beane uncovered in baseball. We treat the history of legal education as a tale of two eras. In the early era, after initial efforts at competition among law schools, the emergence of the Association of American Law Schools (“AALS”) led to a long period of somnolence. Changes in the economic conditions of higher education and the legal profession, combined with increasing demands for accountability and transparency in the computer-Internet age, created the market demand for measuring organizational success which *U.S. News & World Report* met with its annual law school rankings. Although reviled by most law school insiders, *U.S. News & World Report* has had the salutary effect of spurring the development of alternative methods of measuring law school success as well as individual contributions to that success.

Berra posed a conundrum much deeper than what any Critical Legal Studies scholar ever did, “when he was asked ‘what time is it?’ and he answered ‘you mean now?’” *Id.* at 666.

17. Richard H. Thaler & Cass R. Sunstein, *Who’s On First*, *THE NEW REPUBLIC*, Sept. 1, 2003, at 27, 29.

18. For those questioning the analogy between baseball players and law professors, give us time to develop the story; if you are impatient, see LEWIS, *MONEYBALL*, *supra* note 1, at 149 (“The great thing about baseball players . . . is how seldom they break a sweat.”).

19. For a recent attempt to draw lessons for higher education from Major League Baseball (and vice-versa), see Mark Yudof, *What if the Yankees Were Run Like a Public University?*, *CHRON. HIGHER EDUC.*, Mar. 12, 2004, at B7.

In Part IV, we explore the implications of *Moneyball* for legal education in three areas. First, we argue that law school rankings manifest American society's increasing demand for more and better information. Rankings are here to stay, so the professorate should continue the work that has begun to more accurately measure law school success. We offer our views on the current state of law school rankings along with suggestions for future development. We advocate the comprehensive collection of data that individuals and organizations can weigh as they see fit in arriving at competing rankings systems.

Second, this drive for measuring organizational success will encourage efforts begun in the past decade to quantify individual faculty contributions to law school success. We applaud these efforts and suggest some potential improvements. We support measures that take into account both comprehensive and qualitative measurements of faculty performance. We provide some data that both confirm the relationship of productivity and impact measures of scholarly performance and provide support for isolating background and performance characteristics in predicting future faculty scholarly production and impact.

Third, we use Billy Beane as a prototype and identify the qualities that enabled him to revolutionize baseball. We shift the focus here to deans and present data measuring decanal scholarly productivity and impact. We contrast these figures with the corresponding faculty data and distinguish deans' scholarly performance both in the period prior to becoming dean and while serving as dean. We also offer some surprising predictions, based on the data, of the qualities that a future dean will need to assume the mantle of the Billy Beane of legal education.

We hope our Review Essay spurs other attempts to embrace the market demand for greater accountability and transparency in legal education through more refined measures of organization success and individual contributions to that success. As was the case with Michael Lewis and baseball, ours is a story about the profession we love—legal education—and the “people that play it.”

II. The Baseball Story

A. *Pre-Billy Beane*

Major league baseball long has been considered an oasis of objectivity in an otherwise messy, subjective world. A team's success is determined by the on-field results of games played under a rigid set of rules²⁰ governing everything from the number of baseballs the home team must provide (twelve)²¹ to a prohibition on discoloring the ball by rubbing licorice on it.²² The thirty teams engage in an annual 162-game Darwinian struggle for supremacy, which culminates in a best-of-seven-game World Series played between the American League and National League champions (who each have prevailed in two playoff series involving the three regular season division champions as well as each league's nondivision team with the best record).

For over a century, individual player contributions to a team's success have been measured by a variety of statistical criteria. Hitters and pitchers each are rated in three major categories; the rare player who leads the league in each category in a single year is dubbed the winner of a mythical "Triple Crown." For hitters, the holy trinity is batting average, home runs, and runs batted in ("RBIs");²³ for pitchers, the categories are wins, earned run average ("ERA"), and strikeouts.²⁴

20. Rule 1.01 of the 2004 Official Rules of Major League Baseball provides that "[b]aseball is a game between two teams of nine players each, under direction of a manager, played on an enclosed field in accordance with these rules, under jurisdiction of one or more umpires." MAJOR LEAGUE BASEBALL, THE OFFICIAL RULES OF MAJOR LEAGUE BASEBALL, R. 1.01 (2003), available at http://mlb.mlb.com/NASApp/mlb/mlh/official_info/official_rules [hereinafter MLB, OFFICIAL RULES]. Rule 1.02 explains that "[t]he objective of each team is to win by scoring more runs than the opponent." *Id.* R. 1.02. Rule 1.03 states that "[t]he winner of the game shall be that team which shall have scored, in accordance with these rules, the greater number of runs at the conclusion of a regulation game." *Id.* R. 1.03.

21. See *id.* R. 3.01(d) (requiring the home club to keep at least one dozen reserve balls available).

22. See *id.* R. 3.02 (providing that "no player shall intentionally discolor or damage the ball by rubbing it with . . . licorice . . . or other foreign substance").

23. Nine American League hitters and four National League hitters have won the Triple Crown. Stephen Harris, *The Triple Crown*, at http://sportsfacts.net/history/baseball/triple_crown_winners.html (last visited Feb. 1, 2004).

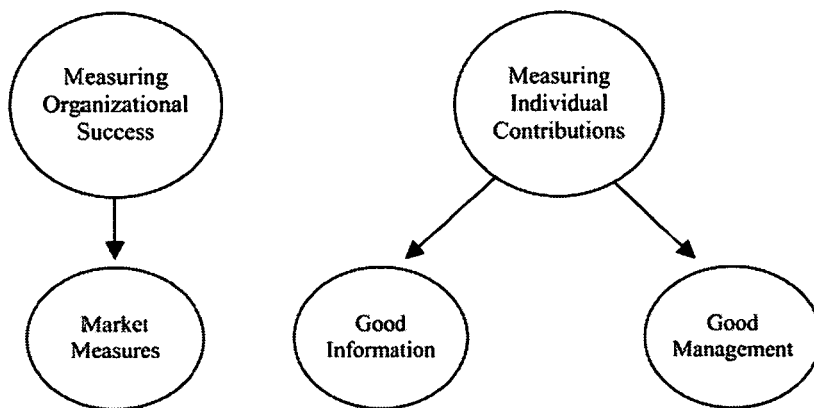
24. Fourteen American League pitchers and twenty National League pitchers have won the Triple Crown. *Id.* In recent years, "saves" earned by relief pitchers have taken on increasing weight in pitching statistics. A relief pitcher earns a "save" when he meets these three criteria:

(1) He is the finishing pitcher in a game won by his club; and (2) He is not the winning pitcher; and (3) He qualifies under one of the following conditions: (a) He enters the game with a lead of no more than three runs and pitches for at least one inning; or (b) He enters the game, regardless of the count, with the potential tying run either on base, or at bat, or on deck (that is, the potential tying run is either already on base or is one of the first two batsmen he faces); or (c) He pitches effectively for at least three innings.

MLB, OFFICIAL RULES, *supra* note 20, R. 10.20.

Since the dawn of free agency in 1976, the economics of Major League Baseball have tilted in favor of large-market teams. Unlike its professional football and basketball counterparts, Major League Baseball has been unable to forge an agreement with its owners and players for large-scale revenue sharing and salary constraints.²⁵ With Major League Baseball revenues approaching \$4 billion annually,²⁶ the objective measures of team success and of individuals' contributions to that success in theory should produce a ruthlessly efficient Major League Baseball market for players. Indeed, it is hard to imagine an industry with greater incentives for accountability and transparency. In Major League Baseball, team success and individual performances are tracked with merciless precision each day in countless newspapers and on web sites, consumed by millions of voracious fans, many of whom collect baseball cards displaying nuggets of statistical insights on players as well as other baseball memorabilia.

Figure 1: An Efficient Baseball Market



Indeed, the conventional wisdom at the time Billy Beane became general manager of the Oakland Athletics in 1997 was that small-market teams simply could not compete against large-market teams. In the words of

25. See Richard C. Levin et al., *The Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics* 7, 38 (July 2000) [hereinafter "*Blue Ribbon Report*"] (noting the relative "substantial competitive balance" between NFL teams in comparison to the lack of competitiveness among the majority of MLB teams, and proposing that MLB teams "share at least 40 percent, and perhaps as much as 50 percent, of all local revenues, after local ballpark expenses are deducted, under what is known as a straight pool plan"), at http://mlb.mlb.com/mlb/downloads/blue_ribbon.pdf.

26. Dan Steinberg & Dave Sheinin, *Empty-Handed: Former Negro League Players, Families Face Difficult Times Minus MLB Pension*, WASH. POST, Aug. 23, 2003, at D1 (noting that the MLB had revenues in excess of \$3.5 billion in 2001).

the July 2000 report of the *Commissioner's Blue Ribbon Panel on Baseball Economics*:²⁷ “Large and growing revenue disparities exist and are causing problems of chronic competitive imbalance. . . . [Y]ear after year, too many clubs know in spring training that they have no realistic prospect of reaching postseason play.”²⁸ The 1996–1999 data generally bore this out, as the median number of games won by teams increased along with player payroll.

Payroll Quartile	Median Number of Games Won
Quartile I	95
Quartile II	86
Quartile III	76
Quartile IV	72

But there was a fly in the ointment: how to explain the nascent success of the small-market Oakland Athletics, which only increased after the release of the *Blue Ribbon Report*.

27. Lewis notes that Bud Selig, Commissioner of Major League Baseball, had an inherent conflict of interest in creating the Commission because he and his family have owned the Milwaukee Brewers since 1970: “He no doubt wanted to believe that the Brewers’ trouble was poverty, not stupidity. He had an obvious financial interest in the commission reaching the conclusion that players’ salaries needed to be constrained and that rich teams should subsidize poor ones.” LEWIS, *MONEYBALL*, *supra* note 1, at 120. After eleven consecutive losing seasons, the Brewers recently announced that the Selig family has put the team up for sale. Adam McCalvy, *Brewers Announce They’re for Sale*, MLB.com, at http://milwaukee.brewers.mlb.com/NASApp/mlb/mil/news/mil_news.jsp?ymd=20040116&content_id=628717&vkey=news_mil&fext=.jsp (Jan. 16, 2004).

28. Levin, *supra* note 25, at 5.

29. *Id.* at 30. The *Blue Ribbon Report* also included data from 1995, but we have excluded that data from this chart because teams only played 144 games that year due to a players’ strike. *Id.* at 30 n.18.

Season	Payroll (MLB Rank) ³⁰	Wins (MLB Rank) ³¹
1997 ³²	\$21.9 million (24)	65 (28)
1998 ³³	\$20.1 million (28)	74 (21)
1999	\$24.2 million (26)	87 (10)
2000	\$32.1 million (25)	91 (6)
2001	\$33.8 million (29)	102 (2)
2002	\$40.0 million (28)	102 (1)
2003	\$50.3 million (23)	96 (4)

As Lewis puts it, “If the market was even close to rational, all the real talent would have been bought up by the rich teams, and the Oakland A’s wouldn’t have stood a chance. Yet they stood a chance. Why?”³⁴ One of the panel members, Paul A. Volcker, continually asked the same question during the Commission’s proceedings: “If poor teams had no hope, how did the Oakland A’s, with [one of the] lowest payroll[s] in all of baseball, win so many games?”³⁵ Lewis recounts how the owners summoned Beane, who explained that his success was likely to be ephemeral in light of his inability to pay the “going rate” for players.³⁶ Lewis notes that although this was what the Commission wanted to hear, it was not what Beane believed.³⁷ “What he believed was what Paul Volcker seemed to suspect, that the market for baseball players was so inefficient, and the general grasp of sound baseball strategy so weak, that superior management could still run circles around taller piles of cash.”³⁸

30. USA Today, *Baseball Salaries Database*, at <http://asp.usatoday.com/sports/baseball/salaries/default.aspx> (last visited Feb. 1, 2004).

31. ESPN, *Oakland Athletics: Franchise History*, at <http://sports.espn.go.com/mlb/alltime/season> (last visited Feb. 1, 2004).

32. There were 28 major league baseball teams in 1997.

33. There were 30 teams after the addition of the expansion Arizona Diamondbacks and Tampa Bay Devil Rays.

34. LEWIS, *MONEYBALL*, *supra* note 1, at 120.

35. *Id.* at 121.

36. *Id.* at 122.

37. Lewis observes that Beane could throw a “pity party” when it suited his purposes. *Id.*

38. *Id.*

B. *Billy Beane's Impact*

Moneyball paints an intriguing portrait of how Billy Beane's "superior management" allowed the Oakland A's not only to compete with, but also to prevail over, teams with double or even triple the resources. Beane realized that Major League Baseball was rife with inefficiencies that he could exploit. These inefficiencies derived from baseball's reliance on subjective evaluation of players by scouts, as well as objective evaluation using conventional Triple Crown statistics, to measure players' contributions to a team's success.³⁹ Beane disdained the view that you could evaluate players by watching them play and instead tapped into an alternative body of statistical data to more accurately value players that other teams either under- or over-valued using the traditional measures. In the case of hitters, Beane displaced the traditional Triple Crown statistics (batting average, home runs, and RBIs) with "OPS," which combines a player's on-base percentage ("OBP") and slugging percentage ("SLG") in measuring his offensive value to a team.⁴⁰ In the case of pitchers, Beane discarded two of the three Triple Crown statistics (wins and ERA) in favor of "DIPS," defense independent pitching statistics, which attempt to strip away the effect of a team's defense on a pitcher's performance by focusing on those statistics exclusively within a pitcher's control: walks, home runs, and strikeouts.⁴¹

Interestingly, these alternative statistical methods did not arise from within Major League Baseball itself. Instead, Lewis traces the lineage of these new ways to evaluate players to Bill James, at the time a night watchman in a pork and beans factory. In 1977, James self-published a sixty-eight-page book⁴² that turned into an annual "abstract" that looked at player performance through new statistical lenses. Lewis explained James's core insight as follows:

Baseball was theatre. But it could not be artful unless its performances could be properly understood. The meaning of these performances depended on the clarity of the statistics that measured them; bad . . . statistics were like a fog hanging over the stage. That raised an obvious question: why would the people in charge allow professional baseball to be distorted so obviously? The answer was equally obvious: they believed they could judge a player's performance simply by watching it. In this, James argued, they were deeply mistaken.⁴³

39. See *id.* at 14–42 (illustrating the conventional method of evaluating players by discussing the Oakland A's 2002 draft).

40. See *id.* at 127–29 (describing the development of a model in which OBP was worth three times SLG to accurately reflect the importance of getting on base).

41. See *id.* at 234–43 (discussing how Voros McCracken, a paralegal in Chicago, developed a theory for creating reliable pitching statistics).

42. BILL JAMES, 1977 BASEBALL ABSTRACT: FEATURING 18 CATEGORIES OF STATISTICAL INFORMATION THAT YOU JUST CAN'T FIND ANYWHERE ELSE (1977).

43. LEWIS, *MONEYBALL*, *supra* note 1, at 68.

Of course, since the invention of the baseball box score in 1845⁴⁴ there had been numerous attempts to rethink baseball's statistical methods of evaluating players. But James appeared at a particularly propitious time that made new statistical insights into player performance both more practical and more valuable. The computer revolution "dramatically reduced the cost of compiling and analyzing vast amounts of baseball data,"⁴⁵ and the boom in baseball salaries "dramatically raised the benefits of having such knowledge."⁴⁶ James's statistical work spawned a movement—sabermetrics—that soon spread to other researchers. Indeed, James's achievement lay in "creating opportunities for scientists as much as doing science himself."⁴⁷ James's work "was catnip to people whose lives were devoted to discovering stable relationships in a seemingly unstable world,"⁴⁸ including "[r]esearch scientists at big companies, university professors of physics and economics and life sciences, professional statisticians, Wall Street analysts, bored lawyers, [and] math wizards unable to hold down regular jobs."⁴⁹ These other researchers provided informal peer review of these new statistical insights.

The statistical pioneers, however, soon faced a roadblock common to researchers in new fields: the absence of data. James approached Major League Baseball and the company that compiled its statistics (the Elias Sports Bureau) to obtain the raw data needed for sophisticated analyses, but was given the cold shoulder.⁵⁰ He then sought alternative means to collect the data, envisioning an army of volunteers to "[t]ake the accumulation of baseball statistics out of the hands of baseball insiders."⁵¹ He proposed building "an organization of hundreds of volunteer scorekeepers who would collect the stuff you needed to reduce baseball to a science."⁵² Such a

44. Lewis notes that "baseball, more than other sports, gave you meaningful things to count, and that by counting them you could determine the value of the people who played the game." *Id.* at 69. The inventor of the box score "succeeded in creating a central role for statistics in baseball, but in doing so he created the greatest accounting scandal in professional sports." *Id.*

45. *Id.* at 72.

46. *Id.*

47. *Id.* at 78.

48. *Id.*

49. *Id.* at 80. Lewis notes that "[t]he sheer quantity of brain power that hurled itself voluntarily and quixotically into the search for new baseball knowledge was either exhilarating or depressing, depending on how you felt about baseball. The same intellectual resources might have cured the common cold, or put a man on Pluto; instead, it was used to divine the logic hidden inside a baseball game" *Id.* at 81.

50. Lewis observes that "Major League Baseball had no sense of the fans as customers, and so hadn't the first clue of what the customer wanted. The customer wanted stats and Major League Baseball did its best not to give them to him. The people inside Major League Baseball were, if anything, hostile to the people outside Major League Baseball who wished to study the game." *Id.* at 83.

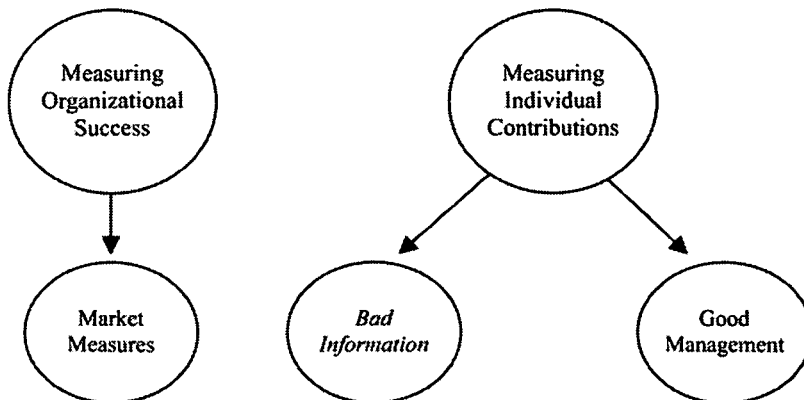
51. *Id.*

52. *Id.*

company—appropriately named STATS Inc.—already existed and had been collecting baseball data since 1980. After several years spent unsuccessfully trying to sell the data to Major League Baseball teams, the company shifted gears in the mid-1980s and began selling the data to fans. Demand skyrocketed as fans flocked to fantasy baseball leagues—dubbed “Rotisserie Leagues” after the name of the New York City restaurant in which the idea was first hatched. Fans became general managers of mythical rotisserie baseball franchises and selected real life baseball players for their “teams.” These fans devoured baseball statistics to track the performance of their teams on a daily basis. James became an investor and creative director of STATS Inc., which grew rapidly and provided statistics to major media outlets like ESPN and *USA Today* and eventually was sold to Fox News Corp. in 1999.⁵³

The story of Major League Baseball in recent years thus is a tale of two markets, both inefficient, but for different reasons. In the pre-Bill James era, baseball executives lacked the requisite information to accurately assess player contributions to team success. Even the most skilled baseball management was unable to overcome the flawed statistical player measures in vogue for over a hundred years. The problem therefore was information, not management.

Figure 2: The Pre-Bill James Inefficient Baseball Market

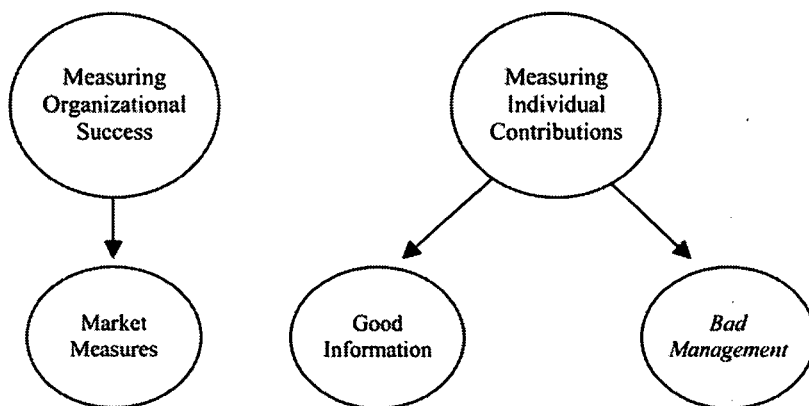


In contrast, the problem in the post-Bill James world that Billy Beane entered was bad management. If baseball were a truly efficient market, these new statistical methods would have swept across the industry: “Everywhere one turned in competitive markets, technology was offering the people who

53. *Id.* at 84–88; see also STATS Inc., at <http://www.stats.com> (last visited Feb. 1, 2004); STATS Inc., at <http://biz.stats.com> (last visited Feb. 1, 2004) (providing information about the structure, history, and services of STATS Inc.).

understood it an edge. What was happening to capitalism should have happened to baseball: the technical man with his analytical magic should have risen to prominence in baseball management, just as he was rising to prominence on, say, Wall Street.”⁵⁴ But real general managers, as contrasted with their fantasy counterparts, obdurately refused to embrace the new statistical measures of players’ contributions to teams’ success and thus created enormous inefficiencies in the Major League Baseball market for players.⁵⁵ The problem therefore was management, not information.

Figure 3: The Post-Bill James Inefficient Baseball Market



Billy Beane became general manager of the Oakland A’s in 1997 and was determined to exploit these inefficiencies.⁵⁶ He had voraciously read all of James’s annual baseball abstracts and sought “to take the knowledge developed by James and other analysts outside the game, and implement it inside the game.”⁵⁷ But Beane resisted the latest statistical fads and continually refined his approach to embrace only those statistics with the best predictive properties. He also appreciated the limits of statistical analysis. For example, he recognized that the Oakland A’s failures in the baseball playoffs resulted from the small sample size (best-of-five or best-of-seven game series), and that did not cause him to re-examine his methods which produced statistically significant results over the course of a 162-game season.⁵⁸ Beane applied his methods not only in the evaluation of current

54. LEWIS, *MONEYBALL*, *supra* note 1, at 88.

55. Lewis notes that “[r]ight from the start Bill James assumed he had been writing for, not a mass audience, but a tiny group of people intensely interested in baseball. He wound up with a mass audience and went largely unread by the people most intensely interested in baseball: the men who ran the teams.” *Id.* at 91.

56. *Id.* at 97.

57. *Id.* at 98.

58. As Beane saltily explained, “My shit doesn’t work in the play-offs. My job is to get us to the play-offs. What happens after that is . . . luck.” *Id.* at 275 (expletive deleted).

major league players but also in the selection of amateur players in the annual baseball draft.

Lewis vividly describes the tension within the Oakland A's organization over evaluating players between the "new-school" objective analysis favored by Beane and the "old-school" subjective analysis favored by the scouting department. The stakes were magnified in the player draft because, as a small-market team, Oakland could not afford to misfire in its evaluation of amateur baseball talent. With statistics now available on the Internet for virtually all of the top college baseball players, Beane was able to project a prospect's major league potential with increasing reliability. To select the players unearthed by his methods, however, he had to confront scouts who placed a premium on their subjective evaluation of a player's potential based on observed "tools."⁵⁹ Although scouting had been the principal player evaluation method in baseball for over a century, it was inferior to statistical analysis in that people tend to (1) generalize wildly from their own experience;⁶⁰ (2) be unduly influenced by recent performance;⁶¹ and (3) be biased by what they saw (or think they saw) with their own eyes.⁶²

In the 2002 player draft, Beane for the first time imposed his vision in determining Oakland's selections. Time after time, Beane refused to give credence to the scouts' views on what a player "looks like, or what he might become," and instead focused on "what he has done" as reflected in his actual statistical performance.⁶³ According to Beane, "talent was beside the point: how could you call it talent if it didn't lead to success?"⁶⁴ Beane derided his scouts' love of prospects with physical tools or "perfect bodies" with jibes such as "My only question is, . . . if he's that good of a hitter why doesn't he hit better?"⁶⁵ and "We're not selling jeans here."⁶⁶ Instead, Beane made his selections based solely on objective statistical methods rather than on the scouts' subjective evaluations. The result was a collection of draft choices that did not *look* like major league prospects (and whose selection drew laughs from other teams) but whose *performance* suggested a bright big league future. Rather than recoil at the prospect of selecting players that

59. For hitters, the "tools" sought by scouts are "the abilities to run, throw, field, hit, and hit with power." *Id.* at 3. For pitchers, the primary tool is the ability to throw hard. *See id.* at 39 (discussing how scouts wanted to draft "a flame thrower named Ben Sheets" rather than Barry Zito, who only had an 88-mph fastball).

60. Lewis notes that "[p]eople always thought their own experience was typical when it wasn't." *Id.* at 18.

61. Lewis counters that what a prospect "did last was not necessarily what he would do next." *Id.*

62. Lewis observes that "[t]he human mind played tricks on itself when it relied exclusively on what it saw, and every trick it played was a financial opportunity for someone who saw through the illusion to reality." *Id.*

63. *Id.* at 38.

64. *Id.* at 55.

65. *Id.* at 30.

66. *Id.* at 31.

other teams undervalued, Beane leapt at the chance to outmaneuver his tradition-bound competitors:

The inability to envision a certain kind of person doing a certain kind of thing because you've never seen someone who looks like him do it before is not just a vice. It's a luxury. What begins as a failure of the imagination ends as a market inefficiency: when you rule out an entire class of people from doing a job simply by their appearance, you are less likely to find the best person for the job.⁶⁷

Lewis notes that in many respects Beane was the ideal person to orchestrate this transformation. As a high school baseball player in 1975–1980, Beane possessed in breathtaking abundance the “tools” favored by scouts, was a star athlete in other sports, and was a good student.⁶⁸ The consensus was that he would be taken either first or second in the baseball draft but, because he was also coveted by Stanford University (which offered him a joint baseball and football scholarship), he “slid” all the way to the twenty-third pick in the first round of the draft and was selected by the New York Mets. Yet despite his many physical attributes, Beane floundered as a baseball player. Although he produced dismal minor league statistics, he made the major leagues anyway because of his enormous physical talents. In parts of six major league seasons for four teams, he played only in a total of 148 games and had poor statistics, both traditional⁶⁹ and new.⁷⁰ Like countless players before and since, Beane's physical prowess did not translate into an ability to consistently hit a baseball:

Billy could run and Billy could throw and Billy could catch and Billy even had presence of mind in the field. Billy was quick-witted and charming and perceptive about other people, if not about himself. He had a bravado, increasingly false, that no one in a fifty-mile radius was ever going to see through. He looked more like a superstar than any actual superstar. He was a natural leader of young men. Billy's weakness was simple: he couldn't hit. . . . Or, rather, he hit sometimes but not others; and when he didn't hit, he unraveled.⁷¹

Beane voluntarily retired at age 27 after his final season with Oakland in 1989⁷² and began work for the team as an advance scout before moving into

67. *Id.* at 115.

68. *Id.* at 9–10.

69. Beane's traditional statistics included a .219 batting average, 3 home runs, and 29 RBIs. DAVID S. NEFT ET AL., *THE SPORTS ENCYCLOPEDIA: BASEBALL* 667 (20th ed. 2000).

70. Beane's new statistics included a .542 OBS, comprised of .246 OBP plus .296 SLG. *Id.*

71. LEWIS, *MONEYBALL*, *supra* note 1, at 48.

72. *Id.* at 54. Beane earned a \$70,500 salary in his final major league season. Baseball-Reference, *Billy Bean*, at <http://www.baseball-reference.com/b/beanebi01.shtml> (last visited Feb. 1, 2004). The median league salary at the time was \$383,125. See *Baseball Salaries Database*, USA Today.com, at <http://asp.usatoday.com/sports/baseball/salaries/mediansalories.aspx?year=1989> (last visited Feb. 1, 2004) (providing each team's median salary). By way of comparison, the 2003 major league median salary was \$875,000. See *Baseball Salaries Database*, USA Today.com, at

the front office in 1993 and assuming the general manager post in 1997. As general manager, Beane commanded respect both as a former major league player and, at six feet, four inches tall and 195 pounds, he remained, in his late thirties and early forties, a top athlete. Indeed, Lewis notes that the Oakland players worked for “the only team in the history of baseball on which the general manager was also the best athlete.”⁷³ Beane thus was well-positioned to remake the Oakland organization from top-to-bottom.

Baseball traditionally allowed its managers to control all on-field decisions. But with the departure of glamour manager Tony LaRussa⁷⁴ in 1995, Beane and his predecessor, Sandy Alderson,⁷⁵ created a new model with organizational policy determined at the top by the general manager. With single-minded dedication, they elevated the humble walk (measured by OBP) as the organization’s lodestar.⁷⁶ The major league manager’s job was demoted into a “middle manager” position, responsible only to implement the organization’s vision for winning baseball games rather than his own.⁷⁷ Beane’s status as a former player, combined with his current physical gifts, made such a transformation possible:

<http://asp.usatoday.com/sports/baseball/salaries/mediansalaries.aspx?year=2003> (last visited Feb. 1, 2004) (providing each team’s median salary).

73. LEWIS, MONEYBALL, *supra* note 1, at 155.

74. Interestingly, LaRussa is the fifth manager in baseball history with a J.D. degree (Florida State (1978), the year before beginning his managerial career with the Chicago White Sox). Baseball Library, *Tony LaRussa*, at <http://www.baseballlibrary.com/baseballlibrary/ballplayers/L/LaRussaTony.stm> (last visited Feb. 1, 2004). The other four manager-lawyers are all in baseball’s Hall of Fame: Miller Huggins (New York Yankees; University of Cincinnati College of Law), Baseball Hall of Fame, *Miller Huggins*, at http://www.baseballhalloffame.org/hofers_and_honorees/hofers_bios/Huggins_Miller.htm (last visited Feb. 1, 2004); Hughie Jennings (Detroit Tigers; Cornell Law School), Baseball Hall of Fame, *Hughie Jennings*, at http://www.baseballhalloffame.org/hofers_and_honorees/hofer_bios/Jennings_Hughie.htm (last visited Feb. 1, 2004); Branch Rickey (St. Louis Cardinals; University of Michigan Law School), Baseball Library, *Branch Rickey*, at http://www.baseballlibrary.com/baseballlibrary/ballplayers/R/Rickey_Branch.stm (last visited Feb. 1, 2004); and Monte Ward (Brooklyn Dodgers; Columbia Law School), Albert G. Spalding, *The Legal Process at the Birth of Baseball*, at 1, at http://www.temple.edu/temprcss/chapters/1346_ch1.pdf (last visited Feb. 1, 2004).

75. Alderson resigned as general manager of the Oakland A’s in 1998 to work for major league baseball as Executive Vice-President of Baseball Operations. Sports Illustrated, *MLB News*, at http://sportsillustrated.cnn.com/baseball/mlb/news/1998/09/28/oakland_howe (last visited Feb. 1, 2004).

76. For example, Alderson leaned on minor league managers to increase their players’ patience at the plate. He routinely reviewed each minor league team’s walks. If the totals were inadequate, he “called up the manager and said, ‘They go up or you’re fired.’ And they went up. Quickly.” LEWIS, MONEYBALL, *supra* note 1, at 60.

77. As Lewis explains:

The need to treat the big league team as the sacrosanct province of people who *had* played in the big leagues struck Alderson, who liked the idea of order and discipline cascading unimpeded from the top, as a kind of madness. “In what other business,” he asked, “do you leave the fate of the organization to a middle manager.” But that is what the Oakland A’s, along with the rest of major league baseball, had always done.

Id.

It was hard to know which of Billy's qualities was most important to his team's success: his energy, his resourcefulness, his intelligence, or his ability to scare the living shit out of even very large professional baseball players. Most GMs hadn't played the game and tended to be physically intimidated in the presence of big league players.⁷⁸

Richard Thaler and Cass Sunstein have argued that *Moneyball* has "large and perhaps profound implications" for professions other than baseball.⁷⁹ Indeed, Lewis notes the potential ramifications of his work beyond baseball:

[I]f gross miscalculations of a person's value could occur on a baseball field, before a live audience of thirty thousand, and a television audience of millions more, what did that say about the measurement of performance in other lines of work? If professional baseball players could be over- or under-valued, who couldn't? Bad as they may have been, the statistics used to evaluate baseball players were probably far more accurate than anything used to measure the value of people who didn't play baseball for a living.⁸⁰

Calls have come from various quarters for Beane to bring his management principles to other organizations such as the Democratic National Committee,⁸¹ and tracts have extolled the "Beane-ing of Life"⁸² in fields such as stock market investing⁸³ and insurance.⁸⁴ Mark Gerson has noted that "[i]f the market for baseball players is not efficient, then no industry can be safely considered efficient. And inefficient markets create opportunities for people who think in new ways. Billy Beane is a baseball genius, but it doesn't take a genius to follow his example and start asking the right questions."⁸⁵ In this Review Essay, we "start asking the right

78. *Id.* at 153. As Lewis colorfully observes:

Billy had not only played, he might as well wear a sign around his neck that said: *I've been here, so don't go trying any of that big league bullshit on me.* He didn't want your autograph. He wasn't looking to be your buddy. Seldom did the player see Billy socially, away from the clubhouse. Billy kept his distance, even when he was right in your face. Nevertheless, he was a presence.

Id. (emphasis in original).

79. Thaler & Sunstein, *supra* note 17, at 29.

80. LEWIS, *MONEYBALL*, *supra* note 1, at 72.

81. Jay Robison, *Billy Beane for DNC Chairman!*, at http://www.democraticunderground.com/articles/01/08/31_beane.html (last visited Feb. 1, 2004).

82. Credit Suisse First Boston, *The Beane-ing of Life: Investor Lessons from the A's Winning Ways*, at http://www.mcfx.biz/investor/trends/2003_08_19_The_Beane-ing_of_Life.pdf (last visited Feb. 1, 2004).

83. *Id.*

84. Katherine Burger, *How To Be the MVP*, at http://www.insurancetech.com/utills/printable/Article.jhtml?doc_id=14706151 (Dec. 16, 2002).

85. Mark Gerson, *Home Run*, *THE WEEKLY STANDARD*, at <http://www.weeklystandard.com/content/public/articles/000/000/002/857zfbhrh.asp> (July 7, 2003).

questions” about how Billy Beane’s management principles should inform the law school world.

III. The Law School Story

As in baseball, legal education at first glance would appear to be a very competitive field.⁸⁶ Indeed, competition seems to permeate every waking moment of law school “players.” Admissions officers spend enormous amounts of time and money promoting their schools to recruit the best possible students. Deans and their public relations staffs similarly devote significant resources to “advertise” the virtues of their schools to other deans, faculty, judges, and practicing lawyers across the country.⁸⁷ Students compete for grades, academic honors such as law review membership, and jobs.⁸⁸ Employers compete for the best students. Faculty compete in recruiting, teaching, and scholarship.

As in any competitive environment, there appear to be “winners” and “losers” in the law school world. Winners and losers are identified in the annual admissions “draft,” with various web sites now chronicling admissions successes and failures.⁸⁹ Deans wait (often in fear) for the annual law school rankings to be released, and either celebrate a rise,⁹⁰ or rush to

86. For an economic history of legal education, see generally Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311 (1978) [hereinafter First, *Legal Education I*]; Harry First, *Competition in the Legal Education Industry (II): An Antitrust Analysis*, 54 N.Y.U. L. REV. 1049 (1979) [hereinafter First, *Legal Education II*].

87. See Ronald A. Cass, *So, Why Do You Want To Be a Lawyer? What the ABA, the AALS, and U.S. News Don't Know That We Do*, 31 U. TOL. L. REV. 573, 575 (2000) (describing increased use and distribution of law school brochures); cf. Joseph P. Tomain & Paul L. Caron, *The Associate Dean for Faculty Research Position: Encouraging and Promoting Scholarship*, 33 U. TOL. L. REV. 233, 240 (2001) (questioning the wisdom of law school publicity efforts in light of the large number of brochures produced and distributed, but noting Cincinnati’s reluctance to “unilaterally disarm”).

88. See Stewart E. Sterk, *Information Production and Rent-Seeking in Law School Administration: Rules and Discretion*, 83 B.U. L. REV. 1141, 1150–64 (2003) (describing competitive behavior by law students).

89. Applicants discuss their admissions prospects on various Internet message boards, including 4LawStudents, at <http://www.lawstudentparadise.com/forums> (last visited Feb. 1, 2004); Greedy Law Students, at <http://www.infirmation.com/bboard/clubs.tcl?topic=Greedy%20Law%20Students> (last visited Feb. 1, 2004); Law School Discussion, at <http://www.lawschooldiscussion.org> (last visited Feb. 1, 2004); Nontrad Law, at <http://www.nontradlaw.com> (last visited Feb. 1, 2004); and Princeton Review, at <http://discuss.princetonreview.com> (last visited Feb. 1, 2004).

90. See, e.g., Boston College Law School, *BCLS Moves Up To #22 in U.S. News & World Report*, at <http://www.bc.edu/schools/law/newsevents/2001-archive/033001> (Mar. 30, 2001) (trumpeting Boston College’s rise from 25th in 2000 to 22nd in 2001); George Mason University School of Law, *George Mason University School of Law Achieves Tier One Status in U.S. News & World Report Rankings*, at <http://www.gmu.edu/departments/law/currnews/usnews2001.html> (Mar. 28, 2001) (trumpeting George Mason’s rise into the top 50 in 2001); Allison Thompson, *Law School Continues To Climb in Latest U.S. News Rankings*, ADVANCE ON THE WEB, at <http://www.advance.uconn.edu/03040702.htm> (Apr. 7, 2003) (trumpeting the University of Connecticut’s rise from 43rd in 2002 to 40th in 2003); University of Maryland, Baltimore News Bureau, *UMB Rankings Rise—Again*, at <http://www.oea.umaryland.edu/news/2003/030404-rankings-ef.htm> (Apr. 4, 2003) (trumpeting Maryland’s rise to 45th in 2003); Marquette University,

explain a drop,⁹¹ in the rankings.⁹² Winners and losers are touted in faculty recruitment, with publications listing important “lateral moves,” as well as “up” and “down” trends in faculty hiring.⁹³

Like their baseball counterparts, law school players should be evaluated on their performance, with rewards dependent on results. Law schools should want to “win,” and to do so law schools should compete for the best players. In theory, an efficient law school market would look like an efficient baseball market.

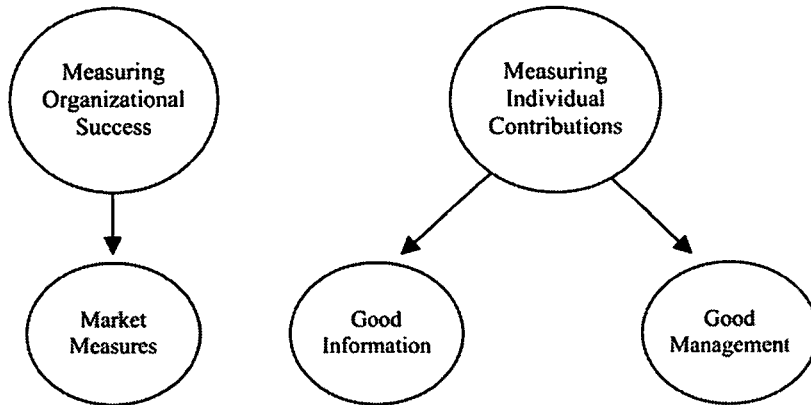
U.S. News & World Report *Graduate Rankings Announced*, at http://www.comp.mu.edu/testim_usnews.html (Apr. 7, 2003) (trumpeting Marquette’s rise into the top 100 in 2003); Jan Gleason, U.S. News & World Report *Rankings Make Room for Several of Emory’s Graduate Programs*, 50 EMORY REPORT, at http://www.emory.edu/emory_report/erarchive/1998/February/erfebruary23/2_23_98USNews.html (Feb. 23, 1998) (trumpeting Emory’s rise from 27th in 1997 to 25th in 1998).

91. For a Dean’s particularly pained mea culpa explaining his school’s drop from 26th in 2002 to 45th in 2003 in the *U.S. News & World Report* rankings, see W.H. Knight, U.S. News and World Report—*Disappointing News*, at <http://www.law.washington.edu/News/DeanCol/02-03/04-07-03.html> (Apr. 7, 2003) (explaining the lower ranking at the University of Washington).

92. See Arthur Austin, *The Postmodern Buzz in Law School Rankings*, 27 VT. L. REV. 49, 52 (2002) (“For law school deans, March is the cruelest month. Publication of the *U.S. News Rankings* supplies every constituency with a graphic snapshot of where they live in legal education society. Unless the school moves up, it’s a no win situation: no movement forces the Dean’s office to issue a litany of promises and explanations, while a drop can prompt vicious clique activity, threatening inquiries from the provost, and alumni indignation, which ironically a dean can use to leverage increased donations.”); Patrick E. Hobbes, *Noblesse Oblige: Four Ways the “Top Five” Law Schools Can Improve Legal Education*, 33 U. TOL. L. REV. 85, 86 (2001) (“I don’t believe there is a single dean that can say he or she does not pay some attention to *U.S. News & World Report*. Moreover, I have yet to meet any dean who thinks we are fortunate to have this annual survey, that the ranking provides valuable consumer information.”).

93. Since 2000, Brian Leiter has annually tracked what he calls “the ten most significant law faculty moves” in his *Law School Observer* column in *The Green Bag*: 6 GREEN BAG 2D 421 (2003); 6 GREEN BAG 2D 77 (2002); 5 GREEN BAG 2D 203 (2002); 4 GREEN BAG 2D 193 (2001). He provides on his web site a listing of law school faculty moves for 1995–2004: Brian Leiter, *Educational Quality Rankings of US Law Schools: 2003–2004; Law School Faculty Moves, 1995–2004*, at http://www.utexas.edu/law/faculty/bleiter/rankings/faculty_moves.html (last visited Feb. 1, 2004).

Figure 4: An Efficient Law School Market



If Billy Beane were to become a law school dean, he would try to figure out how to best measure players' contributions to law school success. In drafting students, what is the relative importance of LSAT scores and undergraduate GPA? In drafting entry-level faculty and signing lateral faculty "free agents," what is the relative importance of academic pedigree, judicial clerkships, practice experience, prior teaching and publications, and performance in the "job talk" and interview pressure-cooker?

But Dean Billy Beane would face a tougher task than that confronted by General Manager Billy Beane. In baseball, the measure of organizational success—wins and losses—is (and always has been) easily identifiable; in the law school world, there is not (and never has been) consensus on the appropriate measure of organizational success. Dean Beane would thus first have to define organizational success and, only then, turn to the determinants of individual contributions to that success.

In Part III, we tell the story of how the world of legal education is very much like the world of Major League Baseball. We treat the history of legal education as a tale of two eras, with the *U.S. News & World Report* law school rankings as the dividing line. In the pre-rankings period, as in the pre-Billy Beane period in baseball, the lack of accurate measurements of individual performance resulted in a market riddled with inefficiencies. In addition, the absence of market measures of organizational success led to a lack of accountability and transparency in legal education, thus creating a safe, comfortable environment for law schools (and particularly for law professors). In the current rankings-centric environment, in contrast, the introduction of market measures of organizational success, however imperfect they may be, has rattled the comfortable world of legal education⁹⁴

94. See Austin, *supra* note 92, at 53 ("The Rankings disrupted decades of the quiet life among the Elites and their cronies at the established regional schools.").

and led to the first attempts at injecting objective measures of individual contributions to organizational success into the law school mix. In Part IV, we critique these early efforts and offer our views on steps Billy Beane might take on both fronts were he to become dean of a law school and confront the increasing demands for accountability and transparency in legal education.

A. *Pre-U.S. News & World Report*

Law schools first appeared in the legal education landscape in the late 1700s.⁹⁵ The most famous early law school, Litchfield Law School (established in 1784 in Connecticut), attributed “its proud pre-eminence . . . to the advantages, which [its] mode of instruction . . . possesses over the systems usually adopted in similar institutions.”⁹⁶ Litchfield’s instruction included lectures in forty-eight subjects over a fourteen month period. Lectures were given daily, lasted an hour and a half, and were followed by *weekly* examinations⁹⁷ consisting “of a thorough investigation of the principles of each rule, and not merely of such questions as can be answered from memory without any exercise of judgment.”⁹⁸ For most of the 1800s, there was a great deal of experimentation and variety in the structure, form, and delivery of legal education.⁹⁹ Independent law schools, like Litchfield, as well as law schools associated with colleges and universities, competed openly, with the inevitable result that some were more successful than others.¹⁰⁰ In the early part of the nineteenth century, “the profit-maximizing law school was the rule not the exception. Legal education was clearly a business, and, for some, quite a profitable one.”¹⁰¹

Differentiation continued to be a hallmark of legal education into the early twentieth century. For example, a wide variety of organizations were

95. See ROBERT STEVENS, LAW SCHOOL LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 3 (1983). For a listing of the early law schools, see ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA 4423–40 (1921).

96. The “Advertisement” of the Famous Litchfield Law School, 1 AM. LAW SCHOOL REV. 19, 19 (1902); see also Litchfield Historical Society, at <http://www.litchfieldhistoricalsociety.org/law-school.html> (last visited Feb. 1, 2004).

97. For a description of our attempts to use modern technology to inject more feedback into law school teaching—going Litchfield one better by providing *daily* feedback—see Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology To Foster Active Student Learning*, 54 J. LEGAL EDUC. (forthcoming 2004).

98. The “Advertisement” of the Famous Litchfield Law School, *supra* note 96, at 19. The examinations were administered by a “distinguished gentleman” of the local bar (Jabez W. Huntington) “whose practice enables him to introduce frequent and familiar illustrations, which create an interest, and serve to impress more strongly upon the mind the knowledge acquired during the week.” *Id.*

99. See STEVENS, *supra* note 95, at 3–6.

100. *Id.* at 5.

101. First, *Legal Education I*, *supra* note 86, at 338–39.

involved in the delivery of legal education. During the 1910–1921 period, 33% of law schools were independent (with no collegiate affiliation); 30% were affiliated with a protestant or nonsectarian college or university; 26% were part of a state or federal university; and 11% were affiliated with a Roman Catholic college or university.¹⁰²

Law schools also differed in their admissions requirements and in the content and structure of the education they provided. Substantial variability existed in the numbers of years (if any) law students were required to have spent in college. Of the 142 law schools surveyed in the early 1900s, only 2% required a college degree while 63% did not require any college education.¹⁰³ Thirty-nine percent of law schools required either a three- or a four-year course of study.¹⁰⁴ Fifty percent of law schools required full-time study, while 10% were “short-course” schools, which allowed completion of studies in less than three years.¹⁰⁵

Law schools also differed in the content of their curricula. The number of credit hours required for completion, even among full-time, three-year programs, ranged from 26 to 59 hours in full-time programs¹⁰⁶ and from 17 to 45 hours in part-time programs.¹⁰⁷ Law schools taught a wide variety of courses, with some requiring both moot court and the equivalent of office or apprenticeship experience, while others required only traditional course work.¹⁰⁸

The most telling difference among law schools during this period was the competition that developed over the best method of legal instruction. After its introduction in 1870 by Dean Langdell,¹⁰⁹ the case method gained

102. See REED, *supra* note 95, at 445 tbl. 7(b) (providing raw data).

103. *Id.* at 441.

104. *Id.*

105. *Id.* at 449 tbls. 9 & 10. One of the most contentious issues in legal education during this period was the ability of part-time evening law programs to deliver high-quality instruction. Critics argued that the “part-time movement was fundamentally unsound—that it is impossible to train students effectively under these conditions.” ALFRED Z. REED, *PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA* 118 (1928). Critics also feared that part-time programs had a deleterious effect on faculty. Professors “with genuine scholarly instincts” would not be attracted to schools offering part-time programs because it would be “apparent to the great majority of those who were sincerely desirous to develop good law schools that inability to command the entire time of their students created special difficulties.” *Id.*

106. *Id.* at 550–51 tbl. 15.

107. *Id.*

108. See REED, *supra* note 95, at 410 (stating that “[s]ome schools have attempted, more or less successfully, to broaden their curriculum by the inclusion of ‘borderland’ subjects such as international law and jurisprudence, by cultivating statutory and administrative law, or by instituting genuine practical work in connection with Legal Aid societies. There is some variation also as to the maintenance of the traditional moot court work, or practice in drafting written documents or in ‘finding the law.’”).

109. C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871); see also Bruce A. Kimball, “Warn the Students That I Entertain Heretical Opinions, Which They Are Not To Take as Law”: *The Inception of Case Method Teaching in the Classrooms of the Early C.C.*

an increasing foothold at many law schools (particularly full-time, three-year programs).¹¹⁰ Langdell's insight was that law could be taught as a science, and that the training should take place in a law school rather than at a law office under the auspices of a practicing lawyer.¹¹¹ Roughly 25% of the 120 law schools in existence in the early twentieth century adopted Langdell's case method.¹¹² Other law schools, however, were skeptical of the usefulness of the case method, opting instead to rely on other forms of delivery of legal instruction such as reading courses, lectures on jurisprudence, and work in legal-aid practice.¹¹³ Law schools thus provided different "products" from which those aspiring to be lawyers could choose.¹¹⁴

In short, during the late 1800s and early 1900s, "vigorous differentiation"¹¹⁵ was the norm in legal education. Law schools saw themselves as competitors "in pursuit of a common aim."¹¹⁶ They understood the importance of differentiating their "product" to highlight their competitive advantages over their peers.¹¹⁷

This vigorous differentiation, however, soon dissipated as a result of two anti-competitive forces: the formation of the American Bar Association ("ABA") Committee on Legal Education¹¹⁸ and the AALS in the late

Langdell, 1870–1883, 17 LAW & HIST. REV. 57, 57 (1999) (calling Langdell "the most influential figure in the history of American professional education").

110. STEVENS, *supra* note 95, at 60.

111. See John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 160 (1993) (recounting process by which Langdell's vision of legal education became dominant in American law schools).

112. STEVENS, *supra* note 95, at 64.

113. REED, *supra* note 95, at 383.

114. See STEVENS, *supra* note 95, at 63 ("By the 1880s, going to law school was no longer a rarity; a law student who wanted product differentiation sought out a case-method school."). Although the debate over the desirability of the case method still rages today, it "is unquestionably the primary method of instruction in U.S. law schools." Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 543 (1991). For a sample of the modern debate over the case method, see Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113 (1999); Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137 (2001); Dennis Patterson, *Langdell's Legacy*, 90 NW. U. L. REV. 196 (1995); W. David Slawson, *Changing How We Teach: A Critique of the Case Method*, 74 S. CAL. L. REV. 343 (2000); David D. Garner, Comment, *The Continuing Vitality of the Case Method in the Twenty-First Century*, 2000 B.Y.U. EDUC. & L.J. 307. See also Paul L. Caron, *Back To the Future: Teaching Law Through Stories*, 71 U. CIN. L. REV. 405 (2002) (discussing the new *Law Stories* series of books that enriches the case method of instruction).

115. REED, *supra* note 95, at 274.

116. *Id.* at 273.

117. To be sure, there were many similarities among sub-groups of schools, in terms of admissions requirements, length of course of studies, and types of program (full- or part-time). *Id.* at 414–16.

118. See STEVENS, *supra* note 95, at 93 (describing the formation of the Committee on Legal Education at the first ABA meeting). A recurring theme of the ABA's early years was the establishment of bar admission requirements, including attendance at law school. *Id.* at 95.

nineteenth century.¹¹⁹ Both of these organizations implemented policies that standardized legal education in the United States and eliminated the product differentiation which characterized the earlier period.

The AALS—created as an association not of law professors but of law schools—sought immediately after its formation to establish entrance requirements for its member schools.¹²⁰ The standards focused not on pedagogical concerns but rather on “questions of organization.”¹²¹ For example, the AALS required that all students be high-school graduates; that member schools have access to state and federal case reporters; and that legal education be at least three years in length.¹²²

In the ensuing decades, the AALS adopted further membership requirements, which accelerated the trend toward standardization of legal education. For example, the AALS in 1916 required that member schools have at least three full-time faculty.¹²³ In 1925, the AALS required member schools to demand that students complete at least two years of college study before entering law school.¹²⁴ Although the AALS adopted a rule requiring law schools to offer only day programs, the AALS quickly dropped that rule as member schools with night programs bolted the association.¹²⁵ The AALS then sought to require schools with night programs to lengthen the number of hours required for graduation. Finally, the AALS in 1922 prohibited its members from operating proprietary schools.¹²⁶

On the road to standardization, the AALS enlisted the help of both the state and the professional bar. In the early twentieth century, for example, the AALS lobbied states to adopt legislation restricting the ability to confer law degrees to those schools in compliance with AALS standards.¹²⁷ Similarly, the AALS sought repeal of the “diploma privilege,” which permitted students graduating from one of a selected group of schools to be admitted to practice without having to take a bar examination.¹²⁸ In the subsequent decades, the AALS also joined forces with the ABA to solidify its “cartel” status.¹²⁹ The end game was “to have the state make AALS

119. The emergence of the AALS paralleled that of the ABA Committee on Legal Education in the development of “academic lawyers” as a professional group distinct from the practicing bar. *Id.* at 96.

120. First, *Legal Education I*, *supra* note 86, at 335.

121. *Id.*

122. *Id.* at 336.

123. *Id.* at 344 n.182.

124. *Id.* at 345.

125. *Id.* at 346.

126. *Id.* at 344–47.

127. *Id.* at 350.

128. *Id.* at 350–51.

129. See Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105, 1182 n.258 (“Particularly in its early years, the AALS successfully exercised some economic power as a cartel. This power seems to continue to exist with respect to member schools who would lose status and market position by withdrawing from the Association.” (citations omitted)); First, *Legal Education I*, *supra*

schools the exclusive avenue for preparing for and, coupled with a bar examination, entering the profession.”¹³⁰

By the 1950s, the AALS and ABA had achieved almost complete standardization of the delivery of legal education. During this period, for example, the AALS continued to develop “increasingly detailed ‘standards’ of operation for law schools.”¹³¹ The unstated goal of eliminating “the non-elite-model schools”¹³² was substantially accomplished by the mid-1960s. Law schools that wanted to play, had to play by the AALS’s rules. These rules required all law schools to provide a very similar type of product, with very little differentiation. Despite criticisms, the AALS sought to minimize experimentation in the delivery of legal education by means of its “visitation program.”¹³³ The visitation program was intended to determine whether the inspected law school was in compliance with AALS standards. One result of the program was to limit the degree to which law schools could deviate from the norm followed by other AALS schools.¹³⁴ Although it is not clear whether the purpose of the inspections was to keep law schools from “bucking the status quo,” the inspections clearly “were not designed to encourage experimentation.”¹³⁵ The AALS thus dutifully performed the functions of a good cartel: restraining output, imposing significant barriers to new entrants, and discouraging innovation.¹³⁶

Before the creation and development of the AALS, the world of legal education was, albeit in its infancy, a competitive industry. Law schools competed in a number of dimensions in delivering their product. Although

note 86, at 376–78 (arguing that AALS and ABA engage in “unreasonable restraint of trade”); Brian Leiter, *The Hopeless Association of American Law Schools*, The Leiter Reports: Editorials, News, Updates, at <http://webapp.utexas.edu/blogs/archives/bleiter/000679.html#000679> (Jan. 13, 2004) (charging AALS with engaging in “intrusive, and . . . largely politically motivated (when not cartel-motivated!), regulation of law schools”).

130. First, *Legal Education I*, *supra* note 86, at 351–52. History came full circle when, faced with a Department of Justice antitrust probe, the ABA agreed to stop refusing to accredit for-profit law schools. *United States v. Am. Bar Ass’n*, 60 Fed. Reg. 39,424 (Aug. 2, 1995).

131. First, *Legal Education I*, *supra* note 86, at 393. For example, the AALS issued standards regarding minimum number of washrooms, floor space, mandatory record keeping, faculty decision-making, and compensation. *Id.*

132. First, *Legal Education II*, *supra* note 86, at 1052.

133. *Id.* at 1060.

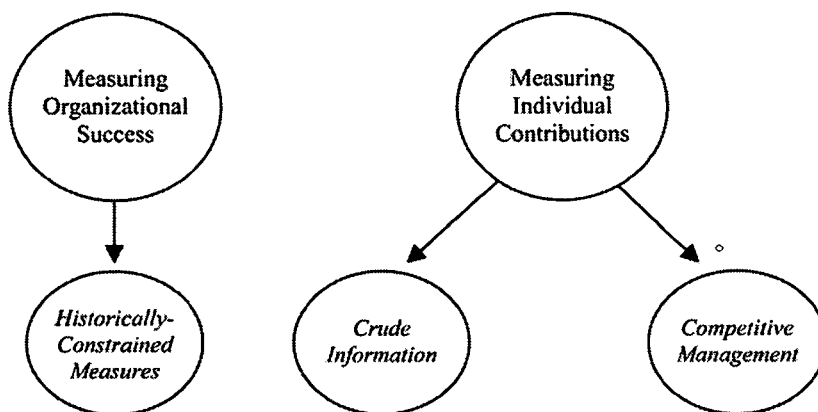
134. *Id.* at 1061.

135. *Id.*

136. *Id.* at 1088; *see also id.* at 1087 (“As a trade association of law schools, the AALS has performed one mission with great success: it has standardized the product and, for the most part, excluded from the market those schools that do not comply.”) (citations omitted); Alvin Esau, *Competition, Cooperation, or Cartel: A National Law School Accreditation Process for Canada?*, at http://www.umanitoba.ca/Law/LRI/Legal_education/esau.htm (last visited Feb. 1, 2004) (“One interpretation of the history of [AALS and ABA] accreditation . . . is that elite lawyers and law schools gained market control to advance their own economic interests . . .”); Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L.Q. 1035, 1035–36 (2002) (observing that the AALS and ABA accreditation standards impose “a barrier to entry and impede competition in legal education”).

the measures of organizational success were constrained by the times and the absence of technology we take for granted today, law schools were able to identify winners and losers at least at a rudimentary level.¹³⁷ Entrepreneurial schools competed in the form and content of legal education. In theory, law school management had incentives to measure individual contributions to success—again constrained only by the times and the absence of technology. At least at a basic level, the early years of the development of legal education in the United States were consistent with the efficient market ideal.

Figure 5: The Pre-AALS Law School Market



The AALS, however, removed competitive elements from the legal education market and allowed law schools to behave in a monopolistic manner.¹³⁸ Law schools are different from the typical profit-maximizing firm (which seeks monopoly power by controlling price and excluding rivals) and the typical nonprofit firm (which seeks output maximization by distributing “its bonnty as widely and as equitably as possible”).¹³⁹ Instead, law schools seek to maximize “elitist preferences.”¹⁴⁰ These preferences include

137. It was not uncommon in the early years of legal education for law schools to be ranked. For example, the *American Law School Review* frequently ranked law schools by size of student body, e.g., *Ten Largest Law Schools, 1901–1902*, 1 AM. L. SCH. REV. 21 (1902), number of library holdings, and annual tuition and fees, e.g., *Annual Tuition Fees in Law Schools*, 1 AM. L. SCH. REV. 311, 312 (1905), as well as published a yearly listing of law school enrollments, e.g., *Registration in Law Schools—Fall of 1925*, 5 AM. L. SCH. REV. 594, 602 (1925). Perhaps foreshadowing Brian Leiter’s list of major lateral faculty moves, *supra* note 93, the *American Law School Review* included regular columns about faculty appointments and moves. E.g., *Notes and Personals*, 1 AM. L. SCH. REV. 62 (1902); see also Paul D. Carrington, *On Ranking: A Response to Mitchell Berger*, 53 J. LEGAL EDUC. 301, 302 (2003) (noting that law school rankings can be traced back to President Charles Eliot’s 1870 goal “to make his Harvard Law School the ‘best’ by making it the longest and toughest”).

138. See First, *Legal Education I*, *supra* note 86, at 332.

139. *Id.* at 324.

140. *Id.* at 323.

“engaging in the full time teaching of law,” “freedom of law schools to teach ‘the best’ law students,” “freedom from faculty accountability to non-peer groups (such as students),” and “freedom to operate in a non-commercial atmosphere.”¹⁴¹

By eliminating, or at least substantially limiting, competition among law schools, the AALS eliminated incentives to measure the success of a law school.¹⁴² To the extent that all law schools offered the same courses, taught by faculty with similar credentials, using the same methods, it became more difficult to identify “winners” and “losers.” This elimination of measures of organizational success was consistent with the elitist preferences of AALS members. More established schools had little to fear from allowing lesser schools to exist—as long as they were not too different (i.e., they operated within rigid AALS standards). Other law schools not only enjoyed the protection afforded by the cartel-like activities of the AALS, but also were in a position to claim equality with their more established counterparts. Standardization permitted every law school to claim to be as good as whatever conventional wisdom suggested were the leading law schools in the country.¹⁴³

The absence of measures of organizational success also eliminated incentives to measure individual contributions. The ability of law schools to pursue elitist preferences, and hence enjoy freedom from accountability, allowed them to pursue various objectives that they would have been unable to seek in a world in which contributions were measured. For example, law faculty could more easily make hiring decisions based not on teaching effectiveness and scholarly productivity but instead on other grounds such as race, gender, or educational pedigree.¹⁴⁴

In short, the AALS presided over a law school world without objective standards and accountability. By standardizing the industry product, the AALS eliminated any measures of organizational success and any incentives to measure individual contributions.

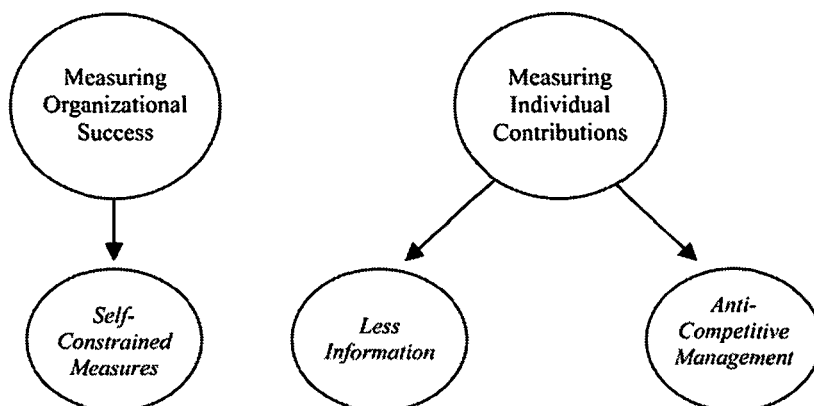
141. *Id.* at 324.

142. See Robert W. Hillman, *The Hidden Costs of Lawyer Mobility: Of Law Firms, Law Schools, and the Education of Lawyers*, 91 KY. L.J. 299, 309–10 (2002) (“Even if some schools were bold enough to be innovative and responsive to changes in the profession, they would face substantial resistance to any departures from the existing norms of legal education. Most notable in this regard are the pressures emanating from an accreditation process that operates to maintain the status quo and discourage innovation.”).

143. See Cass, *supra* note 87, at 576 (“[The AALS and the ABA] have pushed hard to make U.S. legal education more homogeneous, to encourage schools to focus on inputs, and to divert resources from their best uses for legal education.”).

144. See STEVENS, *supra* note 95, at 99–100 (characterizing the AALS efforts to raise legal education standards as an attempt to “keep out Jews, blacks and immigrants”); see also Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 205 (1997) (contending that bias against white women and women of color continues to affect certain aspects of law faculty hiring).

Figure 6: The Post-AALS Law School Market



B. U.S. News & World Report's Impact

Over the past thirty years, several trends emerged that dramatically changed the environment in which law schools operated. These changes posed direct challenges to the law schools' elitist model and led to market pressures for measuring organizational success and individual contributions to success.

In the 1970s, universities began to face severe, ongoing, and systemic financial crises and turned to law schools as a source of untapped revenues.¹⁴⁵ As noted earlier,¹⁴⁶ one of the preferences pursued by law schools under the elitist model was the development of a full-time law professorate, which in turn fed the preference for making law schools part of a wider university community. The financial crises faced by higher education affected the dynamics of the elitist model. Law schools were able to pursue elitist preferences only at a cost.¹⁴⁷ As financial pressures on law schools increased,¹⁴⁸ law schools' ability to pursue the elitist model

145. See First, *Legal Education II*, *supra* note 86, at 1063–64. Two commentators recently noted universities' ongoing "efforts to enlarge the law schools' role as a 'cash cow' for their sister schools." Rena I. Steinzor & Alan D. Hornstein, *The Unplanned Obsolescence of American Legal Education*, 75 *TEMP. L. REV.* 447, 464 (2002). They describe a recent example of a particularly rapacious university's attempt to turn to its law school for financial succor. *Id.* (describing Georgetown Dean Judith Areen's successful resistance of university efforts to foree the law school to fund part of a deficit incurred by the medical school and the university's reversal of its initial decision not to renew the Dean's contract after outcry from faculty, students, and alumni).

146. See *supra* notes 142–44 and accompanying text.

147. First, *Legal Education I*, *supra* note 86, at 323.

148. For further discussion of the financial pressures on law schools, see Alfred C. Aman, Jr., *Protecting a Space for Creativity: The Role of a Law School Dean in a Research University*, 31 *U.*

decreased. As the financial cushion that allowed law schools the luxury to operate under the elitist model dissipated, pressures mounted on law schools to measure organizational success.

In the late 1980s and early 1990s, the market for law students and lawyers began to change dramatically. On the input side, law schools experienced a sharp decline in the number of applicants.¹⁴⁹ On the output side, law firms were facing financial pressures and cut back on their hiring of graduating law students.¹⁵⁰ Financial pressures on law schools resulted in large tuition increases.¹⁵¹ These developments challenged the ability of law schools to continue their elitist preference in avoiding nonpeer and peer accountability. The drop in the number of applicants turned the law school market into a buyers' market. The stakes on selecting a law school increased, as did the sensitivity of applicants to the relative performance of the schools they were considering. Applicants became more selective and demanded more information that would allow them to compare the product offered by the different law schools. Developers of law school rankings soon met this demand.

After publishing an initial ranking of law schools in 1987,¹⁵² *U.S. News & World Report* began publishing annual law school rankings in 1990.¹⁵³ Although there were earlier rankings of law schools¹⁵⁴ (and, as we discuss in Part IV,¹⁵⁵ myriad other rankings have emerged in recent years), the *U.S. News & World Report* law school rankings quickly became (and remain) the eight-hundred-pound gorilla in legal education. *U.S. News & World Report* has tweaked its methodology several times through the years. In its 2004

TOL. L. REV. 557, 563 (2000) (noting "practical financial pressures" on law schools); Howard B. Eisenberg, *The Importance and Place of the Wisconsin Reports on the Delivery of Legal Services and Legal Education*, 80 MARQ. L. REV. 705, 712 (1997) (noting "the very real financial pressures on law schools today"); Robert A. Stein, *The Future of Legal Education*, 75 MINN. L. REV. 945, 966 (1991) (noting extreme financial pressures on law schools); Victor L. Streib, *Law Deanships: Must They Be Nasty, Brutish, and Short?*, 44 J. LEGAL EDUC. 116, 123 (1994) (noting an "era of extraordinary financial constraints in legal education").

149. For example, the number of law school applications fell from 90,335 in 1990–1991 to 68,029 in 2000–2001. Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models with Current Law School Data*, 53 J. LEGAL EDUC. 229, 231 (2003).

150. For example, the number of graduating law students with full-time legal jobs fell to a modern low of 69.6% in 1994. NALP, *Employment Trends for Recent Graduates*, at <http://www.nalp.org/press/years.htm> (last visited Feb. 1, 2004); see also Marc S. Galanter & Thomas M. Palay, *Large Law Firm Misery: It's the Tournament, Not the Money*, 52 VAND. L. REV. 953, 965–66 (1999) (discussing changes experienced by law firms in business and employment practices).

151. See Hobbes, *supra* note 92, at 88–89.

152. *Brains for the Bar*, U.S. NEWS & WORLD REP., Nov. 2, 1987, at 72.

153. Ted Gest, *America's Best Graduate and Professional School: Law*, U.S. NEWS & WORLD REP., Mar. 19, 1990, at 59.

154. See JACK GOURMAN, *THE GOURMAN REPORT: A RATING OF GRADUATE AND PROFESSIONAL PROGRAMS IN AMERICAN AND INTERNATIONAL UNIVERSITIES* (4th ed., 1987).

155. See *infra* notes 188–221 and accompanying text.

version (and current version),¹⁵⁶ the *U.S. News & World Report* law school rankings measure organizational success through the following four categories:

Reputation (40%). A “quality assessment score” is based on two reputation surveys: 25% from a peer assessment score of academics¹⁵⁷ and 15% from an assessment score of practicing lawyers and judges.¹⁵⁸

Selectivity (25%). A combination of median student LSAT scores (12.5%) and undergraduate GPAs (10%), plus a school’s acceptance rate (2.5%).¹⁵⁹

Placement Success (20%). An amalgam of student employment rates at graduation (6%) and nine months after graduation (12%), plus student performance on the jurisdiction’s bar exam (2%).¹⁶⁰

Resources (15%). A combination of data on a school’s expenditures per student for instruction, library, and support services (9.75%), student-teacher ratio (3%), average per-student spending on other areas, including financial aid (1.5%), and total number of library volumes and titles (0.75%).¹⁶¹

In addition to the overall law school rankings, *U.S. News & World Report* also ranks various specialty programs (alternative dispute resolution, clinical training, environmental law, healthcare law, intellectual property law, international law, tax law, and trial advocacy).¹⁶² Other rankings have included a list of “up and coming” schools,¹⁶³ and more recently, a diversity index.¹⁶⁴

156. U.S. News & World Report, *Law Methodology*, at http://www.usnews.com/usnews/edu/grad/rankings/about/04method_brief.php (last visited Feb. 1, 2004). The methodology for the newly-minted 2005 *U.S. News & World Report* rankings is identical. See U.S. News & World Report, *Law Methodology*, at http://www.usnews.com/usnews/edu/grad/rankings/about/oslaw_meth_brief.php (last visited Apr. 9, 2004).

157. The dean and three faculty members at each school are asked to rate schools from “marginal” (1) to “outstanding” (5). The response rate for the 2004 rankings was 70%. U.S. News & World Report, *Law Methodology*, at http://www.usnews.com/usnews/edu/grad/rankings/about/04method_brief.php (last visited Feb. 1, 2004).

158. Practicing lawyers and judges are asked to rate law schools on an identical scale. The response rate for the 2004 rankings was 34%. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* On the “premium edition” available on its web site, *U.S. News & World Report* permits users to access separate law school rankings in each of these criteria. U.S. News & World Report, *Log-In*, at <https://secure.usnews.com/premium/login> (last visited Feb. 1, 2004).

162. U.S. News & World Report, *Speciality Rankings*, at http://www.usnews.com/usnews/edu/grad/rankings/law/lawindex_brief.php (last visited Feb. 1, 2004).

163. See Terry Carter, *Rankled by the Rankings*, A.B.A. J., Mar. 1998, at 46, 48–49 (noting that *U.S. News & World Report* no longer publishes an “up-and-coming” listing).

164. U.S. News & World Report, *Law Diversity Index*, at http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawdiv_brief.php (last visited Feb. 1, 2004).

Critics contend that the *U.S. News & World Report* law school rankings “fail to measure accurately the quality of legal education provided by law schools.”¹⁶⁵ Under this view, any attempt to rank law schools is doomed to fail because there is no consensus in the industry on what combination of factors determine quality in a law school. Moreover, even if such consensus could be determined, the available measurement tools are inherently unreliable.¹⁶⁶

At the core of much of the criticism of *U.S. News & World Report* is a fear of measuring the success of law schools and of the changes such measurements are likely to bring. Yet it was inevitable that *someone* would step in to fill the void in the market for information regarding the performance of law schools. In the pre-AALS period, crude measures such as student enrollments and library holdings provided *some* comparative information to consumers. In cartelizing the market, the AALS eliminated even these crude measures and used the accreditation club to wring much of the product differentiation out of law schools. Although the AALS model dominated for much of the twentieth century, the rapid changes in the law school and legal practice environments over the past thirty years made it unsustainable. In responding to that need, *U.S. News & World Report* has encouraged greater product differentiation in law schools through increased course offerings in nontraditional areas¹⁶⁷ and administrative staffing,¹⁶⁸ as

165. Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEXAS L. REV. 403, 405 (1998); see also Cass, *supra* note 87, at 574 (“The *U.S. News* rankings look at criteria that cannot possibly capture critical aspects of legal education. They do not measure, or even encompass a good proxy for, among other things, the quality of teaching, the scholarly product of a faculty, the mode of instruction, the nature, scope, and organization of the curriculum.”).

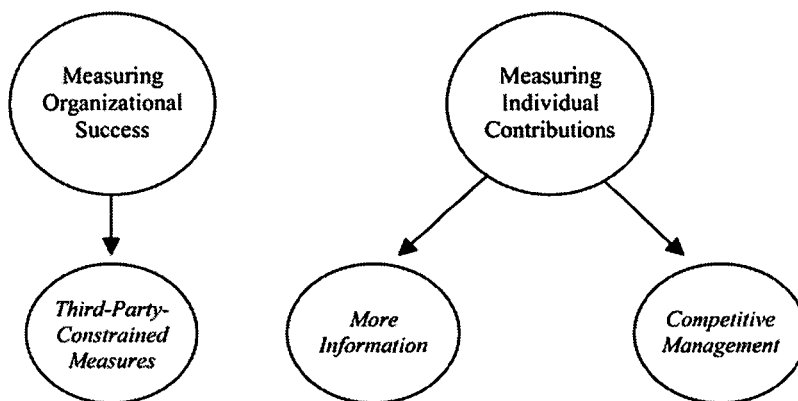
166. See, e.g., Austin, *supra* note 92, at 52–53; Mitchell Berger, *Why the U.S. News and World Report Law School Rankings Are Both Useful and Important*, 51 J. LEGAL EDUC. 487 (2001); Francine Cullari, *Law School Rankings Fail to Account for all Factors*, 81 MICH. B.J. 52 (Sept. 2003); R. Lawrence Dessem, *U.S. News U.: or, The Fighting Volunteer Hurricanes*, 52 J. LEGAL EDUC. 468, 468–70 (2002); Mark A. Lemly, *Rank*, 3 GREEN BAG 2D 457, 457 (2000); Nancy B. Rapoport, *Ratings, Not Rankings: Why U.S. News & World Report Shouldn’t Want to be Compared to Time and Newsweek or The New Yorker*, 60 OHIO ST. L.J. 1097, 1098–99 (1999); David A. Thomas, *The Law School Rankings Are Harmful Deceptions: A Response to Those Who Praise the Rankings and Suggestions for a Better Approach to Evaluating Law Schools*, 40 HOUS. L. REV. 419, 426–28 (2003); David C. Yamada, *Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy*, 31 SUFFOLK U. L. REV. 249, 253 (1997); *U of N News & World Report*, 7 GREEN BAG 2D 81 (2003); Brian Leiter, *The U.S. News Law School Rankings: A Guide for the Perplexed*, at <http://www.utexas.edu/law/faculty/bleiter/rankings/guide.html> (May 2003).

167. See, e.g., Arthur Austin, *The Postmodern Infiltration of Legal Scholarship*, 98 MICH. L. REV. 1504, 1528 (2000) (asserting that “[o]ffering nontraditional bananas has become the favorite product differentiation tactic”).

168. See, e.g., Ronald A. Cass & John H. Garvey, *Law School Leviathan: Explaining Administrative Growth*, 35 U. TOL. L. REV. 37, 40 (2003) (suggesting that a “potential explanation for the growth of law school administration is the effect of rankings, especially *U.S. News & World Report*”).

well as specialty tracks and areas of concentration.¹⁶⁹ The “self-constrained” measures of law school success under the AALS model have thus given way to measures of success defined by a third party and, as we argue in subpart IV(B), have unleashed a desire to measure individual contributions to that success with more information and competitive management.

Figure 7: The Post- *U.S. News & World Report* Law School Market



Billy Beane likely would applaud the *U.S. News & World Report* rankings for moving law schools out of the AALS-induced torpor and at least part of the way toward the efficient law school market ideal.

IV. Billy Beane’s Lessons for Law Schools

In this Part, we discuss the intersection of the baseball and law school stories. Although baseball has long enjoyed consensus on the definition of organizational success, *U.S. News & World Report* has at last triggered industry-wide debate on the desirability and methodology of law school rankings. As a result, attention finally is turning to measuring individual contributions to that success. In the post-*Moneyball* world, we need to ask if there are inefficiencies in these measurements to exploit and, if so, what are the qualities that a law school version of Billy Beane would need to exploit those inefficiencies?

169. See, e.g., Peter V. Letsou, *The Future of Legal Education: Some Reflections on Law School Specialty Tracks*, 50 CASE W. RES. L. REV. 457, 465–66 (1999) (discussing the lack of specialty tracks at American law schools and suggesting that increased competition would result in more schools developing specialty programs to differentiate themselves).

A. *Measuring Organizational Success*

Baseball at first glance would appear to have little to teach legal education in measuring organizational success. In baseball, wins and losses, and division, league, and World Series championships, have long been clearly defined standards against which the performance of every team is evaluated. In contrast, legal education only recently has been dragged kicking and screaming by *U.S. News & World Report* into establishing markers for organizational success. Yet *Moneyball* suggests that a remarkable lesson with broad implications for law schools lurks below the surface.

Although objective measures of organizational success always existed in baseball, to a surprising extent they were ignored by some owners who considered their teams a community asset or “public trust.”¹⁷⁰ While winning was important to an owner like Walter A. Haas, Jr., the Oakland A’s owner in the 1970s and 1980s, he “was willing to lose millions to field a competitive team that would do Oakland proud.”¹⁷¹ Haas’s death set the stage for Billy Beane, as the team was acquired by a pair of real estate developers who shifted the focus to running the team as a business, with “a much tighter budget.”¹⁷² With the explosive growth in the value of Major League Baseball franchises, the newest generation of owners assumed much larger debt burdens in acquiring the clubs and thus were much more aware of the bottom line. They increasingly viewed Major League Baseball teams as business enterprises, in which budgets have to be controlled and outputs and contributions precisely measured.

There are surprising parallels in the history of legal education. As in baseball, economic changes in recent years drove the interest in objective measurements in law schools. As discussed above,¹⁷³ recent changes in both the higher education and legal services markets have raised the stakes for all of the participants in legal education. The increased cost of attending law school,¹⁷⁴ the tightening of the market for lawyers, and the economic

170. LEWIS, *MONEYBALL*, *supra* note 1, at 57.

171. *Id.*

172. *Id.* at 58.

173. *See supra* notes 145–51 and accompanying text.

174. Indeed, the annual cost of attending an elite law school (\$50,000+) now exceeds median family income (\$42,409 in 2002). *See* U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-221, INCOME IN THE UNITED STATES: 2002 (Table 1) (2003), available at <http://www.census.gov/prod/2003pubs/p60-221.pdf> (last visited Feb. 1, 2004); Columbia Law School, *Tuition, Financial Aid & Housing*, at http://www.law.columbia.edu/prosp_students/jd_prog/tuition (last visited Feb. 1, 2004) (\$53,200 at Columbia for the 2003–2004 academic year); Harvard Law School, *Catalogue 2003–2004*, at http://www.law.harvard.edu/academics/registrar/catalog/cat_main.html (last visited Feb. 1, 2004) (\$51,150 at Harvard for the 2003–2004 academic year); Stanford Law School, *Admissions J.D. Program* (2003–2004), at <http://www.law.stanford.edu/>

pressures experienced by many universities all have imposed an urgent sense of market discipline in the delivery of legal education. As in baseball, these changes created a market demand for accountability, transparency, and more information about organizational performance. The rankings are an early attempt to meet this demand.

A central tenet of *Moneyball* is that Billy Beane succeeded by “asking the right questions.”¹⁷⁵ Three questions emerge from the current state of the use of rankings as a measure of law school performance: (1) Do rankings have value? (2) What should rankings measure? (3) Who should lead the rankings effort?

1. *Do Rankings Have Value?*—In recent years, a few voices have been raised, if not in favor of any specific rankings methodology, at least in favor of the concept of ranking law schools. These commentators argue that by providing information about the performance of law schools, the rankings inject needed accountability and transparency into legal education.

For example, rankings provide applicants with convenient access to useful information. Bar exam pass rates and placement statistics provide comparative data on issues of particular interest to prospective students.¹⁷⁶

Rankings also provide a useful sorting function. As Russell Korobkin has argued on these pages, critics of law school rankings may be correct in their substantive claim that rankings do not accurately measure the quality of legal education.¹⁷⁷ But these criticisms are irrelevant because the purpose of rankings is to coordinate the placement of students with employers: “the *existence* of rankings fulfills the *purpose* of rankings, without reference to what the rankings claim to measure or how well they measure it.”¹⁷⁸ The sorting argument is based on the premise that in the labor market for newly minted lawyers there is a need for “high quality” applicants to differentiate themselves from “low quality” applicants.¹⁷⁹ Similarly, legal employers need a way of sorting high quality from low quality applicants. Law school rankings thus help applicants and employers bridge this gap:

By choosing a school with a high ranking, the student sends an important signal to future employers: he is brainy or clever enough to be accepted by a more selective school. . . . The most selective employers respond to the signaling of students by interviewing and

admissions/jd/admissions.html (last visited Feb. 1, 2004) (\$50,000 at Stanford for the 2003–2004 academic year).

175. Gerson, *supra* note 85.

176. Berger, *supra* note 166, at 496–97.

177. Korobkin, *supra* note 165, at 404.

178. *Id.*

179. *See id.* at 409 (noting that high quality students need a way to signal their quality to employers).

selecting students from the top-ranked law schools or at least the most highly-ranked schools in their areas.¹⁸⁰

Rankings thus serve a useful sorting function regardless of the manner in which they are compiled.¹⁸¹

Rankings also increase law schools' accountability to their relevant constituencies. A law school that fares poorly in one element of the rankings may face pressure from students, faculty, alumni, or university administrators to implement changes to address the perceived deficiency.¹⁸² For example, a law school with a high faculty-student ratio might respond by seeking additional resources to hire additional faculty (or at least protect faculty lines in the face of budget pressures) or by shrinking its class size (without losing a proportionate share of funding).¹⁸³ Rankings provide a measure against which a law school can be evaluated, as well as a basis for praising (or criticizing) schools that exceed (or fall short of) the expectations of relevant constituencies.

U.S. News can help lift the veil of ignorance from the eyes of both applicants and the public by comparing law schools using important criteria. This can spur law schools to seriously reflect on the quality of their offerings and take steps to improve. . . . For the first time, the rankings have forced the law schools to respond to someone else's idea of excellence rather than their own relatively self-serving standards.¹⁸⁴

Professor Korobkin adds an interesting wrinkle to the accountability argument. He contends that an added benefit of rankings is to provide law schools with incentives to produce a specific kind of public good: legal

180. *Id.* at 409–10; see also Richard A. Ippolito, *The Sorting Function: Evidence from Law School*, 51 J. LEGAL EDUC. 533, 533 (2001) (noting that the ranking of a student's school can indicate her ability); Sterk, *supra* note 88, at 1145 n.12 (discussing the power of the "brand name" law school to attract students).

181. The practicing bar appears well aware of this relationship. See, e.g., Randall T. Shepard, *What the Profession Expects of Law Schools*, 34 IND. L. REV. 7, 8 (2000). Explaining why practitioners value law school rankings, Chief Justice Shepard of the Indiana Supreme Court observes:

A law school graduate often associates his or her own standing in the legal community with the status of the graduate's alma mater. Those graduates whose institutions are rising stars stand a little taller when they go to the bar meetings. This is among the reasons why law practitioners take interest in and are more tolerant of the *U.S. News and World Report* law school rankings than practicing academics.

Id.

182. For example, in 1998 Hastings responded to a drop in its ranking by making changes in its career placement office (hiring new staff and providing individual career counseling to students). Berger, *supra* note 166, at 498.

183. Of course, rankings-induced reforms may have a detrimental effect on legal education. For example, critics have argued that by including measures such as the LSAT and GPA in its rankings, *U.S. News & World Report* encourages law schools to overemphasize these criteria at the expense of other important indicators of student quality. *Id.* at 497.

184. *Id.* at 498.

scholarship. Legal scholarship fits the definition of a public good because “consumption of it by one person does not leave less for others and . . . the cost of excluding free riders from consuming it is prohibitive.”¹⁸⁵ As with public goods generally, a collective action problem develops regarding the decision to produce legal scholarship. A mechanism needs to be adopted that will penalize those schools that fail to produce enough of the public good, and transfer that benefit to those schools that produce more than their fair share. Rankings that are primarily based on scholarly productivity are such a mechanism because they allow schools to capture the reputation associated with producing a public good.¹⁸⁶

Rankings in theory thus can add value to the law school enterprise. They can communicate useful information that otherwise might be hard or impossible to convey in other formats. In measuring overall performance, rankings can provide information that both students and potential employers find useful. Rankings also motivate individuals and organizations to change their behavior.

2. *What Should Rankings Measure?*—*U.S. News & World Report* has sparked a cottage industry of law school rankings. Various legal scholars, as well as other organizations and individuals, have developed their own methodologies in response to market demand and flaws in *U.S. News & World Report's* approach. These “alternative” rankings can be divided into two groups. One group follows the *U.S. News & World Report's* “comprehensive” approach and collects data on law school performance in several categories and, based on some specified formula,¹⁸⁷ assigns a rank to each school. The second group, composed primarily of law professors, focuses exclusively on faculty scholarly performance and ranks schools according to this one criteria.

185. Korobkin, *supra* note 165, at 418.

186. *Id.*

187. In 1967, retired political science professor Jack Gourman began writing and self-publishing a ranking of undergraduate and graduate programs; Gourman first included law schools in his rankings in 1977. In 1997, the *Princeton Review* acquired the rights to the rankings and published them as “the most authoritative and accurate assessments of higher education.” GOURMAN, *supra* note 154. The *Gourman Report* has long been discredited because Gourman refuses to reveal his methodology beyond a vague list of criteria. See, e.g., Arthur G. Bedian, *Caveat Emptor: The Gourman Report*, available at http://siop.org/tip/backissues/TIPJan02/pdf/393_032to033.pdf (last visited Feb. 1, 2004); Jeffrey Selingo, *A Self-Published College Guide Goes Big-Time, and Educators Cry Foul*, CHRON. HIGHER EDUC., Nov. 7, 1997, at 45. The *Gourman Report's* law school rankings have come under particularly withering fire. See, e.g., Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY'S L.J. 301, 319 n.78 (2003) (“inexplicable”); Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1449, 1449 (1991) (“deplorable”); see also Abbie Willard, *Law School Rankings: Through the Education and Employment Looking Glass*, at <http://www.nalp.org/Schools/rank1.htm> (last visited Feb. 1, 2004) (noting that the *Gourman Report* “has inspired considerable ire and disdain from legal educators and employers”).

a. *Comprehensive Rankings*.—Among the first group, the *Educational Quality Rankings of US Law Schools* (the “EQR”)¹⁸⁸ is the most sophisticated and has received the most attention.¹⁸⁹ Published by University of Texas law professor Brian Leiter, the 2000–2002 EQR focuses “exclusively on the factors central to a good legal education—quality of the faculty and student body”¹⁹⁰—and omits “irrelevant, unreliable and prejudicial criteria.”¹⁹¹ The 2000–2002 EQR is based on three categories: faculty quality (70%);¹⁹² student quality (30%);¹⁹³ and teaching quality.¹⁹⁴ Professor Leiter notes that his ranking will have the most value to “[a]cademically serious and ambitious students, who embark upon the study of law with a sense of intellectual excitement.”¹⁹⁵

Other comprehensive law school rankings both consider more criteria than Professor Leiter and take different approaches to the weighting of the criteria. Judge Thomas E. Brennan and Don LeDuc, former president and current president and dean, respectively, of Thomas M. Cooley Law School, publish the *Judging the Law Schools* rankings.¹⁹⁶ Unlike *U.S. News & World Report* and the EQR, *Judging the Law Schools* does not assign weights to the

188. Brian Leiter, *New Educational Quality Rankings of US Law Schools: 2000–2002*, at <http://www.utexas.edu/law/faculty/bleiter/rankings02> (last visited Feb. 1, 2004).

189. Because of the difficulty of collecting the data, Professor Leiter studied only 55 law faculties (but studied the student quality data for every law school) in coming up with his ranking of the top 40 law schools. Brian Leiter, *New Educational Quality Rankings of US Law Schools: 2000–2002, Appendix A: Schools Studied*, at <http://www.utexas.edu/law/faculty/bleiter/rankings02/appendicea.html> (last visited Feb. 1, 2004).

190. Brian Leiter, *New Educational Quality Rankings of US Law Schools: 2000–2002, Educational Quality Rankings v. U.S. News*, at <http://www.utexas.edu/law/faculty/bleiter/rankings02/usnews.html> (last visited Feb. 1, 2004).

191. *Id.*

192. Faculty quality is measured by scholarly productivity (25%), scholarly impact of faculty work (25%), and reputation (50%). Leiter describes *scholarly productivity* as per capita production of articles published in the top ten student-edited law reviews and peer-edited law journals, as well as books published by the three leading legal education publishers and the six leading legal academic presses; *scholarly impact of faculty* as per capita rate of scholarly impact for the top quarter of each school’s faculty based on citations to faculty work on the Westlaw JLR database; and *academic reputation* as *U.S. News & World Report*’s measure of peer assessment by legal academics. Brian Leiter, *New Educational Quality Rankings of US Law Schools: 2000–2002, The Criteria*, at <http://www.utexas.edu/law/faculty/bleiter/rankings02/criteria.html> (last visited Feb. 1, 2004).

193. Student quality is measured by 75th/25th LSAT medians (60%) and 75th/25th GPA medians (40%). *Id.* Professor Leiter thus gives more weight to LSAT scores compared to GPAs than does *U.S. News & World Report*. See *supra* note 159 and accompanying text.

194. Teaching quality is based on data collected by the *Princeton Review Surveys of Student Satisfaction with Teaching*. Professor Leiter notes that “although the category is important, the available data is crude, and so it is used only to give ‘extra credit’ to strong teaching faculties.” Brian Leiter, *New Educational Quality Rankings of US Law Schools: 2000–2002, The Criteria*, at <http://www.utexas.edu/law/faculty/bleiter/rankings02/criteria.html> (last visited Feb. 1, 2004).

195. Brian Leiter, *New Educational Quality Rankings of US Law Schools, 2000–2002*, at <http://www.utexas.edu/law/faculty/bleiter/rankings02/> (last visited Feb. 1, 2004).

196. Thomas E. Brennan & Don LeDuc, *Judging the Law Schools—Overall Rankings*, at <http://www.cooley.edu/rankings/overall2004.htm> (last visited Feb. 1, 2004).

results in different categories but instead weighs all thirty-two factors equally.¹⁹⁷ Judge Brennan and Dean LeDuc seek to minimize subjectivity in the ranking process and instead rely only on publicly available objective information.¹⁹⁸ Because all of the information they rely on is publicly available, “[a]ll that remains to complete a ranking is to list that information in some sort of sequence from high to low or low to high.”¹⁹⁹

In *The Ranking Game*,²⁰⁰ Indiana law professor Jeffrey E. Stake, like Judge Brennan and Dean LeDuc, initially ranks law schools by giving equal weight to various criteria. Professor Stake employs five criteria: student-faculty ratio, reputation, student credentials, job placement, and library.²⁰¹ In a novel twist, however, the web site allows users to re-rank law schools by giving different weights to the five criteria (and sub-components of the criteria), as well as other criteria not used in the initial ranking, including both traditional (e.g., tuition, faculty size, student enrollment) and nontraditional (e.g., Tibetan restaurants within four hundred meters of the law school²⁰² and campus beauty) considerations.²⁰³ Another web site, *My Law School Rankings*,²⁰⁴ skips the initial rankings altogether and allows the

197. The factors are: total J.D. enrollment; total minority enrollment; percentage of minority students; 75th percentile undergraduate grade point average; 75th percentile LSAT scores; total applications; number of full-time faculty; number of part-time faculty; total teaching faculty; student-faculty ratio; typical first-year section size; number of course titles beyond the first year; full-time resident tuition; full-time nonresident tuition; percentage of students receiving grants or scholarships; median amount of grants or scholarships; total volumes in library; total titles in library; total serial subscriptions; number of library professional staff; library hours per week with professional staff; library hours per week without professional staff; total library hours per week; library seating capacity; number of student computer work stations; library total square footage; nonlibrary total square footage; total law school square footage; percentage of graduates employed; number of states in which graduates are employed; first-time bar passage percentage; program achievement rating rank ((bar passage rate) / (GPA × 15 + LSAT) × .5). *Id.* Because this last factor (program achievement ratings rank) includes three already-counted factors (bar passage rate, GPA, and LSAT), *Judging the Law Schools* does not weigh all factors equally.

198. The information they use is from ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (Wendy Margolis et al., eds. 2003).

199. Thomas E. Brennan & Don LeDuc, *Overview*, at <http://www.cooley.edu/rankings/overview.htm> (last visited Feb. 1, 2004).

200. Jeffrey E. Stake, *The Ranking Game: Welcome*, at <http://monoborg.law.indiana.edu/LawRank/index.html> (last visited Feb. 1, 2004).

201. Jeffrey E. Stake, *The Law School Ranking Game: How to Play the Game*, at http://monoborg.law.indiana.edu/LawRank/rankgame_howto.html (last visited Feb. 1, 2004).

202. Professor Stake includes this factor “[j]ust to prove, if it is not already obvious, that my choices of criteria (like everyone else’s) are subjective and idiosyncratic” Jeffrey E. Stake, *The Ranking Game: The Game’s Method*, at http://monoborg.law.indiana.edu/LawRank/rankgame_method.html (last visited Feb. 1, 2004). He notes that this factor is “designed to account for whether there are adequate restaurants within walking distance of the law school,” but jokes that its inclusion also highlights the “rightful place of Indiana-Bloomington in the law-school world.” *Id.* For further discussion of motivation in law school rankings, see *infra* note 235.

203. Jeffrey E. Stake, *The Ranking Game: The Game’s Method*, at http://monoborg.law.indiana.edu/LawRank/rankgame_method.html (last visited Feb. 1, 2004).

204. Teach law.com, Inc., *My Law School Rankings*, at <http://www.mylawschoolrankings.com/> (last visited Feb. 1, 2004).

user to assign varying weights to each of five categories: academic reputation, median LSAT score, student-to-faculty ratio, starting salary of graduates, and quality of teaching.²⁰⁵

b. *Faculty Rankings*.—Other methodologies focus exclusively on faculty quality to rank law schools.²⁰⁶ James Lindgren and colleagues at the Chicago-Kent College of Law took the lead in a series of articles in the late 1980s to mid 1990s²⁰⁷ that first developed a methodology for ranking leading law reviews²⁰⁸ and then ranked faculty productivity by measuring publications in the top twenty law reviews.²⁰⁹ Although they noted that their intent was not to provide “a direct measure of faculty quality,” their data provided “a better indicator of the quality of a school and its faculty than counts of books in the library or the number of applicants to the law school.”²¹⁰

Following Professor Lindgren’s lead, other law professors have sought to improve on the ranking of faculty quality by developing more refined measures of academic reputation and productivity. Theodore Eisenberg and Martin T. Wells assess “the degree to which the major consumers of legal scholarship, legal academics, use the schools’ scholarly output.”²¹¹ Thus, instead of measuring academic reputation based on what “scholars say” about other schools, Professors Eisenberg and Wells look at what scholars

205. In the basic version, users assign one of five weights to each of the five categories: “Minimally Important,” “Somewhat Important,” “Fairly Important,” “Very Important,” and “Extremely Important.” *Id.* In the advanced version, users allocate a total of one hundred percentage points among the five categories. TeachLaw.com, Inc., *My Law School Rankings: Advanced Rankings*, at <http://www.mylawschoolrankings.com/advanced.asp> (last visited Feb. 1, 2004).

206. In recent years, the *National Jurist* has published single-category law school rankings in areas such as “most wired” and “best value.” Christine Willard, *Best Schools for Your Money*, NAT’L JURIST (Feb. 2004) (ranking schools by value), available at <http://www.nationaljurist.com/archives.asp>; Rebecca Luczycki, *Hot-wired Law Schools*, NAT’L JURIST (Mar. 2001) (evaluating schools based on technology programs), available at <http://www.nationaljurist.com/archives.asp>.

207. Colleen M. Cullen & S. Randall Kalberg, *Chicago-Kent Law Review Faculty Scholarship Survey*, 70 CHI.-KENT L. REV. 1445 (1995); The Executive Board of the Chicago-Kent Law Review, *Chicago-Kent Law Review Faculty Scholarship Survey*, 65 CHI.-KENT L. REV. 195 (1989); Janet M. Gumm, *Chicago-Kent Law Review Faculty Scholarship Survey*, 66 CHI.-KENT L. REV. 509 (1990); James Lindgren & Daniel Seltzer, *The Most Prolific Law Professors and Faculty*, 71 CHI.-KENT L. REV. 781 (1996). See also Ira Mark Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. LEGAL EDUC. 681 (1983); Michael I. Swygert & Nathaniel E. Gozansky, *Senior Law Faculty Publication Study: Comparisons of Law Productivity*, 35 J. LEGAL EDUC. 373 (1985).

208. The leading law reviews were identified by counting citations to law reviews in two sources: *Shepard’s Law Review Citations* and *Social Science Citation Index*. Lindgren & Seltzer, *supra* note 207, at 786.

209. See Cullen & Kalberg, *supra* note 207, at 1445.

210. See Lindgren & Seltzer, *supra* note 207, at 781.

211. Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373, 374 (1998).

“in fact do with schools’ output.”²¹² By counting the number of documents in which a scholar’s name appears, Professors Eisenberg and Wells attempt to capture both the qualitative and quantitative components of scholarly impact.²¹³

Both in the latest 2003–2004 edition of his on-line EQR²¹⁴ and in the article on which the EQR is based,²¹⁵ Professor Leiter further refines the measurement of law schools based on faculty quality. In the article, Professor Leiter eschews the measurement of student quality and teaching quality contained in his 2000–2002 EQR and focuses exclusively on “the academic and scholarly distinction of law faculties,”²¹⁶ as measured by both objective (per capita production of books and articles²¹⁷ and per capita rates of citations of faculty work²¹⁸) and subjective (reputation among academics²¹⁹) criteria. In the 2003–2004 EQR, Professor Leiter uses only subjective criteria in ranking law schools through a reputational survey of “150 leading legal scholars,”²²⁰ resulting in what he claims to be “the most thorough evaluation of American law faculty quality ever undertaken.”²²¹

212. *Id.*

213. *Id.* at 376.

214. Brian Leiter, *Educational Quality Rankings of US Law Schools 2003–2004*, at <http://www.utexas.edu/law/faculty/bleiter/rankings> (Mar. 25, 2003).

215. Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUDIES 451 (2000).

216. *Id.* at 455. Professor Leiter attributes his shift in focus to Russell Korobkin’s article, *supra* note 165, and Professor Korobkin’s claim that rankings based on scholarly output have the advantage of generating financial and institutional support for legal scholarship. Leiter, *supra* note 215, at 454.

217. As in the 2000–2002 EQR, Professor Leiter only counts production of books published by the three leading law education publishers and by the eight (not six, as in the 2000–2002 EQR; *see supra* note 192) leading legal academic presses, as well as articles published in the top ten student-edited law reviews and peer-edited law journals. Leiter, *supra* note 215, at 461–68.

218. As in the 2000–2002 EQR, Professor Leiter measures per capita rate of scholarly impact for the top quarter of each school’s faculty based on citations to faculty work on the Westlaw JLR database. *Id.* at 468–75.

219. As in the 2000–2002 EQR, Professor Leiter uses *U.S. News & World Report*’s measure of peer assessment by legal academics. *Id.* at 480–81.

220. Brian Leiter, *Ranking of Law Faculty Quality for 2003–2004*, at <http://www.utexas.edu/law/faculty/bleiter/rankings> (Mar. 25, 2003). Criteria for inclusion included (1) “active and distinguished scholars” who thus are “likely to have informed opinions about faculty quality”; (2) multiple faculty from every school evaluated; (3) diversity in terms of seniority; and (4) diversity in terms of fields and approaches. *Id.* For a list of the evaluators, see Brian Leiter, *Appendix A: Evaluators*, at <http://www.utexas.edu/law/faculty/bleiter/rankings/appendA.html> (last visited Feb. 1, 2004).

221. The survey respondents were asked to evaluate the “intellectual quality of faculty work in the fields in which you work” from a list of 69 law schools on a scale of 1 (weak), 2 (adequate), 3 (good), 4 (strong), and 5 (excellent). To try to avoid the “halo” effect, evaluators were presented with faculty lists identified only by number; no law school names were provided to evaluators. Brian Leiter, *Appendix B: Instructions to Evaluators*, at <http://www.utexas.edu/law/faculty/bleiter/rankings/appenB.html> (last visited Feb. 1, 2004).

3. *Who Should Lead the Rankings Effort?*—The *U.S. News & World Report* rankings, and the other rankings that have followed in its wake, are responding to a market demand for greater information about law schools. As Professor Leiter has noted, “students care about distinction and prestige and need some way to gauge it.”²²² As recounted in *Moneyball*,²²³ the party best positioned to supply the statistical information demanded by its consumers—Major League Baseball—refused, despite numerous entreaties, to supply the data. The same phenomenon has occurred with law school rankings, as the party best positioned to supply the statistical information demanded by its consumers—the AALS—has similarly gone AWOL.

Like any good cartel, the AALS has vigorously resisted *U.S. News & World Report*'s efforts to rank law schools. The most public assault occurred in February 1998, when the AALS issued a press release calling on *U.S. News & World Report* to stop publishing the rankings,²²⁴ released a commissioned study that challenged the particular rankings methodology,²²⁵ and handed out a letter signed by 164 of the 180 law school deans and sent to 93,000 law school applicants ranting that “Law School Rankings May Be Hazardous To Your Health.”²²⁶ The letter criticized the rankings for leaving “many important variables out of account, arbitrarily weight[ing] others,” and being “generally unreliable.”²²⁷ Concurrently, then-NYU Dean and AALS President John Sexton sent a letter to *U.S. News & World Report* asking it to stop ranking law schools and “abandon an enterprise which we believe you should regard as an embarrassment to your magazine.”²²⁸

222. Leiter, *supra* note 215, at 453.

223. See *supra* notes 50–57 and accompanying text.

224. Association of American Law Schools Calls On *U.S. News & World Report* To Stop Ranking Law Schools; Study Challenges Validity of Magazine's System, at <http://www.aals.org/ranknews.html> (last visited Feb. 1, 2004).

225. Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Ranking of ABA Law Schools*, at <http://www.aals.org/validity.html> (Feb. 18, 1998) [hereinafter *AALS Study of U.S. News Rankings*].

226. The original version of the letter can be found at <http://jurist.law.pitt.edu/letter.htm> (last visited Feb. 1, 2004); the current version can be found at <http://www.lsac.org/LSAC.asp?url=lsac/deans-speak-out-rankings.asp> (last visited Feb. 1, 2004). As one web site hilariously chronicles, many of these deans who condemn the *U.S. News & World Report* rankings as biased, unscientific, and inaccurate “publicize their own rankings when the rankings are to their liking.” LawTV, Inc., *Ranking U.S. News*, at <http://www.rankingusnews.com> (last visited Feb. 1, 2004). See, e.g., Carter, *supra* note 163, at 46 (noting that at the same time that John Sexton, then Dean of NYU, was “on a passionate mission to tear down” the *U.S. News & World Report* rankings, he mailed the NYU alumni magazine to every law professor at each of the 180 ABA accredited law schools in the country).

227. The letter, we think, is internally inconsistent. Early in the letter the deans note, “The range of performance among law schools based on most hard variables is actually fairly narrow.” In the appendix to the letter, titled, *What's Wrong With Law School Ranking Systems: A Brief Analysis*, the deans note, “There exists within legal education a consensus about the foundational requirements for a sound program. . . . But among the law schools that meet these standards, the variety is enormous.” Association of American Law Schools, *Law School Rankings May Be Hazardous to Your Health!*, at <http://www.jurist.law.pitt.edu/letter.htm> (last visited Feb. 1, 2004).

228. Carter, *supra* note 163, at 49.

Both the ABA and the Law School Admission Council (LSAC) have supported the AALS's head-in-the-sand approach. The *Official Guide to ABA Approved Law Schools* discourages the use of rankings and cautions applicants that "[t]he factors that make up a law school's reputation—strength of curriculum, faculty, career services, ability of students, quality of library facilities, and the like—don't lend themselves to quantification."²²⁹ But having failed on the demand side to staunch the public's thirst for law school rankings, the battle may be shifting to the supply side as the LSAC is considering a proposal to deny law schools (and thus *U.S. News & World Report*) access to individual applicants' LSAT scores.²³⁰

The legal education establishment, like Major League Baseball, thus has responded to consumer demand for information by retreating. Instead of following Professor Leiter's advice to counter the *U.S. News & World Report* rankings by doing it "better and with more credibility,"²³¹ the legal education establishment instead seeks to deny the reality that rankings are here to stay. Indeed, the history of the *U.S. News & World Report* law school rankings shows that consumers want more, not less, information. From 1990–1993, *U.S. News & World Report* ranked only the top twenty-five schools, with the other schools listed alphabetically in four "quartiles."²³² From 1994–2003, *U.S. News & World Report* ranked the top fifty law schools, with the other schools listed alphabetically in other "tiers."²³³ In 2004–2005, *U.S. News & World Report* ranked the top one-hundred law schools, with the other schools listed alphabetically in other tiers.²³⁴

229. ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 19 (2004); see also Jane Easter Bahls, *The Rankings Game: U.S. News and World Report's Annual Law School Rankings Get Plenty of Attention. But Do They Really Matter?*, at <http://www.abanet.org/lstd/stulawyer/mar03/rankinggame.html> (Mar. 2003) ("Each year, nearly all deans of the 185 ABA-approved law schools sign a letter to everyone who takes the LSAT, warning potential applicants not to put too much stock in commercial rankings.").

230. Under the proposal, LSAC will provide law schools only with data on how an applicant's LSAT score ranks in comparison to the scores of other applicants to the school. See Daniel Golden, *Law Schools Rebel Against Magazine* (Dec. 31, 2002), at http://collegejournal.com/aidadmissions/newstrends/20021231_golden.html.

231. Leiter, *supra* note 215, at 453.

232. Ted Gest, *America's Best Graduate and Professional Schools: Law*, U.S. NEWS & WORLD REP., Mar. 19, 1990, at 59; Robert J. Morse & Elizabeth A. Wagner, *Top 25 Law Schools*, U.S. NEWS & WORLD REP., Apr. 29, 1991, at 74–77; *Law*, U.S. NEWS & WORLD REP., Mar. 23, 1992, at 78–82; *The Top 25*, U.S. NEWS & WORLD REP., Mar. 22, 1993, at 62–64.

233. Interestingly, from 1994–1996, *U.S. News & World Report* ranked the top twenty-five schools in the first tier and schools twenty-six to fifty in the second tier; the remaining law schools were listed alphabetically in Tiers 3–5. From 1997–2003, *U.S. News & World Report* ranked the top fifty schools without mentioning the first tier; the remaining schools were listed alphabetically in Tiers 2–4.

234. *U.S. News & World Report* apparently has removed Tier 1 and Tier 2 from the rankings lexicon; the first mention of tiers is with Tier 3 and then Tier 4. We anticipate that in the not-too-distant future *U.S. News & World Report* will do away with all tiers and separately rank all law schools, as its site now permits users to do within the various categories. See *supra* note 161.

In baseball, statistical savants like Bill James emerged from outside the establishment to meet consumer demand for more information. Yet unlike in baseball, where fans with a love for baseball and statistics came to the fore to provide new statistical insights eventually seized upon by Billy Beane, legal education lacks a cadre of fans aching to uncover the latest statistical wrinkles about their favorite law school or favorite law professor. In this environment, James Lindgren, Brian Leiter, and other law professors are attempting to fill the void left by the AALS. Yet the main scholarly interests of these professors lie outside the area of law school rankings. The legal establishment itself needs to recognize that rankings are inevitable and to begin a process of rigorously evaluating the various ranking methods already in existence and work to improve both the data collection process as well as the analytical components of rankings. The AALS would bring two formidable assets to this endeavor: (1) financial and institutional resources to support a time-consuming and expensive data collection and analysis process; and (2) a neutral, knowledgeable entity.²³⁵

235. The AALS's neutrality would help forestall the criticism leveled against the propagators of alternative rankings systems. In each case, their school ranks higher under the alternative method than it does in *U.S. News & World Report*. We do not claim that there are any intentional biases in any of the alternative rankings. To the contrary, we believe in each case that the "rankers" have adequately justified their alternative methodologies. But this type of criticism would be easier to avoid if a neutral organization like the AALS assumed control of the process.

Rank of Rankers' Law School			
Alternative Ranking	Law School	<i>U.S. News</i> Rank	Alternative Rank
Leiter	Texas	11	10
Brennan & LeDuc	Thomas Cooley	172	29
Stake	Indiana-Bloomington	34	29
Ellman	Arizona State	47	7
Lindgren & Seltzer	Chicago-Kent	54	22
Eisenberg & Wells	Cornell	11	6

Professor Stake does not contend that the particular weights he assigns to the factors are the correct weights. Instead, he selects the initial weights to illustrate that his "Rankings Game" can come close to replicating the *U.S. News* rankings without consideration of some of the *U.S. News* factors that he considers harmful.

B. *Measuring Individual Contributions*

The increased interest in measuring organizational success has generated pressure to develop measures of how individuals contribute to that success. As noted earlier, baseball and law schools share a common story line. Both were motivated by economic concerns to develop more refined measures of individual contributions to organizational performance.²³⁶ And both are now able, through advances in computer technology and Internet capabilities, to compile and analyze vast amounts of data. In this section, we discuss the present state of attempts to measure individual contributions to law school success and offer some tentative thoughts on how to give these measurements greater explanatory and predictive power.²³⁷

In *Moneyball*, Lewis describes the hurdles faced by Bill James and his followers as a result of the “paucity of the information kept by Major League Baseball teams.”²³⁸ Indeed, James noted that his most “consistent problems” in refining the statistical measures of player performance arose from the establishment-imposed limitations on his information sources.²³⁹ He faced outright hostility from those “inside Major League Baseball” against “people outside Major League Baseball who wished to study the game.”²⁴⁰

The parallels to legal education are striking. Until very recently, the legal academy made no attempt to measure individual performance of law faculty. Only in the last decade, prompted by the *U.S. News & World Report* law school rankings, have a few members of the professorate stirred. The pioneering work of James Lindgren and Brian Leiter,²⁴¹ discussed in *supra*

236. See *supra* notes 27–39 and 148–51 and accompanying text.

237. We focus on the implications of Billy Beane’s story on the measurement of law faculty performance. Of course, we recognize that there are other “players” whose contributions are important to the organizational success of law schools: e.g., students, deans, librarians, and other administrators. Similarly, other factors such as organizational structure (public v. private) could affect a law school’s performance. Perhaps others will undertake similar work to develop more sophisticated measurements of how to evaluate the contributions of these other players and other relevant factors in the law school world.

238. LEWIS, *MONEYBALL*, *supra* note 1, at 82.

239. *Id.*

240. *Id.* at 83.

241. Interestingly, despite the similarities in the work of Professors Lindgren and Leiter in bringing objective analysis to bear on measuring faculty performance, they appear to have quite different views on the role of the AALS. Professor Lindgren is a consummate AALS insider, having served as past chair (and co-founder) of the AALS Section on Scholarship and current Chair of the AALS Section on Social Science. James Lindgren, *Curriculum Vitae*, at <http://www.law.northwestern.edu/faculty/fulltime/Lindgren/Lindgren.html> (last visited Feb. 1, 2004). In contrast, Professor Leiter in his blog recently blasted the AALS:

Complaints about the AALS are legion among law professors: the organization’s relentless political correctness (without regard to the diversity of views among its members), its inability to stage real scholarly conferences, and its intrusive, and again largely politically motivated (when not cartel-motivated!), regulation of law schools. On one important issue where the AALS might have made a difference—namely, the growing influence of the U.S. News law school rankings—the organization’s response was to put its head in the sand and tell prospective students, incredibly, that they

subpart IV(A) in connection with the ranking of law faculties, represents the opening salvo at doing for legal education what Bill James and his followers did in revolutionizing the measurement of the performance of baseball players.

In 1996, Professor Lindgren ranked the most prolific law professors by measuring their publication of articles in the most-cited law reviews. Employing the same methodology he used to rank law faculties,²⁴² he ranked 200 individual professors based on the number and length of certain of their articles. Interestingly, the rankings revealed an under-representation of women (but a proportionate representation of minorities) in the top twenty-five,²⁴³ an absence of Chicago graduates in the top twenty,²⁴⁴ a large presence among the top one-hundred of individuals not teaching at elite law schools,²⁴⁵ and a large proportion of lateral appointments in the top twenty-five.²⁴⁶

Professor Leiter takes a different tack in ranking individual faculty members based on “scholarly impact” by measuring only citation counts.²⁴⁷ He has published several varieties of citation count rankings, including “Most-Cited Law Faculty,”²⁴⁸ “Fifty Most-Cited Law Faculty,”²⁴⁹ “Top Ten

shouldn't look at law school rankings. (The AALS is endlessly ridiculed by prospective law students for this posture, as it should be: students understand full well that prestige and reputation are important factors to consider in choosing law schools. It's a shame U.S. News does such a shabby job in measuring it.)

Brian Leiter, *The Hopeless Association of American Law Schools*, The Leiter Reports: Editorials, News, Updates, at <http://webapp.utexas.edu/blogs/archives/bleiter/000679.html#000679> (Jan. 13, 2004). Other commentators harbor similar concerns about the AALS. For example, Steven Bainbridge in his blog commends Professor Leiter for “nail[ing]” the AALS and affirms his criticisms of the AALS quoted above with a “[d]arn straight.” Steven Bainbridge, *Brian Leiter on AALS*, ProfessorBainbridge.com, at http://www.professorbainbridge.com/2004/01/brian_leiter_on.html (Jan. 13, 2004). For other criticisms of the AALS, see David E. Steinberg, *More of the Same: Elitism and Exclusion at the AALS Annual Meeting*, 54 ME. L. REV. 251, 274 (2002) (describing AALS as an “exclusive country club, where only the right faculty members at the right law schools matter”).

242. See *supra* notes 209–10 and accompanying text.

243. See Lindgren & Seltzer, *supra* note 207, at 804. Only one woman appeared in the top 25, but women were represented proportionally (22%) in the next 100. In contrast, minorities were proportionately represented in the top 25 (12%), but not in the next 100. *Id.*

244. On the other hand, five of the eleven most prolific scholars graduated from Yale. *Id.*

245. Professor Lindgren noted that “[t]here are many individuals at non-elite schools who have alone published in the most-cited journals more than the entire faculties of law schools sometimes ranked by *U.S. News* as being in the top twenty-five.” *Id.* at 805.

246. Nineteen of the top 25 were lateral appointments. *Id.*

247. In this respect, Professor Leiter follows the methodology developed by Professors Eisenberg and Wells, *supra* note 211, to rank law faculties, albeit with some important changes.

248. A July 2002 compilation of the top 119 most-cited law faculty (along with a comparison to his 2000 ranking of the top 68 most-cited faculty) is available at Brian Leiter, *Most Cited Law Faculty*, at http://www.utexas.edu/law/faculty/bleiter/rankings02/most_cited.html (last visited Feb. 1, 2004).

249. A July 1998 compilation is available at Leiter, *supra* note 215, at 468–75.

Most-Cited Law Faculty by Subject Areas,”²⁵⁰ and “Fifty Most-Cited Law Faculty Who Entered Teaching Since 1992.”²⁵¹ Although generally supportive of the use of objective measures to evaluate faculty quality, Professor Leiter has expressed reservations about the accuracy of citation counts to measure scholarly impact. For example, citation counts may over-reward the “industrious drudge” (“the competent but uninspired scholar who simply churns out huge amounts of writing in his or her field”),²⁵² the “treatise writer” (the scholar “whose treatise is standardly cited because [the work] is a recognized reference point in the literature”),²⁵³ the “academic surfer” (the scholar “who surfs the wave of the latest fad to sweep the legal academy”),²⁵⁴ and more senior faculty (“once-productive dinosaurs”) at the expense of more junior faculty (“bright young things”).²⁵⁵ Citation counts also are “highly field-sensitive”²⁵⁶ and may tell us little about quality (such as when a work is continually cited as “the classic mistake”—an article that is “so wrong, or so bad, that everyone acknowledges it for that reason”).²⁵⁷ In the end, although citation counts may be “an imperfect measure of scholarly quality,” Professor Leiter rightly notes that “an imperfect measure may still be an adequate measure, and that is almost certainly true of citation rates as a proxy for impact as a proxy for reputation or quality.”²⁵⁸

250. A 2002 compilation is available at Brian Leiter, *Top 10 Most Cited Law Faculty by Areas*, at http://www.utexas.edu/law/faculty/bleiter/rankings02/top10_most_cited.html (last visited Feb. 1, 2004).

251. A 2002 compilation is available at Brian Leiter, *50 Most Cited Law Faculty Who Entered Teaching Since 1992*, at http://www.utexas.edu/law/faculty/bleiter/rankings02/50_most_cited.html (last visited Feb. 1, 2004).

252. Leiter, *supra* note 215, at 469.

253. *Id.*

254. *Id.*

255. Brian Leiter, *The Top 40 Faculty Based on Per Capita Scholarly Impact (as Measured by Citations) for 2003–04*, at http://www.utexas.edu/law/faculty/bleiter/rankings/scholarly_impact.html (July 16, 2003).

256. *Id.* Professor Leiter notes that “[l]aw reviews publish lots on constitutional law, and very little on tax.” *Id.* As a result, “[s]cholars in the public law fields or who work in critical theory get lots of cites; scholars who work on trusts, comparative law, and legal philosophy do not.” *Id.* This insight was confirmed in William J. Turnier, *Tax (and Lots of Other) Scholars Need Not Apply: The Changing Venue for Scholarship*, 50 J. LEGAL EDUC. 189, 211 (2000) (demonstrating that “an author’s subject area plays an inordinate role in determining whether her scholarship will appear in a major [law] review”).

257. See Leiter, *supra* note 215, at 470.

258. Brian Leiter, *The Top 40 Faculty Based on Per Capita Scholarly Impact (as Measured by Citations) for 2003–2004*, at http://www.utexas.edu/law/faculty/bleiter/rankings/scholarly_impact.html (July 16, 2003). In contrast, Professor Leiter has backed away from the use of objective data in ranking law schools in favor of subjective data gleaned from reputational surveys, see *supra* note 221, because “high-quality survey data may ultimately be more informative than ‘objective’ measures.” Brian Leiter, *Rankings of Law Faculty Quality for 2003–2004*, at <http://www.utexas.edu/law/faculty/bleiter/rankings/index.html> (Mar. 25, 2003). Professor Leiter plans to no longer aggregate results of the reputational component with objective data about faculty and student quality, but instead plans to present these individual measures for users to weigh as they deem

Professors Lindgren and Leiter thus have made a substantial contribution in injecting long-needed objective analysis into measurements of faculty contributions to law school performance. We hope their work represents the beginning of a sustained effort in the legal academy to develop alternative ways to measure what we do, both individually and collectively. We note, however, that the literature is surprisingly bereft of work assessing the other main component of faculty work: teaching. Until 2001, the *Princeton Review* provided the only nationwide review of law teaching on a school-wide basis, through a periodic survey of students that produced a ranking of the best (and worst) teaching faculties.²⁵⁹ Professor Leiter rightly observes that this was not a reliable measure of teaching quality and that users should take the teaching rankings “with a big grain of salt.”²⁶⁰ Of course, this did not stop law schools who performed well in the survey from trumpeting their ranking.²⁶¹ In an effort to more formally test the relationship between teaching and scholarship, Professor Lindgren found that, at three law schools (Boston University, Chicago, and Colorado), the best scholars (by his measure) tended to be the best teachers (as measured by student evaluations) as well.²⁶² Despite Professor Lindgren’s call for a much larger study to “assess the relationship between scholarship and teaching in American law schools,”²⁶³ no such study has emerged six years later.

In any event, *no* effort has been made to date to rank individual faculty teaching performance across law schools.²⁶⁴ We believe that the growing

appropriate. *Id.* This self-selected weighting follows recent trends in law school rankings. See *supra* notes 202–205 and accompanying text.

259. THE PRINCETON REVIEW, THE BEST LAW SCHOOLS 130 (2000).

260. Brian Leiter, *Best Teaching Faculties*, at http://www.utexas.edu/law/faculty/bleiter/rankings/03_best_teachers.html (July 1, 2003).

261. See, e.g., *BUSL Takes “Best Teaching Faculty” Honors for 5 Years*, at <http://www.bu.edu/law/news/princeton120199.html> (last visited Feb. 1, 2004) (trumpeting Boston University’s #1 ranking in final five years of survey); *Rankings & Polls*, at <http://www.wm.edu/virtualvisit/rankings.php> (last visited Feb. 1, 2004) (trumpeting William & Mary’s #7 ranking); *Baylor Schools, Programs Ranked Among Nation’s Finest*, at <http://pr.baylor.edu/story.php?id=002975> (trumpeting Baylor’s top ten ranking) (last visited Feb. 1, 2004).

262. James Lindgren & Allison Nagelberg, *Are Scholars Better Teachers?*, 73 CHI.-KENT L. REV. 823, 823 (1998) (noting that “good law teaching and legal scholarship tend to be found together, rather than apart”); see also Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 816 (1998) (finding positive association between excellent teaching and excellent research). A serious inquiry into the teaching component of faculty performance could raise interesting questions about the relationship of teaching and scholarship as well as the value of individual faculty members to their institutions. For example, is a professor who publishes an article in a top-ranked journal while bearing a regular teaching load more valuable than a professor who places an article in a similar journal but benefits from a reduced teaching load?

263. Lindgren & Nagelberg, *supra* note 262, at 823.

264. The *AALS Newsletter* publishes the names of the winners of law schools’ annual teacher-of-the-year awards. However, this listing does not provide much assistance in ranking law faculty teaching because: (1) back issues are not maintained on the AALS web site (Association of American Law Schools, *AALS Publications*, at <http://www.aals.org/aalspub.html> (last visited Feb.

demand for accountability and transparency, coupled with advances in computer technology and the Internet, eventually will produce such rankings. In an ideal world, the AALS would lead the effort in creating a uniform student evaluation form which would be tabulated either centrally through the AALS or locally at individual schools and then accessed via the Internet by users and researchers. If past behavior is a guide, we suspect that the AALS will not lift a finger and instead will respond with alarmed dismay when the market inevitably produces the first law professor teaching ranking service.

As a result, we focus here, as does the existing literature, exclusively on objective measures of faculty performance in the legal scholarship arena. As the next step in this evolutionary process, we suggest how insights from *Moneyball's* baseball story can inform the next chapter in the law school story.

“*Keep your eye on the ball.*”—As noted earlier,²⁶⁵ Lewis explains that baseball insiders preferred subjective evaluation to objective measurement because they (like all people) tend to (1) generalize wildly from their own experience; (2) be unduly influenced by recent performance; and (3) be biased by what they see with their own eyes.²⁶⁶ As Professors Thaler and Sunstein have observed,²⁶⁷ these three problems are well documented in the behavioral economics literature.²⁶⁸ People often make judgments based on the “availability heuristic.”²⁶⁹ Although this is not necessarily “dumb,” “reliable statistical evidence will outperform the availability heuristic every time.”²⁷⁰ The lesson for law schools is that in most situations, objective information, even if somewhat flawed, is better than purely subjective information. On the faculty side, how well do law schools do in deploying objective information in decisions regarding appointments, promotion, and tenure, and the allocation of institutional rewards?

For example, recent data reveal that over one-third of new law professors earned their degrees from only three law schools (Harvard, Yale,

1, 2004)); (2) not all schools award such annual prizes; (3) schools that award such prizes use different selection criteria (some focus exclusively on teaching while others reward a mix of scholarship and teaching) and processes (selections are made either exclusively by students or exclusively by the dean, or by some combination of the students and the dean); and (4) these prizes provide information only on a very small proportion of a school's faculty (i.e., there are no distinctions among the many nonwinners at a given school).

265. See *supra* notes 60–67 and accompanying text.

266. LEWIS, *MONEYBALL*, *supra* note 1, at 18.

267. Thaler & Sunstein, *supra* note 17, at 29.

268. Timur Kuran & Cass R. Sunstein, *Controlling Availability Cascades*, in *BEHAVIORAL LAW AND ECONOMICS* 374 (Cass R. Sunstein, ed. 2000).

269. RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* 152 (1994) (“When using the availability heuristic people estimate the frequency of a class by the ease with which they can recall specific instances in that class.”).

270. Thaler & Sunstein, *supra* note 17, at 29.

and Stanford), and close to one-half hail from just ten law schools.²⁷¹ Applicants in the entry-level applicant pool are quite similar in other respects (e.g., law review, judicial clerkship, and practice experience). Are hiring decisions being made on the basis of pedigree (talent) as opposed to performance? Are appointments committees over-generalizing their own personal experiences or letting themselves be over-influenced by what they see (or think they see) with their own eyes? Is actual performance, such as prior publications and teaching experience, a better predictive measure of future performance?

Similarly, are decisions regarding promotion and tenure, as well as the allocation of institutional rewards such as pay raises and chairs, made on the basis of the availability heuristic as opposed to “hard” evidence of performance? Do tenure committees make decisions based on a steady stream of performance, or are they over-influenced by the most recent performance? *Moneyball* cautions us to “keep our eye on the ball” in making decisions and to search for objective data whenever possible.

Yet *Moneyball* cautions against erring in the opposite direction as well. In his last *Baseball Abstract*, Bill James lamented what he thought was “the mess” he had helped to create:

I hate to say it and I hope you're not one of them, but I am encountering more and more of my own readers that I don't even like, nitwits who glom onto something superficial in the book and misunderstand its underlying message. . . . I wonder if we haven't become so numbed by all these numbers that we are no longer capable of truly assimilating any knowledge which might result from them.²⁷²

Indeed, statistics qua statistics are not important; statistics are only helpful if they help us “make life on earth a bit more intelligible.”²⁷³

In a similar vein, voices in the legal academy have been raised in opposition to the untrammelled use of objective measures of law professor performance. Texas law professor Richard Markovits fears “the substitution of ‘market evaluations’ for direct personal assessments of quality,” with the result that legal academics will stop “judging their peer’s performance themselves” and instead rely on market measures such as teaching evaluations, citations counts, and reputational surveys.²⁷⁴ Because these measurements are just proxies for quality, Professor Markovits is concerned that “faculty decisions about hiring, promotion, salary, and chairs [will be]

271. Brian Leiter, *Where Tenure-Track Faculty Went to Law School*, at <http://www.utexas.edu/law/faculty/bleiter/rankings02/tenure.html> (last visited Feb. 1, 2004).

272. LEWIS, *MONEYBALL*, *supra* note 1, at 95.

273. *Id.*

274. Richard S. Markovits, *The Professional Assessment of Legal Academics: On the Shift from Evaluator Judgment to Market Evaluations*, 48 J. LEGAL EDUC. 417, 417 (1998).

less positively correlated with the objective quality of the academic performance of the person being evaluated.”²⁷⁵

Moneyball helps resolve the tension between over-reliance on either subjective or objective measures. On one hand, Billy Beane would agree that the legal academy should not use “market measures” as an excuse for law school decisionmakers to fail to do their homework before making difficult, important decisions in these areas. Beane understood the importance of using not just any statistic, but rather the right statistic, as well as the limitations on the use of statistics. On the other hand, Beane would disagree that the academy should forgo objective measures of performance entirely in favor of subjective evaluations. Indeed, Beane’s core insight was to take decisionmaking authority away from scouts in the field who used their eyes to evaluate players based on their subjective “tools”²⁷⁶ and to place it in the hands of officials in the front office who used their computers to evaluate players based on their actual statistical performance.²⁷⁷

“*Keep refining your measures.*”—Billy Beane understood the importance of measuring individual player contributions and continually probed for better and more refined measures. For example, although Bill James and other statistical aficionados initially established more accurate statistical measures to evaluate batters, pitchers’ contributions were more difficult to quantify. Beane likened pitchers to writers:

Like writers, pitchers initiated action, and set the tone for their games. They had all sorts of ways of achieving their effects and they needed to be judged by those effects, rather than by their outward appearance, or their technique. . . . [T]o say all pitchers should pitch like Nolan Ryan was as absurd as insisting that all writers should write like John Updike. Good pitchers were pitchers who got outs; how they did it was beside the point.²⁷⁸

In addition, the output of pitchers, like the output of writers, “was harder than it should have been to predict.”²⁷⁹ Lewis describes in detail how Beane and others went through the process of refining pitching statistics so that they reflected “objectively . . . what [the pitcher] had accomplished,”²⁸⁰ as opposed to factors outside the pitcher’s control.²⁸¹

275. *Id.*

276. Lewis saltily observes, “Scouts from other teams would almost surely say: who gives a shit about a guy’s numbers? It’s college ball. You need to *look* at the guy. *Imagine* what he might become.” LEWIS, *MONEYBALL*, *supra* note 1, at 32 (emphasis in original).

277. In evaluating a young player, Beane’s approach was to focus on “not what he looks like, or what he might become, but [on] *what he has done.*” *Id.* at 38 (emphasis in original).

278. *Id.* at 222.

279. *Id.*

280. *Id.* at 242.

281. Lewis attributes the success of this refinement in evaluating pitchers to Voros McCracken, a paralegal who in “[l]ooking for a way to ignore whatever he was meant to be doing for the Chicago law firm that he loathed working for, . . . had taken up fantasy baseball.” *Id.* at 235. We

The difficulty in measuring law professor performance thus would not dissuade Beane from the task. We similarly enter the fray here, offering some preliminary thoughts on how to advance the existing work on measuring individual faculty contributions to law school success. Given the limitations of this Review Essay format, we propose some potentially fruitful lines of inquiry and structure our comments along the two types of measures currently in use for evaluating individual faculty scholarly performance: productivity (number of books and articles published) and impact (number of citations to published work).

Productivity rankings are based on counting publications in the “most prestigious journals and presses.”²⁸² These five words implicate important choices in the measurement process. With respect to “journals and presses,” Professor Lindgren counts only law review articles while Professor Leiter adds books to the mix. We applaud this more inclusive definition of faculty scholarship and would expand it further, along the lines of Professor Postlewaite’s observation that

the consummate legal academic publishes for the academy (academic articles and university press books), for the profession (professional articles and treatises), and for students (casebooks and student guides). Each constituency is worth addressing, and the vehicles appropriate to the different constituencies are equally legitimate. No constituency and no vehicle of expression should be preferable to the others. All have value.²⁸³

With respect to “most prestigious,” this term adds a measure of quality. For example, Professor Lindgren limits his survey to the top twenty most-cited law reviews,²⁸⁴ while Professor Leiter counts only the top ten student-edited law reviews and faculty-edited law journals, as well as the top three legal education book publishers and the top six legal academic presses.²⁸⁵ These methodologies raise a number of concerns.

leave it to others to ponder if, like Voros McCracken, we are looking for ways to ignore research we should be doing in our respective tax and labor fields.

282. See Leiter, *supra* note 215, at 461.

283. Philip F. Postlewaite, *Life After Tenure: Where Have All the Articles Gone?*, 48 J. LEGAL EDUC. 558, 567 (1998).

284. Professor Lindgren arrived at his list of the top twenty law reviews through citation counts in two commercial indexes: *Shepard's Law Review Citations* and *Social Science Citation Index*. Lindgren & Seltzer, *supra* note 207, at 786. These top twenty law reviews account for two-thirds of citations to American law reviews in the *SSCI*. *Id.* at 782.

285. Professor Leiter selects the student-edited law reviews on the basis of citation counts but does not identify his selection criteria in coming up with the leading faculty-edited law reviews, legal education book publishers, and legal academic presses. Leiter, *supra* note 215, at 461; Brian Leiter, *New Quality Rankings of U.S. Law Schools: 2000–2002, The Criteria*, at <http://www.utexas.edu/law/faculty/bleiter/rankings02/criteria.html> (last visited Feb. 1, 2004).

By limiting measurement to a very small subset of journals and publishers, the existing productivity rankings suffer from a severe “cliff effect.”²⁸⁶ For example, under the current approach, a faculty member with a consistent history of publishing in law reviews ranked just below the top ten (or twenty) receives the same credit (zero) as a faculty member who publishes very little and in markedly lower-ranked journals or, even worse, a faculty member who does not publish at all.²⁸⁷ Given the increasing market demand for more detailed and refined measurements of performance, future studies should provide a comprehensive list of all faculty publications, with the weighting disclosed by the authors and thus capable of further refinement by others. Indeed, we envision a custom-ranking process that allows users to assign their own rankings to the comprehensive data, as is developing now with law school rankings.²⁸⁸

Existing productivity rankings thus screen out articles based on some measure of law review quality. Measurement of law review quality thus is intrinsically related to rankings of faculty scholarly performance. Scholars have advanced several alternative ways of ranking law reviews: citation

286. For an explanation of the “cliff effect,” see Alliance for Telecommunication Industry Solutions, *Cliff Effect*, at http://www.atis.org/tg2k/_cliff_effect.html (last visited Feb. 1, 2004) (explaining that with regards to the digital transmission of analog signals, unless the detection threshold is met or exceeded, there will be no digital marks declared and the analog signal they represent cannot be decoded or is lost entirely).

287. At the risk of giving offense, assume five law professors each publish seventy-five page articles on an issue of tax law in five different law reviews.

Counting of Hypothetical Articles by Hypothetical Law Professors in Existing Measures			
Professor	Law Review (Rank Per <i>U.S. News</i>)	Lindgren & Seltzer	Leiter
A	Harvard (1)	Yes	Yes
B	Cornell (11)	Yes	No
C	Colorado (39)	No	No
D	Rutgers (70)	No	No
E	Florida Coastal (177)	No	No

Assume further that Professor F does not publish during the period in question. In our view, it is wrong to assign a “zero” score to Professors B–E. Instead, ranking methodologies should explore ways to weigh at least some of these publications differently so that whatever weight is assigned to the respective law reviews leaves Professors A–E with a higher score than Professor F. The relative rank of Professors A–E, of course, is where the real difficulty lies.

288. See *supra* notes 201–05 and accompanying text.

counts;²⁸⁹ surveys of experts in the field;²⁹⁰ identity of authors;²⁹¹ and library usage rates.²⁹² Yet only citation counts have been used in productivity rankings of law professors. Because ranking law reviews exclusively by citation counts is problematic on a number of levels,²⁹³ Billy Beane would demand that further efforts be made to refine law review rankings and thus help generate more accurate quality measures of individual faculty productivity.

Usage rates in particular hold promise as a fruitful methodology. In the past, usage rate studies have suffered from skewed results because they are based on *physical* library usage and thus are biased in favor of journals with a local or regional focus at the expense of journals with a national focus.²⁹⁴ Usage rates studies now could overcome these limitations if based on *virtual* libraries. For example, law reviews could be ranked by number of “hits” (as well as print requests) on Lexis and Westlaw. If available, the data would not suffer from the local-regional bias and would provide a better measure of usage. Other market measures could be developed as well. For example, law reviews could be ranked, as are newspapers and other periodicals, based on circulation. Surprisingly, although the U.S. Post Office collects

289. See, e.g., Lindgren & Seltzer, *supra* note 207, at 786–92; Louis J. Sirico & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051 (1991) (ranking based on frequency of citation in U.S. Courts of Appeals opinions); Louis J. Sirico & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986) (ranking based on frequency of citation in U.S. Supreme Court opinions); Washington & Lee University School of Law, *Most-Cited Legal Periodicals: U.S. and Selected Non-U.S.*, at http://www.law.wlu.edu/library/research/lawrevs/most_citedmethod.asp (last visited Feb. 1, 2004) (ranking based on frequency of citation in law reviews and federal and state case law).

290. See, e.g., Gregory Scott Crespi, *Ranking the Environmental Law, Natural Resources Law, and Land Use Planning Journals: A Survey of Expert Opinion*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 273 (1998) (ranking specialized environmental law journals based on mail surveys of experts in the field); Gregory Scott Crespi, *Ranking International and Comparative Law Journals: A Survey of Expert Opinion*, 31 INT'L LAW. 869 (1997) (ranking specialized international law journals based on mail surveys of experts in the field).

291. See, e.g., Tracey E. George & Chris Guthrie, *An Empirical Evaluation of Specialized Law Reviews*, 26 FLA. ST. L. REV. 813 (1999) (ranking specialized law reviews based on author prominence); Robert M. Jarvis & Phyllis G. Coleman, *Ranking Law Reviews: An Empirical Analysis Based on Author Prominence*, 39 ARIZ. L. REV. 15, 15–24 (1997) (ranking traditional law reviews based on author prominence).

292. See, e.g., Margaret A. Goldblatt, *Current Legal Periodicals: A Use Study*, 78 LAW LIBR. J. 55, 57–71 (1986) (ranking based on library usage); Nancy P. Johnson, *Legal Periodical Usage Survey: Method and Application*, 71 LAW LIBR. J. 177, 179–82 (1978) (ranking based on library usage).

293. See, e.g., Arthur Austin, *The Reliability of Citation Counts in Judgments on Promotion, Tenure, and Status*, 35 ARIZ. L. REV. 829, 831–32 (1993) (arguing that “citation idiosyncrasies” in legal scholarship compromises the validity of citation count rankings as a measure of the prestige of law reviews); Russell Korobkin, *Ranking Journals: Some Thoughts on Theory and Methodology*, 26 FLA. ST. U. L. REV. 851, 864–70 (1999) (arguing that citation count is a poor index of scholarly quality).

294. See Korobkin, *supra* note 293, at 871 (discussing practical problems with usage studies).

circulation figures for periodicals desiring reduced postage rates,²⁹⁵ we found no attempt in the literature to rank law reviews based on circulation. Our own preliminary ranking of law reviews by circulation yielded surprising results. Only five of the top twenty law reviews, but eight of those ranked lower than one-hundred (as measured by *U.S. News & World Report*), are included in the top twenty law reviews based on circulation figures.²⁹⁶

295. See United States Postal Service, *Form 3526: Statement of Ownership, Management, and Circulation*, available at http://www.usps.com/forms/_pdf/ps3526.pdf (last visited Feb. 1, 2004).

296. To access the relevant database, see <http://web5.silverplatter.com/webspirs/start.ws> (last visited Feb. 1, 2004) (data on file with authors). However, there are significant limitations with these data. For example, 26 law reviews did not report circulation figures, even though Form 3526, *supra* note 295, is required to be filed and published in order to obtain significant postage discounts available to periodicals. Second, the circulation figures in the table include both paid and free copies, which are required to be separately broken out on Form 3526 but, as far as we were able to determine, there is no easily accessible database containing all Forms 3526 filed by periodical publishers.

Ranking of Law Reviews By Circulation and <i>U.S. News & World Report</i>		
Law Review	Circulation	<i>U.S. News</i> Rank
Harvard	7,500	1
Arkansas (Fayetteville)	5,000	97
Yale	4,500	1
Arkansas (Little Rock)	3,800	119
Cornell	3,500	11
McGeorge	3,200	108
Boston University	3,000	25
Brooklyn	3,000	64
Seattle	3,000	108
South Carolina	3,000	87
Fordham	2,800	34
Columbia	2,500	4
Hofstra	2,500	87
John Marshall (Chicago)	2,500	144
Northern Kentucky	2,500	158

Citation counts also are used to measure scholarly impact. These rankings are based on the premise that to have any impact, scholarship has to be read and incorporated into future scholarship. As Professors Eisenberg and Wells argue, citation counts allow us to measure impact based on what legal academics actually do.²⁹⁷ Frequency of citations is correlated with impact, which in theory should be related to quality.²⁹⁸ Yet commentators by and large have ignored internal inconsistencies in the measurements of scholarly productivity and impact.²⁹⁹

On the one hand, the universe of productivity counts has expanded from articles to books, and we have argued for further expansion to other forms of scholarship as well.³⁰⁰ Yet measurements of scholarly impact by citation counts have remained exclusively focused on articles. The next step in the development of citation count methodologies should extend measurements to include citations to faculty work in books and other forms of scholarship, as well as in judicial opinions, executive branch determinations, and congressional sources.³⁰¹

On the other hand, productivity counts long have used quality filters, and we have argued for both comprehensive productivity counts and more flexible quality weightings.³⁰² Yet measurements of scholarly impact by citation counts to date consistently have foreshorn any qualitative measures and instead have embraced a strictly numerical approach. But assuming a reliable measure of law review quality can be developed, it may be proper to “count” an article in the #1-ranked journal more than an article of equivalent

Chicago	2,400	4
Montana	2,300	108
North Dakota	2,300	132
Temple	2,300	64
Maryland	2,200	44
South Texas	2,200	158
Virginia	2,200	9

297. See *supra* notes 211–13 and accompanying text.

298. See Eisenberg & Wells, *supra* note 211, at 377 (noting that scholars usually do not cite works not worth mentioning).

299. See *id.* at 379–410 (noting the difficulties involved in defining a universe of “documents” from which to determine scholarly impact).

300. See *supra* notes 286–93 and accompanying text.

301. The rapidly expanding universe of online books, and the increasing scope of government web sites, are reducing the technological barriers to such citation counts.

302. See *supra* notes 283–96 and accompanying text.

length in the #180-ranked journal.³⁰³ It also may be appropriate for an extensive discussion of a faculty member's work in the text of an article to "count" more than a single mention in a string cite in a footnote of an article.³⁰⁴

Technological developments regarding online legal research and the availability of information on the Internet also provide new opportunities to improve our existing measures of individual faculty contributions in scholarship. For example, the number of times an article is "hit" and "downloaded" from one of the on-line research sources can be used to measure an author's visibility. A ratio of hits and downloads to cites might tell us something about the article's quality—a low ratio (indicating that a significant portion of the users ended up citing the article in their work) might be a good proxy for the article's impact.³⁰⁵

In addition to productivity and citation counts, a more rigorous and systematic use of peer evaluation could provide an alternative measure of individual faculty productivity. The Internet provides a venue for faculty to evaluate each other's work, not unlike the "book reviews" common on Internet bookstores such as Amazon.com.³⁰⁶ Indeed, although it has been almost a decade since Bernard Hibbitts predicted the demise of the traditional law review because of the many advantages of self-publishing on the web (including the ability of law professors to engage in real-time scholarly debates),³⁰⁷ an intermediate step of web-based commentary on published work need not be far away. Such a website easily could be developed,

303. See *supra* note 300 and accompanying text.

304. See Brian Leiter, *The Top 40 Law Faculties Based on Per Capita Scholarly Impact (as Measured by Citations) for 2003–04*, at http://www.utexas.edu/law/faculty/bleiter/rankings/scholarly_impact.html (last visited Feb. 1, 2004) (noting six phenomena that skew the correlation between citation and quality). Curiously, although Professor Leiter has pioneered measurements of both scholarly productivity and scholarly impact, he does not note these internal inconsistencies in the two rankings.

305. The growing use of the Social Science Research Network (SSRN), with 41,800 electronic papers in downloadable Adobe Acrobat pdf format (as of February 1, 2004), provides a new data set to measure scholarly impact through hits and downloads. SSRN, at <http://www.ssrn.com> (last visited Feb. 1, 2004).

306. See Amazon.com, *Review Guidelines*, at <http://www.amazon.com> (review guidelines) (last visited Feb. 1, 2004) (providing content and length guidelines to Amazon.com users).

307. Hibbitts noted:

[A]fter we publish on the Web, we do not have to wait in our offices for someone to take the time to write to us or to make the psychological effort to call with comments of criticism or praise. The built-in electronic mail capacities of the Web allow and encourage our readers to provide meaningful and timely feedback to us at the touch of a button, comments which we can use as the basis of revision of the original article and/or append to the original document for the enlightenment and benefit of other readers and evaluators. Instead of being dead-on-arrival, every article we write on the Web can be a living creature, capable of interactivity, growth, and evolution.

Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 671 (1996).

perhaps in conjunction with existing sites such as Jurist³⁰⁸ or SSRN,³⁰⁹ in which articles appearing in print could be subject to peer review. Reviews could be encouraged by tracking contributors and giving recognition to their efforts. Summary statistics of an article's review could be posted as on Amazon.com, as well as responses by the article's author.

In any event, the evolution in the measurement of law professor scholarly performance can be contrasted with the provocative recent work by Stephen Choi and Mitu Gulati in measuring performance of U.S. Courts of Appeals judges through both productivity (number of published opinions) and impact (citations to judges' opinions in other opinions and law reviews).³¹⁰ In determining who would win a merit-based "tournament" of these judges—with the "prize" being a seat on the U.S. Supreme Court—Professors Choi and Gulati focus on comprehensive measurements on the productivity side but employ both comprehensive and selective measures on the impact side. Thus, with a few minor exceptions not relevant here, one published opinion in F.3d is treated the same as any other opinion in F.3d in measuring a judge's productivity, but Professors Choi and Gulati filter out negative citations on the impact side. We contend that the hierarchical nature of law professor publishing demands both comprehensive and selective measurements on both the productivity and impact sides in the scholarly "tournament" of law professors. This proposal flows directly from the lessons of *Moneyball*, when outsiders led by Bill James first developed comprehensive raw data and then engaged in a peer-review process of using the data to generate new objective measures of player performance, all without the assistance (and indeed in the face of outright hostility) of baseball insiders. A review of the existing literature highlights the evolution of measurements of law faculty scholarly performance towards this ideal.

308. JURIST, at <http://jurist.law.pitt.edu> (last visited Feb. 1, 2004).

309. SSRN, at <http://www.ssrn.com> (last visited Feb. 1, 2004).

310. See Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 305–10 (2004) (expounding this productivity and impact methodology as a useful tool for objectively evaluating judicial performance and enhancing the fairness of the judicial appointment process); Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance*, at <http://papers.ssrn.com> (last visited Feb. 1, 2004). Professors Choi and Gulati also measure judges' independence, a criterion not relevant in ranking law faculty scholarship.

Table 3 Measurement of Productivity and Impact				
Study & Group Measured	Productivity (Publications)		Impact (Citation Counts)	
	Comprehensive	Selective	Comprehensive	Selective
Lindgren & Seltzer (Individual Faculty)		✓		
Eisenberg & Wells (Faculties)			✓	
Leiter (Faculties)		✓	✓	
Leiter (Individual Faculty)			✓	
Choi & Gulati (Individual Judges)	✓		✓	✓
Proposal (Faculties & Individual Faculty)	✓	✓	✓	✓

Testing the Rankings. Billy Beane's major challenge to the "Greek chorus" of scouts who pushed for players with impressive physical "tools" but who performed poorly in Beane's objective measures was simple and direct: "[I]f he's that good a hitter why doesn't he hit better?"³¹¹ We close this section by similarly putting some of the existing measures of law professor success to the test. We provide preliminary answers to two questions that are critical in the development of measures of individual faculty performance that thus far have eluded analysis: (1) are law professors who perform well in existing rankings demonstrably "better" than their unranked counterparts; and (2) are there reliable predictors for who will be a productive and impactful scholar?

We compare the background and performance of two groups of law professors. The first group is the fifty young scholars identified by Professor Leiter as the most-cited young law faculty.³¹² The second group is fifty other

311. LEWIS, MONEYBALL, *supra* note 1, at 30.

312. Brian Leiter, *50 Most Cited Faculty Who Entered Teaching Since 1992*, at http://www.utexas.edu/law/faculty/bleiter/rankings02/50_most_cited.html (last visited Feb. 1,

young scholars who entered law teaching at the same or a similarly ranked school and at the same or about the same time as each of the most-cited young scholars. By matching entering school and year, we attempt to control for other factors that might affect scholarly performance. Two demographic characteristics of the groups are consistent with Professor Lindgren's findings: the most-cited group is 12% female and 28% minority, while the control group is 50% female and 16% minority.³¹³

We collected information on two sets of variables: prehiring background variables and posthiring scholarly performance variables. Tables 4 and 5 provide the mean values for each of these variables, as well as the results of the difference-of-means test. The difference-of-means test allows us to test for differences across specific variables of interest among the two groups.³¹⁴

In Table 4, we explore whether the two groups differ in terms of their scholarly performance. Have the most-cited young scholars actually outpaced their counterparts in various measures of scholarly performance? In addition to citation counts,³¹⁵ we compare the two groups in terms of the total number of articles published based on data collected from Westlaw's JLR database as well as from each professor's curriculum vitae.³¹⁶ We thus employ a comprehensive measure of productivity, unlike the selective measures used in the existing literature. Consistent with existing productivity rankings, however, we include a quality measure tied to the reputation of the law review in which the article appears: we compare the two groups based on both the number of articles published in the top ten law

2004). We used this group instead of the overall most-cited faculty ranking to facilitate the collection of data on the comparison group.

313. Lindgren & Seltzer, *supra* note 207, at 803–05 (observing that, on one ranking of the most-cited law professors, women were underrepresented while minorities were over-represented).

314. The difference-of-means test of statistical significance allows us to determine whether the two groups differed along a specific characteristic. Formally, the procedure tests the null hypothesis that no difference exists between the means value of a specific characteristic of the two populations from which the groups are drawn. A finding of statistical significance allows us to reject the null hypothesis and to conclude that there is a significant difference between the mean of one population and the mean of another population from which the two groups were obtained. The level of significance of a particular test is reported in the form of a probability that the association could have happened by chance. The test we perform here provides us with information about the chances that the differences we observe would occur if such differences did not in fact exist. The tests do not provide any information about the “strength or importance” of the differences. See Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEXAS L. REV. 1781, 1828 (2002) (using the difference-of-means test).

315. We use Professor Leiter's methodology. See Leiter, *supra* note 215, at 468.

316. JLR is Westlaw's database of law journals. We also mined each professor's CV (if available online) to capture articles published in certain specialty journals not included in the JLR database.

reviews and in law reviews ranked 11 through 25.³¹⁷ In addition to the number of articles,³¹⁸ we, like Professor Leiter, also compare the two groups in terms of the number of books published, but we go further and count book chapters as well and take a comprehensive rather than a selective measurement.

We also include three additional measures of performance. We compare the two groups with regard to the average number of years it took after entering teaching for the professors in each group to publish their first article. We then compare the groups in terms of the rank of the law review in which the first article was published and the rank of the professor's current school.

317. We measure law review reputation and law school reputation using the 2004 *U.S. News & World Report* academic ranking. For a somewhat different methodology, see Deborah Jones Merritt, *Scholarly Influence in a Diverse Legal Academy: Race, Sex, and Citation Counts*, 29 J. LEGAL STUD. 345 (2000).

318. With respect to both citations counts and number of articles (total number as well as by ranking of law reviews), we also calculated mean values per year of law teaching. We do not include these data here because by definition both groups entered law teaching at roughly the same time (circa 1992). We refer to these data in *infra* subpart IV(C) when we compare the scholarly performance of both groups against the scholarly performance of law school deans. See *infra* notes 342–46 and accompanying text.

<p style="text-align: center;">Table 4 Post-Hiring Scholarly Performance Characteristics of Law Faculty Mean Values (Standard Deviations in Parentheses)</p>			
Characteristic	Top 50 Young Scholars	Sample Group	t- Statistic
Citation count	508.00 (233.68)	152.37 (123.82)	9.51***
Number of articles published (JLR)	23.36 (10.43)	10.04 (6.93)	7.52***
Number of articles published (CVs)	25.82 (12.28)	11.22 (8.08)	7.02***
Number of articles published in law reviews ranked 1–10	5.42 (4.66)	2.27 (2.94)	4.04***
Number of articles published in law reviews ranked 11–25	3.98 (3.30)	2.02 (2.29)	3.45***
Number of books published	2.18 (1.91)	1.00 (2.15)	2.90***
Number of book chapters published	2.36 (4.13)	1.14 (1.57)	1.95
Average number of years between entering teaching and first article	1.42 (0.70)	2.22 (1.33)	-3.76**
Law review rank of first article	24.91 (29.93)	34.97 (40.51)	-1.42
Rank of current law school	22.40 (22.19)	42.56 (96.33)	-1.44
, *, significant at the .05, .01 level			

The results in Table 4 indicate that there is a statistically significant difference between the mean values of the two groups in seven of the ten variables measured. The results show that the most-cited young faculty outperformed the professors in the comparison group in terms of citation counts and productivity counts (number of articles, number of articles in the top law reviews, and number of books). Compared to the faculty in the comparison group, the most-cited professors have been cited roughly three times as often and have published twice as many articles (both in total and in the top law reviews) and almost twice as many books. Interestingly, the results also indicate that the two groups differ regarding the speed at which the professors produced their first article: the most-cited professors published their first article almost a year earlier, on average, than the professors in the comparison group. The results thus show that the most-cited professors started writing earlier and continue to write more often and produce more impactful scholarship than the professors in the comparison group.

In Table 5, we begin to explore whether any background variables can help predict future scholarly stars. We collected data on the backgrounds of the professors included in both groups. We included both “pedigree variables” (academic rank of law school attended, law review membership, judicial clerkship, and advanced degree) and pre-hiring “performance” variables (publication of a student note or article prior to first law teaching job and prior law teaching experience).

The results in Table 5 indicate that there is no statistically significant difference between the means of any of the “pedigree” variables of the two groups. However, there is a statistically significant difference with respect to the two pre-hiring publication performance measures: the most-cited professors published about twice as many articles before entering the profession and were more likely to have published a student note than the professors in the comparison group. These findings suggest that pre-hiring publication may be a helpful predictor of future scholarly success.³¹⁹

319. These results are consistent with Professor Merritt’s findings. See Merritt, *supra* note 317, at 360 (concluding that pre-hiring publications predict higher citation counts).

<p style="text-align: center;">Table 5 Prehiring Characteristics of Law Faculty Mean Values (Standard Deviations in Parentheses)</p>			
Characteristic	Top 50 Young Scholars	Sample Group	t- Statistic
Academic rank of law school attended	5.10 (12.76)	7.27 (18.26)	-.69
Membership on law review	.64 (.48)	.56 (.50)	.82
Judicial clerkship	.80 (.40)	.72 (.45)	.94
Advanced degree (other than J.D.)	.36 (.48)	.32 (.47)	.42
Published student note	.56 (.50)	.35 (.48)	2.14**
Number of articles published prior to first tenure-track job	2.78 (2.53)	1.10 (1.76)	3.85***
Teaching experience prior to first tenure-track job	.24 (.43)	.32 (.47)	-.89
<p>** , *** , significant at the .05, .01 level</p>			

C. Dean Billy Beane

Moneyball is about much more than baseball and statistics.³²⁰ At its very core, it is a human, personal story about “a man whose life was turned

320. As Professors Thaler and Sunstein eloquently put it at the beginning of their review of *Moneyball*:

Michael Lewis’s new book is a sensation. It treats a topic that would seem to interest only sports fans: how Billy Beane, the charismatic general manager of the Oakland Athletics, turned his baseball team around using, of all things, statistics. What’s next: an inspiration tale about superior database management? But there are some broader lessons in Lewis’s book that make it worth the attention also of people who do not know the difference between a slider and a screwball.

Thaler & Sunstein, *supra* note 17, at 27.

upside down by professional baseball, and who, miraculously, found a way to return the favor.”³²¹ We conclude the final chapter of our story by shifting the focus, not to one person, but to a group of people of singular importance in legal education: law school deans.³²²

Billy Beane’s story is unique, not because he possessed the right attributes to be a successful general manager who successfully challenged baseball’s conventional wisdom, but because he possessed the right attributes to be the *first* one to do so. “Billy Beane was a human arsenal built, inadvertently, by professional baseball to attack its customs and rituals. He thought himself to be fighting a war against subjective judgments.”³²³ Beane was not the first person to appreciate the importance of rethinking baseball’s existing measurements of player performance; Bill James had fired the first shot in that war decades earlier. But Beane was the first baseball insider to successfully embrace and implement a new way of thinking about the game. In telling us both *how* Beane did it and *why* he was the right person at the right time for the job, Lewis lays out a roadmap for deans to achieve similar success in the law school world and for identifying the attributes deans need to succeed in this new era.³²⁴

Beane systematically reexamined every aspect of traditional thinking about the operation of a baseball team. In particular, he turned the baseball world on its head by rethinking both the roles and methods of subjective and objective player evaluation (in the contexts of deciding whether to select particular players in the annual draft, to resign a team’s own free agents and to sign free agents from other teams, and to trade players on one’s team for players on other teams)³²⁵ and a team’s optimal organizational structure (the

321. LEWIS, MONEYBALL, *supra* note 1, at xiv.

322. Commentators have noted that a dean is “the central figure in a school’s personality. He or she is the chief executive, academic, administrative, and financial officer of a relatively self-contained academic unit.” Jagdeep S. Bhandari, Nicholas P. Cafardi & Matthew Marlin, *Who Are These People? An Empirical Profile of the Nation’s Law School Deans*, 48 J. LEGAL EDUC. 329, 329 (1998). Indeed, law school deans’ musings about legal education are published in the annual Leadership in Legal Education Symposium. See 35 U. TOL. L. REV. 1 (2003) (containing 24 deans’ essays); 34 U. TOL. L. REV. 1 (2002) (containing 25 deans’ essays); 33 U. TOL. L. REV. 1 (2001) (containing 37 deans’ essays); 31 U. TOL. L. REV. 1 (2000) (containing 36 deans’ essays); see also Tomain & Caron, *supra* note 87 (representing one of only two out of 122 deans’ essays coauthored by (in this case) a pushy former associate dean). Since leaving our law school’s rotating associate dean post, one of us has been unable to find a law review willing to publish his annual thoughts on tax law.

323. LEWIS, MONEYBALL, *supra* note 1, at 117.

324. To those who may be inclined to think that our comparison of law school deans to baseball general managers is stretched, see Donald G. Gifford, *How Does the Dean Resemble the Islets of Langerhans?*, 31 U. TOL. L. REV. 599 (2000) (comparing law school deans to insulin producing cells within the pancreas).

325. There are parallels in the law school world to baseball’s annual amateur player draft and free agent auction in the forms of the AALS “meat market” hiring conference for entry-level faculty and the recruitment and retention of experienced faculty in the face of market demand for their services. Of course, unlike in baseball, law school deans are unable to “trade” law professors to

respective role of a scout, manager, general manager, and owner).³²⁶ Beane brought to this battle a keen appreciation of the new statistical models developed by James and others, as well as a willingness to follow James's advice to "[t]hink for yourself along rational lines. Hypothesize, test against the evidence, never accept that a question has been answered as well as it ever will be."³²⁷ Legal education is in dire need of someone like Billy Beane to challenge old approaches and adopt new methods.

Lewis identifies three characteristics that made Beane uniquely qualified for the role of baseball revolutionary: (1) he had played the game,³²⁸ (2) he continued to excel as an athlete,³²⁹ and (3) he had failed as a player.³³⁰ This final characteristic is counterintuitive but has enormous implications for applying the lessons of *Moneyball* to law schools.

When recruited as a baseball player out of high school, Beane was the "dream" prospect. He possessed in breathtaking abundance the "tools" favored by scouts. But his potential never flowered into performance. After a short career, with statistics that told "an eloquent tale of suffering,"³³¹ he voluntarily stopped playing at a very young age (27- years old), ending "his fruitless argument with his talent."³³² As Lewis notes:

In his own mind [Beane] ceased to be a guy who should have made it and became a guy upon whom had been heaped a lot of irrational hopes and dreams. He had reason to feel some distaste for baseball's mystical nature. He would soon be handed a weapon to destroy it.³³³

These experiences gave Beane a keen perspective on the shortcomings of subjective player evaluations. With a firsthand understanding of why he did not succeed despite the "can't miss" tag he bore from the scouts, Beane set out to ruthlessly avoid the very player that he once was. He wielded the new statistical measurement tools to populate his team with players that were nothing like him. In so doing, he provides a model for the role of law school revolutionary.³³⁴

strengthen their schools, whether by addition (landing a faculty member from another school) or subtraction (shedding an existing faculty member who is not, in the dean's mind, sufficiently contributing to the organizational success of the law school). Similarly, reappointment, promotion, and tenure rules constrain deans' ability to turn over their faculty rosters as easily or as quickly as baseball general managers are able to by demoting underperforming players to the minor leagues or by granting them their unconditional release.

326. See *infra* note 335 (comparing baseball and law school organizational structures).

327. LEWIS, MONEYBALL, *supra* note 1, at 98.

328. See *supra* note 68 and accompanying text.

329. See *supra* note 73 and accompanying text.

330. See *supra* notes 69–72 and accompanying text.

331. LEWIS, MONEYBALL, *supra* note 1, at 51.

332. *Id.* at 54–55.

333. *Id.* at 55–56.

334. Of course, we are not suggesting that all law school deans should emulate Beane. Instead, we believe the Beane template is particularly suited for the first law school dean who embraces an objective evaluation of law school and law faculty performance.

The tectonic plates of the legal education landscape are inexorably moving in the direction toward greater accountability and transparency in this era of increased computing power and Internet capabilities. These conditions are creating the environment in which the law school version of Billy Beane may emerge to seize the opportunities afforded in this new world order. The economics of law schools have forever changed, creating growing demands for more and better information about organizational performance. In response, exciting work has commenced over the past decade to meet this demand to better understand and measure the contributions that individuals make to the performance of their law schools. We offer here some thoughts on the lessons *Moneyball* suggests about the type of dean needed to turn legal education on its head.³³⁵

Prior studies and our own data reveal that deans, as a group, fit the first two characteristics of Billy Beane's profile. Law schools traditionally hire deans that have "played the game."³³⁶ Survey data indicate that 93–96% of deans held prior law school teaching positions.³³⁷ Moreover, not only have deans been teachers,³³⁸ but by and large they also have played the scholarship game as well.³³⁹

335. As noted earlier, *see supra* notes 74–77 and accompanying text, Beane created a new baseball model with organizational policy set at the top by the general manager and the on-field manager's position demoted to a middle-management position charged with implementing policy set from above. In importing this model to the law school world, the authority wielded by Billy Beane as general manager is more akin to that of a university provost, with a university president in the role of baseball owner and a law school dean in the role of baseball manager. However, we focus in this Review Essay on deans, both to limit our inquiry to law schools rather than to university administration generally and, frankly, because "Dean Beane" sounds catchier than "Provost Beane." For discussion of the role of the law school dean in the larger university, see Alfred C. Aman, Jr., *Protecting a Space for Creativity: The Role of a Law School Dean in a Research University*, 31 U. TOL. L. REV. 557 (2000); Janice C. Griffith, *The Dean's Role as a Member of the University's Central Administration*, 35 U. TOL. L. REV. 79 (2003); Lawrence Ponoroff, *Law School/Central University Relations: Sleeping with the Enemy*, 34 U. TOL. L. REV. 147 (2002).

336. *See* John D. Hutson, *From Admiral to Dean*, 35 U. TOL. L. REV. 101, 105 (2003) (noting that "[o]f 185 deans, about 180 of us are traditional"); Peter Keane, *Interloper in the Fields of Academe*, 35 U. TOL. L. REV. 119, 119 (2003) (written by one of the other four nontraditional deans).

337. *See* Bhandari, Cafardi & Marlin, *supra* note 322, at 342; *see also* Ronald F. Phillips, *The Origins and Destinations of Law School Deans*, 38 J. LEGAL EDUC. 331, 332 (1988).

338. For discussion of the dean's role as classroom teacher, *see* Jeffrey A. Brauch, *Why I Must Teach*, 34 U. TOL. L. REV. 23 (2002).

339. *But cf.* Hutson, *supra* note 336, at 109 (noting that he has never done legal scholarship).

Table 6 Scholarly Performance Profiles of Deans Mean Values		
Performance Measure	Total	Per Year
Citation Count	227.46	13.40
Number of Articles	11.53	3.11
Number of Articles in Law Reviews Ranked 1–10	1.32	.48
Number of Articles in Law Reviews Ranked 11–25 ³⁴⁰	1.32	.39

The results in Table 6 indicate that, on average, law schools tend to hire deans who have engaged in legal scholarship with some regularity.³⁴¹ But how do they compare with the law professorate generally?³⁴² Using our prior

340. In a statistical quirk, the deans have published virtually the identical number of articles in law reviews ranked 1–10 as they have in law reviews ranked 11–25.

341. Table 6 and the subsequent tables in the text, by using mean values, understate the scholarly productivity and impact of deans above the midrange of the rankings because the median values reveal that such deans overperform the averages. For example, the table below shows that deans above the mid-range account for the lion's share of the 1.32 average number of articles in top 25 law reviews. This result also occurs for each of the subsequent tables in the text, but we do not separately report those median values.

Scholarly Performance Profiles of Deans Median Values		
Performance Measure	Total	Per Year
Citation Count	127.00	6.90
Number of Articles	8.00	.50
Number of Articles in Law Reviews Ranked 1–10	0	0
Number of Articles in Law Reviews Ranked 11–25	0	0

342. We do not here make any special adjustments in applying scholarly productivity and impact measures to both deans and faculties. For example, should productivity counts use quality screens other than rankings of law reviews to account for special publishing opportunities afforded deans *qua* deans? The annual University of Toledo deans' symposium, which has added 122 articles to the deans' productivity count in our data, pointedly sets the scholarship bar quite low in trolling for decanal contributions: "Because deans often have little time for serious research, the

scholarly productivity and impact rankings,³⁴³ deans on average have not published as much (measured by number of articles), nor have they had as much scholarly impact (measured by citation counts), as either the most-cited young scholars or the comparison group of young scholars.³⁴⁴

Performance Measure	Deans	Most-Cited Faculty	Sample Faculty Group
Citation Count	13.40	54.13	15.29
Number of Articles	.76	2.49	1.04
Number of Articles in Law Reviews Ranked 1–10	.08	.58	.23
Number of Articles in Law Reviews Ranked 11–25	.07	.44	.20

Our data also reveal that higher ranked schools tend to hire stronger scholars as deans. For example, deans at the top twenty-five schools on average have published at least twice as much (measured by number of articles and placement of articles in the top twenty-five law reviews), and

emphasis in this forum is on short articles.” William M. Richman, *Introduction, Symposium: Leadership in Legal Education*, 35 U. TOL. L. REV. (2003); 34 U. TOL. L. REV. (2002); 33 U. TOL. L. REV. (2001); 31 U. TOL. L. REV. (2000) (appearing on an unnumbered page in each symposium). One of us takes issue with the view that articles published in the symposium do not embody “serious research.” See Tomain & Caron, *supra* note 87. The organizers of the deans’ symposium expressly invite recidivist deans to make an annual contribution, but surprisingly only one dean has appeared in all four symposia (a home run?) (Thomas C. Galligan, Jr.). Three deans have appeared in three of the symposia (triples?) (Jeffrey A. Brauch, R. Lawrence Dessem, and Nancy B. Rapoport), and ten deans have appeared in two of the symposia (doubles?) (Patrick J. Borchers, Ronald A. Cass, John H. Garvey, Janice C. Griffith, Harry J. Haynsworth, Thomas M. Mengler, Kenneth C. Randall, W. Taylor Reveley III, Douglas E. Ray, and David E. Shipley). *Cf.* Paul R. Verkuil, *Hitting for the Academic Cycle*, 33 U. TOL. L. REV. 245 (2001). The remaining participating deans have been content to submit one essay (a single?). One hundred twenty-three different deans have participated in the symposium over the four years. Unless future studies use quality screens to filter these essays, one would expect more deans to take advantage of this “intentional walk.”

343. See *supra* notes 315–19 and accompanying text (Table 4).

344. Of course, the dean group on average has been in law teaching much longer (21.03 years) than either the most-cited young scholar group or the comparison young-scholar group (9.70 years). We discuss below the scholarly production and impact of deans both before and after assuming their deanships.

have had at least twice the scholarly impact (measured by citation counts), as the average dean. This effect is magnified when deans at higher-ranked schools are compared to deans at lower-ranked schools.

Table 8 Scholarly Performance Profiles of Deans By Rank of School Mean Values				
Law School Rank	Citation Count	No. of Articles	No. of Articles in Law Reviews Ranked 1-10	No. of Articles in Law Reviews Ranked 11-25
1-25	668.77	19.89	6.19	4.00
26-50	222.80	10.19	1.04	.96
51-100	159.62	10.63	.48	1.07
101-150	119.32	11.66	.09	.55
151-176	68.00	5.35	.15	.27
Mean Dean ³⁴⁵	227.46	11.53	1.32	1.32

Law school deans thus have played the game, and played it better, than Billy Beane did.

After ending their “playing days” and moving into the front office, law schools deans continue, as Billy Beane did, to be engaged in the game. Our data reveal that deans continue to publish, albeit at a lower rate, after assuming their deanship.³⁴⁶

345. This refers to the mean values for all of the deans, not 2004 Democratic Presidential candidate Howard Dean’s celebrated meltdown after losing in the Iowa caucuses. See <http://www.deangoesnuts.com> (last visited Feb. 1, 2004).

346. Because of the difficulty of compiling the data, we have not broken down the measurement of the deans’ scholarly impact into pre-deanship and as-dean periods.

Law School Rank	Number of Articles		Number of Articles in Law Reviews Ranked 1–25 ³⁴⁷	
	Pre-Deanship	As Dean	Pre-Deanship	As Dean
1–25	13.92	7.54	8.08	2.79
26–50	7.26	3.48	1.78	.22
51–100	6.69	4.88	1.29	.21
101–150	6.00	6.92	.50	.21
151–179	3.81	1.81	.36	.09
Mean Dean	7.39	5.13	2.18	.59

Could a Dean Beane emerge from this crop of existing deans? Close examination of the deans data reveals that current law school deans are quite different from Billy Beane in at least three respects.

First, as noted earlier,³⁴⁸ Beane enjoyed less success as a baseball player prior to assuming his current position than current deans on average enjoyed as scholarly players prior to assuming their current positions. Beane's objective record as a baseball player resulted in frequent stints on the bench where he was unable to play the game; the law school deans' average objective record as scholarly players appears sufficient to keep them in the game.

Second, after becoming general manager, Beane did not continue his career as a baseball player; he instead excelled as an athlete (and thus impressed his current players) in developing the physical tools (e.g., strength, speed, agility, and endurance) he possessed that had led scouts to project for him a better baseball career than he was able to fulfill. In contrast, our data reveal that after becoming dean, the average dean has continued his or her career as a scholar, albeit at slower rates than exhibited as a professor.

347. Because the number of articles in the top 25 law reviews is so small, we have combined the figures for the number of articles in law reviews ranked 1–10 and 11–25 in this column.

348. See *supra* note 70–73 and accompanying text.

Moneyball suggests that the deans' publication efforts may be misguided³⁴⁹ and that the deans' time might be better spent excelling as a scholarly colleague (and thus impress his or her faculty) in developing nonpublishing scholarly tools (e.g., reviewing colleagues' works-in-progress, familiarity with scholarly literature, participation in scholarly colloquia, conferences, and symposia).³⁵⁰

Third, Beane's failure as a player forced him to choose between continuing to chase false dreams and walking "out of the Oakland A's dugout and into their front office."³⁵¹ His failure as a player allowed Beane to see baseball traditions for what they were—"illusions created by the insiders on the field."³⁵² Because "Beane had himself been one of those illusions,"³⁵³ he had the self-confidence to reject conventional wisdom, to reject himself, in pursuing baseball success by targeting the type of player he was not in his youth. "[W]hat set [Beane] apart from most baseball insiders—was his desire to find players unlike himself. Billy Beane had gone looking for, and found, his antitheses. Young men who failed the first test of looking good in a uniform. Young men who couldn't play anything but baseball."³⁵⁴

The deans' scholarly performance profile we have set forth suggests that Billy Beane may not be lurking among the existing crop of deans. They played the scholarly game in the past as faculty, and continue to play the game today as deans, with too much success. The conventional wisdom in legal education—by insisting that deans when hired be leading scholars and that they continue to be engaged in substantial scholarship during their deanship—is contrary to the lessons in *Moneyball*. Billy Beane's example suggests that the revolutionary dean who can help define organizational success and properly value individual contributions to that success may turn out to rank below the mid-range in scholarly productivity and impact measures. But Dean Beane will have the requisite talents, tenacity, and temperament to drive all law school players to better performance. Dean Beane will confront tradition head on, challenging the conventional wisdom with the certainty of one who has seen (and lived) its limits first-hand. Dean Beane will have the confidence and courage to lead a faculty of professors both with the objective markers of success he or she lacked (and continues to

349. *But see* Symeon C. Symeonides, *On Deaning, Writing, and Roses*, 33 U. TOL. L. REV. 217, 218–19 (2001) (noting the importance of continuing to publish while serving as dean).

350. Of course, the baseball-law school analogy is imperfect because a general manager is foreclosed from continuing as a player on the baseball field (and indeed is prohibited from even sitting in the dugout among the players, managers, and coaches). In contrast, a dean is able (if he or she so chooses) to continue as a player in the scholarly field (and indeed is allowed to sit in the faculty lounge).

351. LEWIS, *MONEYBALL*, *supra* note 1, at 55.

352. *Id.* at 62.

353. *Id.*

354. *Id.* at 118.

lack) and without the subjective characteristics he or she had (and continues to possess) in abundance. As Marx³⁵⁵ might say, the innovative law school of the future (like the Oakland A's of today) very well might be one which would never have hired its dean as a faculty member (or its general manager as a player) in the first place.

V. Conclusion

A tsunami of accountability and transparency is sweeping across American law and society. One manifestation is the insatiable public demand for ever more and increasingly sophisticated rankings in all aspects of American life. Unfortunately, American institutions and the insiders that lead them initially respond almost unfailingly by taking rear-guard actions to try to preserve the comfortable status quo. But by resisting the inevitable, these caretakers cause their institutions enormous harm as private parties and the government step in to fill the void with broad-brush solutions that do not properly accommodate legitimate institutional interests. Yet the insiders' post hoc wailing rings hollow in light of their failure to respond before a loaded gun was pointed at their heads. The landscape regrettably is littered with many recent examples.

The explosion of corporate accounting scandals and related financial irregularities that burst into public consciousness in late 2001 with Enron, Arthur Andersen, WorldCom, and many others can be laid, in part, at the feet of the Financial Accounting Standards Board ("FASB"). Congress responded with the Sarbanes-Oxley Act, and the FASB and the business community will have to deal for years to come with the ham-fisted requirements imposed on corporations and accounting firms.

More recently, the mutual fund scandals involving trading abuses and self-dealing brought to light by New York Attorney General Eliot Spitzer erupted in late 2003 only after many years of inaction by the Investment Company Institute ("ICI"). Although it is too soon to know the precise contours of the remedies to be foisted on the mutual fund industry, if history is any guide the ICI will be unable to forestall a Sarbanes-Oxley type response.

Our medical school counterparts also have faced the *U.S. News & World Report* bludgeon as rankings mania has spread to medical schools, hospitals, doctors, and health insurance plans. Perhaps because of the increased stakes involved, the public's demand for accountability and transparency through rankings also has attracted the government's attention, with various legislative and regulatory measures aimed at providing medical consumers with more detailed information about the performance of the

355. Groucho (famous comedian who once said "I don't want to belong to any club that will accept me as a member"), not Tommy (left-handed pitcher in Milwaukee Brewers organization) or Karl (another lefty).

various health care players. Although a litany of professional groups (e.g., the Association of American Medical Colleges, American Hospital Association, and American Medical Association) initially resisted the rankings effort, consumers, professional groups, and government regulators now are at the table working to fashion the most accurate performance measures.

Demands for accountability and transparency have been felt at all levels of education. The No Child Left Behind Act's imposition of performance measures on elementary, middle, and high schools and their teachers has met resistance from a wide range of groups, including the states, local school districts, the National Education Association, and the American Association of School Administrators. Similarly, Congress recently held hearings on rising college tuition costs, and legislation has been introduced requiring disclosure of various financial data by colleges and universities. An interesting parallel is the Crime Awareness and Campus Security Act, which requires colleges and universities to provide detailed statistics on crimes occurring on their campuses (and which are now easily accessed through a Department of Education web site).

In our view, law schools are faced with a clear choice. We can continue resisting public demands for accountability and transparency through rankings. But such resistance is futile, as a market that demands rankings of brain surgeons and heart-transplant programs will not accept protestations from the legal academy that what we do is simply too special to be evaluated with objective measures. Like the story of the boy with his finger in the dike, we face the prospect down the road of cascading federal- or state-imposed heavy-handed performance measures for determining organizational success and individual contributions to that success. We do not know the length of that road, but it is one that law schools need not go down. Instead, we can chart the course laid out in this Review Essay and embrace change and make it our own.

Like Michael Lewis, we have told a story about a profession and people we love. We are proud of the work law schools and law professors do in teaching future lawyers and producing legal scholarship to the betterment of American law and society. As institutions and as individuals, we have nothing to fear from the accountability and transparency spotlight. Indeed, we do our best work in the light. We should welcome the opportunity to tell the world what we do and help them measure our performance as teachers and scholars. If we do not, the story will be told by others and it will no longer be our own.