

Commentary

How To Rank Law Schools

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I have relatively little to add to Russell Korobkin's sensible criticisms¹ of the ranking proposals and analyses of Judge Posner² and Professor Sunstein,³ so I will keep my remarks on that score brief.

Professor Sunstein candidly discusses the primary limitations of "revealed-preference" rankings of schools.⁴ The two most important of these, in my view, are (1) the enormous role of geographical preferences in where students choose to go to law school, and (2) the more general problem with revealed preferences in all domains namely that they may reveal more about the ignorance of and pernicious influences operating on those with the preferences than about the quality or value of the things preferred.

Factors like (1) give an advantage to schools (like my own) that benefit from regional dominance or regional chauvinism (Texas chauvinism is, in my experience, matched only by that of New Yorkers), and exact a severe penalty on schools tightly clustered with others of comparable quality. (Think of the northeast corridor where, as popular perception has it, Columbia and NYU are full of students who did not get into Harvard and Yale; and Cornell, Georgetown and Penn are full of students who did not get into any of the preceding four.) The undergraduate revealed-preference rankings by Professors Avery et al. suggest as much. That Texas ("UT-Austin") (#38) ranks ahead of Michigan (#42), Vassar (#43), Illinois (#45), Emory (#61), Washington University in St. Louis (#62), and UC San Diego (#85) tells us much more about regional loyalties and regional competition than about the quality or value of undergraduate education at UT-Austin against any of these other schools.

More generally, of course, revealed preferences are always hostage to ignorance and pernicious influence (the main reason why no serious utilitarians, only economists, think revealed preferences are good measures of well-being) and revealed-preference rankings of law schools are no different. Perhaps the primary pernicious influence, and contributor to ignorance, is none other than the *U.S. News* rankings themselves, which include both the law school rankings and the college rankings. At least some students treat law school rankings as a proxy for professional opportunities and faculty quality, and are, more often than not, misled; while some students treat college rankings as a proxy for university quality and are, almost always, completely misled.⁵

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1. Russell Korobkin, Keynote Address, *Harnessing the Positive Power of Rankings: A Response to Posner and Sunstein*, 81 IND. L.J. 35 (2006).

2. Richard A. Posner, *Law School Rankings*, 81 IND. L.J. 13 (2006).

3. Cass R. Sunstein, *Ranking Law Schools: A Market Test?*, 81 IND. L.J. 25 (2006).

4. *Id.* at 7-19.

5. Law professors may find this hard to believe, but the *U.S. News* rankings of colleges are even worse than their rankings of law schools. The former are, in many instances, wildly unhinged from academic quality as measured by more reputable sources like the National

Given all this—about which Professor Sunstein is admirably clear—I see no reason to think that a revealed-preference ranking of law schools would provide any worthwhile information.

The utility of Judge Posner's analysis is entirely a function of the underlying ranking data on which he relies.⁶ A major worry is that the underlying data cover disparate periods, during which a number of things have changed. He looks, for example, at scholarly impact data published in 1998 (but reflecting citations from a decade ago)⁷ and Social Science Research Network (SSRN) download data from 2005,⁸ yet by my casual but reasonably informed estimate, faculty quality at some two dozen schools changed during this period in ways that would affect results.⁹ So, too, with the Law School Admission Test (LSAT) data, which comes from 2000,¹⁰ yet which maps rather unevenly on to LSAT data from 2005¹¹ (no doubt reflecting the influence of changes in *U.S. News* rankings in the interim). Judge Posner uses the survey I conducted in 2003 asking law professors to evaluate, among other things, the quality of business law faculties,¹² but since that time, five "top 20" schools have had notable faculty changes.¹³

Apart from the risk of "apples and oranges" comparisons resulting from measuring different time periods, Judge Posner's analysis is also hostage to the soundness of the underlying rankings, even within their time frames. SSRN download data are heavily skewed, for example, to a handful of areas (corporate law, law and economics, intellectual property), and are also affected by which schools have faculty who regularly post on SSRN.¹⁴ All citation data are subject to the limitations I have noted

Research Council. Thus, I have had the odd experience of talking to prospective law and graduate students who thought, because of the *U.S. News* college rankings, that universities like Georgetown, Virginia, and Vanderbilt were better than, or even competitive, with Texas, when they are not even in the same league. I suspect that faculty at Illinois and Wisconsin confront the same distorted perceptions, and that the University of Chicago confronts the same problem vis-à-vis Washington University in St. Louis, Duke, and Penn.

6. Posner, *supra* note 2, at 20 tbl.3.

7. *Id.* (citing Theodore Eisenberg and Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373, 388 (1998)).

8. *Id.* (citing the Social Science Research Network (SSRN) Homepage, <http://www.ssrn.com> (last visited Sept. 4, 2005) (faculty download statistics)).

9. The 2005 scholarly impact data I recently published makes this especially clear. *See* Leiter's Law School Rankings, Faculty Quality Based on Scholarly Impact, 2005, http://www.leiterrankings.com/faculty/2005faculty_impact_cites.shtml.

10. Posner, *supra* note 2, at 20 tbl.3 (citing Leiter's Law School Rankings, Faculty Quality in the Business Law Areas, 2003–04, http://www.leiterrankings.com/faculty/2003faculty_businesslaw.shtml).

11. *See* Leiter's Law School Rankings, Rankings of Law Schools by Student Quality, 2005, http://www.leiterrankings.com/students/2005student_quality.shtml.

12. Posner, *supra* note 2, at [8 n.6] (citing Leiter's Law School Rankings, Scholarly Reputation in Specialty Areas, 2003–04, http://www.leiterrankings.com/faculty/2003faculty_quality.shtml).

13. For example, Stanford (#3) lost Bernard Black to Texas and John Donohue to Yale, but added Robert Daines from NYU. Yale (#6) added Donohue from Stanford and Jonathan Macey from Cornell (#7). Northwestern (#11) lost Richard Speidel to retirement and Texas (#11) added Black from Stanford (as well as two tenure-track professors in the business law area).

14. A school's overall rank in SSRN is also highly sensitive to just a handful of faculty members. Texas, for example, would drop from 6th to roughly 15th without Bernard Black, and

elsewhere.¹⁵ The national job placement data Judge Posner relies upon are based on aggregating regional placement success in a way that skews the results in favor of schools whose graduates mostly land in high cost-of-living markets.¹⁶

Even if Judge Posner's underlying data are questionable on their own merits, and unreliable for comparative purposes, I do not really disagree with his conclusion that "the *U.S. News* ranking . . . does a pretty good job of grouping law schools by tier."¹⁷ I just do not think Judge Posner's mix-and-match approach to the various kinds of ranking data is very good support for the point.

Perhaps more important, though, is the fact that this point is rather trivial, since getting it right by "tier" is on par with being able to hit the side of the proverbial barn. The problem with *U.S. News* is not that it identifies Chicago as a top ten law school (it has been ranked 6th every year since 1999), it is that it has left a whole generation of undergraduates with the misleading impression that Penn (#7 of late in *U.S. News*) and Michigan (#7 or #8 in *U.S. News*) are actually competitive with Chicago, and that NYU (usually #5) and Columbia (usually #4) are perhaps better. The problem with *U.S. News* is not that it identifies George Mason as a "tier one" school, it is that it does so *despite the fact* that the criteria the magazine employs to measure academic merit would relegate the school to the second tier.¹⁸ The problem with *U.S. News* is not that it correctly identifies Washington and Lee as a "tier one" school, it is that it often ranks Washington and Lee ahead of schools like Boston University and the University of

from 15th to roughly 21st without me. In each instance, I am quite sure this overstates our respective importance to the law school at Texas. A handful of faculty members determine the rank of most of the top 10 schools on SSRN.

15. See, e.g., Leiter's Law School Rankings, The Top 40 Law Faculties Based on Per Capita Scholarly Impact (Citations), 2003-04, http://www.leiterrankings.com/faculty/2003faculty_impact_cites.shtml.

16. Anthony Ciolli, *The Legal Employment Market*, 45 JURIMETRICS J. 4 (forthcoming 2005). This is a quite interesting and informative study (though a bit awkwardly written), but the reader must approach with care what its results mean. Its regional placement results (the most interesting part of the study) are affected by the number of graduates of each school seeking to find work in that region. Hence, for example, in the region that includes New York and Philadelphia, it turns out that the University of North Carolina (UNC) ranks ahead of Penn and Cornell! This plainly does not mean a student looking to work in these northeastern legal markets ought to go to North Carolina instead of Cornell or Penn. Rather, the result is an artifact of the very small number of UNC students seeking work in these markets, combined with the fact that they will be a self-selected few with unusually good credentials (the average UNC student presumably does not bother to try to land a job at a firm in New York City). This limitation of the regional results, however, would be apparent to anyone who reads the ranking methodology carefully. More problematic is the way the author aggregates the regional results into a ranking of schools by "national placement," the data on which Judge Posner relies. Mr. Ciolli opts to aggregate regional placement results based on each region's share of the market for elite law firms. But since student geographic preferences play an enormous role in where students choose to work (as Mr. Ciolli elsewhere notes), any school located in a geographic region with fewer "elite" firms will fare less well by this aggregation method. Moreover, since "elite" firms are determined in part by revenues, and since revenues are, in part, a function of cost-of-living in different regions of the country (which affects fees charged), the results will also be skewed in favor of schools located in higher cost-of-living areas.

17. Posner, *supra* note 2, at 24.

18. Only because George Mason has mastered the art of manipulating the other *U.S. News* criteria does the school rank in the first tier.

Illinois that have much more distinguished faculties and equally (if not more) distinguished alumni.

Of course, even in terms of tiers, *U.S. News* messes things up from an academic point of view, relegating Chicago-Kent College of Law, the University of San Diego, the University of Miami, Florida State University, Rutgers University (both Camden and Newark), Wayne State University, and many others to a lower tier than any informed law professor would assign.

All of these criticisms presuppose, of course, that a ranking of academic institutions ought to reflect certain relevant attributes which serve as a benchmark for critiquing the *U.S. News* result. Here I part company with Professor Korobkin, who reiterates his well-known Marxist view that rankings essentially serve a coordination function—allowing good students to find good employers and vice versa—such that the criteria by which schools are ranked hardly matters.¹⁹ On this view, legal education is really about pedigree and certification, not education and training. As I once heard a prospective law student put it: “I’m going to law school to get my ticket punched. Everyone knows you learn the material on your own anyway.”

There is certainly *something* to this. If, sotto voce, the Fordham faculty were swapped for the Yale faculty next year, Yale would still continue to produce hugely successful graduates for the foreseeable future. But that is surely, in significant part, because the Fordham faculty is rather good. So the real question should be: what if we swapped, say, the Baylor faculty for the Yale faculty tomorrow? While the Yale “name” would continue to carry forward for a short while, surely it would not be long before both students, judges, and employers noticed that something significant had changed—and not only that Yale students were being taught by folks who actually knew how to practice law!

But what is it exactly that they would notice? According to Professor Korobkin, it would be nothing that matters to either the students or the employers. Therefore, the only reason to prefer a ranking that favors the Yale faculty over the Baylor faculty is that we have made a societal value judgment to encourage the kind of scholarly work that Yale faculty do. Perhaps this is right, though I am skeptical.

I am still attracted to the old-fashioned view that those who are smarter and more learned can provide higher-quality instruction. (I am not saying that this is true of the Yale faculty, though it may be in some cases.) This is not to say that the best scholars are the best teachers: that plainly is not true, since there are a variety of pedagogical skills that are unrelated to intellectual acumen. But it is to say that no set of pedagogical skills can compensate for lack of intellectual depth in one’s subject-matter, and I am reasonably confident, based on experience on both sides of the podium, that this is true. That difference may be lost on many students, but it will not be lost on the better ones. And whether noticed or not, if the old-fashioned view is correct, then it will affect educational outcomes. With all that in mind, I think an assessment of academic institutions ought to weigh heavily the intellectual and scholarly caliber of the faculty, not to the exclusion of other factors, but as a way of putting *education* at the center of any evaluation of institutions in the business of educating.

19. Korobkin, *supra* note 1, at 41–43. On the Marxian nature of Professor Korobkin’s analysis, see Brian Leiter, *Measuring the Academic Distinction of Law School Faculties*, 29 J. LEGAL STUD. 451, 454 (2000).

Let me conclude by suggesting four general guidelines for how law schools can be meaningfully and usefully ranked.

First, rankings of *academic* institutions should emphasize and reward *academic* values: scholarly excellence, pedagogical skill, and student ability and achievement. It is odd to have to emphasize this, but in an era in which *U.S. News* ranks schools based on the inefficiency of their spending and their self-reported, and thus largely fictional, job placement statistics, I fear it is necessary to state the obvious.

Second, it is desirable to evaluate law schools along dimensions where there can be measurable change and constructive competition. Not all the elements of academic value are equally susceptible to measurement, but some certainly are. If Professor Stake is correct in his contribution to this symposium²⁰ (and I am persuaded that he is), then one of the many deficiencies of *U.S. News* is that its reputational surveys of academics are so poorly conducted that they have simply become echo chambers of the prior year's *U.S. News* ranking. But this does not mean faculty quality cannot be measured more reliably by better-designed surveys or by the use of "objective" measures like citations. So, too, measures of student quality in terms of LSAT scores are hostage both to a similar echo chamber effect, as well as the many other factors identified by Professors Henderson and Morriss in their contribution.²¹ To the extent more academically sound rankings proliferate, serious students will begin making better-informed choices, and rankings of student quality may tell us more than how *U.S. News* recently ranked particular schools.

Third, those elements worth measuring should be measured separately rather than aggregated on the basis of unprincipled and unrationizable schema. One can rank schools based on SSRN downloads, student LSAT scores, faculty reputation, scholarly impact as measured by citations, job placement, Supreme Court clerkships, and so on, but there is no way these criteria can be meaningfully amalgamated.

Fourth, we should encourage and welcome many different kinds of academic rankings from many different sources to counteract the excessive influence of the academically unreliable *U.S. News* rankings.²² If the Association of American Law Schools were not in contention for being recognized as the most useless professional organization in the United States, it would have long ago taken the lead in promoting alternatives, instead of giving students the laughable advice that they should discount prestige and reputation in choosing schools. There is a sizable audience looking for rankings that convey genuine academic information. Contrast my own academically oriented ranking site,²³ which garners upwards of 10,000 hits per week during the peak admissions season and has been frequently discussed in this symposium, with the

20. Jeffrey E. Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 250–55 (2006).

21. William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Pattern in the U.S. News Rankings Era*, 81 IND. L.J. 163 (2006).

22. One must note, however, that even in the world of business schools, where there are five different media outlets ranking schools, faculty still bemoan the effect of rankings. See, e.g., Harry Deangelo, Linda Deangelo & Harold L. Zimmerman, *What's Really Wrong with U.S. Business Schools?*, (working paper, July 2005) available at <http://ssrn.com/abstract=766404>.

23. Leiter's Law School Rankings, <http://www.leiterrankings.com> (last visited Nov. 22, 2005).

bizarre Thomas M. Cooley law school rankings,²⁴ which contain no useful information and are uniformly ignored by students, faculty, and in most discussions of rankings. If Professor Korobkin were right, though, then the Cooley method of simply aggregating A.B.A. data without regard to its meaning or importance would have worked as well for *U.S. News* as the methods it actually adopted, which at least attempt to identify some factors of relevance to legal education.

Academic rankings that provide actual information on matters of educational value have a useful role to play for students, quite obviously, but they also have a constructive role to play for faculty. Professor Korobkin suggests that in ranking schools we want to discourage “status competition.”²⁵ I guess my own view is more Nietzschean, and so let me close with a quote I have used before.²⁶ This is Nietzsche from his early essay on “Homer’s Contest”:

[J]ealousy, hatred, and envy, spurs men to activity: not to the activity of fights of annihilation but to the activity of fights which are *contests*. The Greek is envious, and he does not consider this quality a blemish but the gift of a *beneficent* godhead The greater and more sublime a Greek is, the brighter the flame of ambition that flares out of him, consuming everybody who runs on the same course.

. . . .
Every talent must unfold itself in fighting: that is the command of Hellenic popular pedagogy, whereas modern educators dread nothing more than the unleashing of so-called ambition And just as the youths were educated through contests, their educators were also engaged in contests with each other.²⁷

We should produce more rankings that unleash academic talent and ambition, not rankings that reward decanal connivance at manipulating ranking schemes cooked up by journalists. Although many of the scholarly critiques of *U.S. News* in this symposium are devastating, only alternative ranking schemes, that embody academic values we share, will counteract the pernicious impact of *U.S. News* on legal education. In the process, the right kinds of academic rankings may also stimulate and strengthen our scholarly community in law.

24. Thomas M. Cooley Law School, *Judging the Law Schools—7th Edition*, <http://www.cooley.edu/rankings/> (last visited Nov. 22, 2005).

25. See Korobkin, *supra* note 1, at 41–44.

26. Leiter, *supra* note 19, at 451.

27. FRIEDRICH W. NIETZSCHE, *HOMER’S CONTEST*, reprinted in *THE PORTABLE NIETZSCHE* 32, 35–37 (Walter Kaufmann trans., Penguin Books 1976) (1954) (emphasis in original).