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ARTICLE REVIEW

WHAT THE REVEALED-PREFERENCES RANKING FAILS TO REVEAL

JEROME M. ORGAN*

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INTRODUCTION

The Revealed-Preferences Ranking methodology developed by Professors Christopher J. Ryan, Jr. and Brian L. Frye purports to be an “objective ranking” because it identifies the claimed preferences of first-year law students by looking at and comparing the “quality” of the first-year students who chose to attend each law school based on the LSAT and UGPA indicators for the entering class at each law school.¹ For *The 2019 Revealed-Preferences Ranking of Law Schools*, the authors incorporate the preferences

* Professor of Law and Co-Director of the Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas School of Law in Minneapolis, Minnesota. I am very grateful to Bernie Burk and Emma Rasiel, with whom I have discussed some aspects of these issues over many months. I also am grateful to C.J. Ryan and Brian Frye for engaging in a productive dialogue regarding some of my concerns with the Revealed-Preferences Ranking, particularly in relation to the challenges associated with incorporating transfer in data.

1. See Christopher J. Ryan, Jr. & Brian L. Frye, *The 2019 Revealed-Preferences Ranking of Law Schools*, 7 BELMONT L. REV. 86, 87 (2019).

of those who chose to transfer out from a given law school as a further indication of how the preferences of transfer students inform the “quality” of a given law school.²

While I appreciate the concept of trying to generate something that can be identified as an objective ranking, I write to highlight two issues that shroud the accuracy of the Revealed-Preferences Ranking as a general matter: the failure to account for (1) the size of the entering class and (2) the average net tuition paid by an entering class, both of which may skew the results of the Revealed-Preference Ranking somewhat significantly. I also comment briefly on the inclusion of “transfers out” as a further indicator of preference, while applauding the authors for deciding to exclude “transfers in” from their analysis given a number of issues with the use of the “transfer in” data.

I. SIZE

Perhaps the most significant issue with the Revealed-Preferences Ranking is its complete failure to account for the size of the class that is enrolled at a given law school.

Assume that there were two law schools ranked equally in the 2018 Revealed-Preferences Ranking because they had exactly identical first-year class profiles in Fall 2017, such that under the methodology described in the Revealed-Preferences Ranking they came out with the same “score” or “index.” To provide more context for this hypothetical, assume that both law schools had the following LSAT and UGPA profiles: 165/162/158 and 3.75/3.6/3.4. If one school had 400 first-year students and the other school had only 200 first-year students, should they actually be considered to be equal in quality, or by the logic of the Revealed-Preferences Methodology, shouldn’t the law school with the larger enrollment be viewed as stronger because it in fact attracted more of the “best” students?

This “size” dilemma gets more complicated over time. What if, in the 2019 Revealed-Preferences Ranking, these two law schools again had the exact same LSAT and UGPA first-year class profiles in Fall 2018—165/162/158 and 3.75/3.6/3.4—but the school with 400 first-year students in Fall 2017 still had 400 first-year students while the school with 200 first-year students in Fall 2017 now had only 180 first-year students? The 2019 Revealed-Preferences Ranking would still treat these two schools as being identical even though one clearly did better in attracting the best students than the other on a year-over-year basis.

Thus, my first critique is that, because the Revealed-Preferences Ranking fails to account for the size of a given law school’s entering class in any way, it creates potential anomalies in the rankings.

2. *Id.* at 87–88.

I recognize size can be a confounding factor. Some law schools simply have different size operations. Harvard has had roughly 560 first-year students for the last several years while Yale has had roughly 200 first-year students for the last several years. Yale is designed to operate on a different “scale” in terms of campus infrastructure and human resource capacity (faculty and staff). Thus, the fact that Harvard attracts 560 of the strongest students while Yale attracts roughly 200 of the strongest students should not necessarily mean that Harvard is profoundly “better” than Yale simply because a larger number of strong students chose to attend Harvard. But at the same time, hypothetically, if, in a declining market, Harvard continues to attract 560 of the strongest students while Yale attracts only 180 of the strongest students in terms of LSAT and UGPA profile, then one could posit that Harvard is “stronger” than Yale because a slightly larger percentage of strong students year-over-year continued to choose Harvard over Yale.

Phrased differently, while I think that one of the foundational premises of the Revealed-Preferences Ranking is accurate—that all law schools are competing for the “best” students—they aren’t all competing for the same number of the best students or for a growing market share of the best students. Indeed, most law schools were operating at something of a “steady-state” prior to the Great Recession, taking in roughly the same number of first-year students year over year with only modest changes in LSAT and UGPA profile year-over-year. The challenge between 2010 and 2015 was that the applicant pool shrank by roughly 38 percent (from roughly 88,000 to roughly 55,000) forcing law schools to make difficult choices.³ Most highly-ranked law schools, with a choice of giving up revenue (smaller classes and/or lower average net tuition (discussed *infra*)) or profile, gave up revenue to maintain profile.⁴ The relative attractiveness of a law school to first-year students then would be better-measured by changes in relative performance over time. This would take into account relative profile (how a given law school’s profile compares with the profiles of other law schools along with how its profile changed in comparison with changes in the profiles of other law schools) as well as relative size (how much did one law school’s first-year class size change in comparison with the first-year class sizes of

3. *Archive: 2000-2015 ABA End-of-Year Summaries—Applicants, Admitted Applicants & Applications*, LSAC, <https://www.lsac.org/archive-2000-2015-aba-end-year-summaries-applicants-admitted-applicants-applications> (last visited Aug. 11, 2019) [<https://perma.cc/2Z48-63M6>]. More significantly, the nature of the applicant pool also changed, with a smaller percentage of applicants at the top end of the LSAT distribution and a greater percentage of applicants from further down the LSAT distribution. Jerry Organ, *Changes in Composition of the LSAT Profiles of Matriculants and Law Schools Between 2010 and 2015*, LEGAL WHITEBOARD (Jan. 18, 2016), <https://lawprofessors.typepad.com/legalwhiteboard/2016/01/in-late-december-2014-i-posted-a-blog-analyzing-how-the-distribution-of-matriculants-across-lsat-categories-had-changed-si.html> [<https://perma.cc/2C2E-DLPS>].

4. Bernard A. Burk et al., *Competitive Coping Strategies in the American Legal Academy: An Empirical Study*, 19 NEV. L.J. 583, 621 (2019).

other law schools). The strongest law schools in such a ranking would be those that had the strongest profiles and managed to increase profile and/or size or minimize declines in profile and/or size.

II. AVERAGE NET TUITION

The other significant issue with the Revealed-Preferences Ranking is its complete failure to account for average net tuition in any meaningful way.

Assume that there were two law schools ranked equally in the 2018 Revealed-Preferences Ranking because they had exactly identical first-year class LSAT and UGPA profiles in the Fall of 2017 such that under the methodology described in the Revealed-Preferences Ranking they came out with the same “score.” To provide more context for this hypothetical, assume again that both law schools had the same LSAT and UGPA profiles noted above: 165/162/158 and 3.75/3.6/3.4. Assume for this analysis that each law school also enrolled 200 students in its first-year class. These two law schools would seem to be identical and would appear to be appropriately ranked equally in the 2018 Revealed-Preferences Ranking, given that the size of the first-year class and the LSAT and UGPA profile of the first-year class are identical.

But what if one law school attracted its 200 students with an average net tuition after scholarships of \$35,000, while the other law school attracted its 200 students with an average net tuition of \$25,000? Would you still consider these two law schools to be equal, or would the logic of the Revealed-Preferences Ranking suggest that the law school able to charge \$35,000 for the “best” students is actually more-preferred than the law school that can only charge \$25,000 to attract a comparable set of students?

This also becomes more complicated over time. Assume that in Fall 2017 (the base year for the 2018 Revealed-Preferences Ranking), both law schools had 200 first-year students and the exact same LSAT and UGPA profiles AND the exact same average net tuition (let’s assume both had an average net tuition of \$35,000 for the Fall 2017 entering class). Now assume that in Fall 2018 (the base year for the 2019 Revealed-Preferences Ranking), both law schools again had 200 first-year students and the exact same LSAT and UGPA profiles, but that one law school was able to increase average net tuition to \$37,000 while the other saw average net tuition decline to \$33,000. The logic of the Revealed-Preferences Ranking methodology would suggest these two law schools should still be ranked equally, but clearly one is “stronger”—or better able to attract the “best” students—since the best students are willing to pay more to go to one than the other.

III. SIZE AND AVERAGE NET TUITION AS APPROPRIATE MEANS OF MANAGING PROFILE

The failure to address size and average net tuition is a flaw in not just the Revealed-Preferences Ranking, but in all of the other rankings that rely on LSAT and UGPA profile as a component of the ranking—the *U.S. News* Rankings, the Brophy Rankings, the *Above the Law* Rankings, etc.⁵

Going back for more than a decade, critics of the *U.S. News* rankings have noted that a number of components of the rankings are subject to manipulation, one of them being LSAT and UGPA profile.⁶ Prior to the agreement between the ABA and the LSAC to have the LSAC “verify” the LSAT and UGPA profiles of entering classes across law schools,⁷ some law schools would try to improve the profile of the entering class in a variety of ways. At one time, some law schools tried to shift students into part-time programs so as to exclude them from the calculation of the LSAT and UGPA profile which they reported based only on full-time students.⁸ At one time, some law schools “rounded up” on UGPA.⁹ While these were perhaps somewhat inappropriate ways to improve profile, there always have been two entirely appropriate ways to try to improve or maintain profile—work with a smaller class (so a school needs fewer strong students to generate the desired LSAT and UGPA profile), and work on “buying” more strong students by offering greater scholarships (and thereby reducing average net tuition).

Law schools have the ability to manipulate size and average net tuition to craft profile and they have been doing so for some time. In the article *Competitive Coping Strategies in the American Legal Academy: An Empirical Study*,¹⁰ my co-authors and I demonstrated that among private law schools, in the face of a declining applicant pool between 2010 and 2016, most law schools accepted fewer students and/or decreased average net tuition in an effort to maintain LSAT and UGPA profile (or minimize the decline in LSAT and UGPA profile).¹¹ For the vast majority of private law schools that had some ability to control their own destiny, profile preservation was a greater concern than revenue preservation, and profile

5. See Ryan & Frye, *supra* note 1, at 90–93 (discussing a variety of other ranking systems).

6. For some criticisms of the *U.S. News* ranking, see *id.* at 91 n.12.

7. Paul Caron, *LSAC to Verify Law School Admissions Data Reported to ABA*, U.S. NEWS, TAXPROF BLOG (June 12, 2012), https://taxprof.typepad.com/taxprof_blog/2012/06/lsac-to-.html [<https://perma.cc/RJP5-EQLE>].

8. Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES (July 31, 2005), <https://www.nytimes.com/2005/07/31/us/education/the-878-million-maneuver.html> [<https://perma.cc/6R66-YR2V>] (describing use of part-time students to exclude students with lower LSATs or UGPAs from reported profile).

9. Calculations for Class of 2010 on file with author.

10. See Burk et al., *supra* note 3.

11. *Id.* at 627–29.

preservation required many schools to reduce the size of their entering classes AND to reduce their average net tuition.¹²

IV. SIZE IS WORKABLE—AVERAGE NET TUITION IS PROBLEMATIC

If one really wanted to construct an “objective” Revealed-Preferences Ranking that more accurately described the extent to which one law school was better able to attract “better” students than another law school, the ranking would need to account for size in some way and would need to account for average net tuition in some way.

The size information is readily available for all law schools¹³ and one could look at relative changes in size over time along with changes in profile in an effort to determine whether one school has a stronger ability to attract the “best” students than another law school. This would be something of a “market share” analysis where relative change in market share is the focus more so than actual market share at a given point in time.

This analysis, however, also would be incomplete without some engagement of data relating to average net tuition. The problem is that there are multiple challenges with integrating average net tuition meaningfully into such a ranking. The first challenge with respect to average net tuition is that it is essentially impossible to calculate based on publicly-available information for public law schools. Roughly 45 percent of law schools are public law schools for which there generally are different tuition rates charged to residents and non-residents. While the different tuition rates are publicly available, what is not publicly available is the percentage of first-year students who are residents compared to the percentage who are non-residents. Although some schools voluntarily release this information, it is not widely available across the universe of public law schools. Thus, one is very hard-pressed to come up with a workable formula for calculating average net tuition at public law schools (which would mean they would likely have to be excluded from the rankings).

Moreover, what information is available about average net tuition is only available on a one-year deferred basis and is not reported on the entering class, but on the entire student body.¹⁴ Thus, an effort to integrate average net tuition into a Revealed-Preferences Ranking would require that the ranking for a given entering class be delayed until December of the following year when the ABA releases the grants and scholarship information for the year in which that class entered law school. Thus, for the 2019 Revealed-Preferences Ranking drawing on the LSAT and UGPA profiles of the class

12. *Id.*

13. The ABA Standard 509 Report includes information on the size of the entering class. See *ABA Required Disclosures*, ABA: SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, <http://abarequireddisclosures.org/Disclosure509.aspx> (follow “509 Required Disclosures” hyperlink, then search Standard 509 Reports by school and year) (last visited Aug. 11, 2019).

14. *Id.*

that entered law school in Fall of 2018, the rankings could not be released until early 2020 (after the grants and scholarship information for the 2018–2019 academic year is made available in December 2019). In addition, because the average net tuition calculations would be reported based on the entire student body (rather than the entering class alone), it would be difficult to determine with specificity how average net tuition changed for the entering class of first-year students from one year to the next.

V. INTEGRATING TRANSFERS

The effort to incorporate transfers in the 2019 Revealed-Preferences Ranking probably is a reasonable refinement, given that the authors recognized the need to limit the analysis to transfers out from a given law school.

Let me begin by acknowledging that the desire to incorporate transfers into a ranking system designed to reflect law student preferences is somewhat understandable given that transfers are expressing a preference. Those students leaving one law school to go to another law school are expressing a preference—they prefer the law school to which they are transferring over the law school from which they are transferring. Thus, I think it is reasonable to recognize that those law schools with fewer transfers out are seen as preferable relative to those law schools with more transfers out. Phrased differently, to the extent that the Revealed-Preferences Ranking speaks to the preferences of students based on the quality of students choosing to attend a given law school, the fact that a number of students choose to transfer away from that law school suggests that the entering class quality might slightly overstate the extent to which that law school is in fact preferred.

The authors of the Revealed-Preferences Ranking wisely have decided not to include “transfers in” in the calculations of their rankings. This decision makes sense for a number of reasons. First, the foundational premise of the analysis of preferences of first-years is that all law schools are competing for the “best” first-year students. The challenge with trying to incorporate “transfers in” as a meaningful indication of student preference is that not all law schools are competing for transfer students. One of the biggest problems with incorporating “transfers in” into a ranking analysis that encompasses all law schools is that most law schools really are not participating in the transfer market in any meaningful way. In the summer of 2018, there were 1,494 transfer students, but 1,020 of them went to 46 law schools with ten or more transfers in. Less than one-quarter of law schools accepted more than two-thirds of all transfers. By contrast, there were 24 law schools with no transfers in, 30 law schools with one transfer in and 25 law schools with two transfers in. These 79 law schools (nearly 40 percent of law

schools), took in a total of 80 transfers, less than six percent of all transfers.¹⁵ Thus, law schools cannot be said to compete for transfers in the same manner that they compete for first-year students.

But perhaps an even bigger problem with including transfers is that it would reward a small subset of law schools with a “multiplier” effect. One of the strategies for preserving profile over the last several years that some law schools have pursued involved a concerted effort to accept a smaller entering class (to preserve profile) while seeking to recoup lost revenue by growing the number of transfers.¹⁶ The key consideration here is that the LSAT and UGPA profile of transfer students are not incorporated into the “profile” scoring done by *U.S. News* (or by the Revealed-Preferences Ranking). Thus, because “size” has not been a factor in any of the rankings systems, some law schools “gamed the system” by taking a smaller entering class and maintaining (or minimizing declines in) profile, and then welcoming a large number of transfer students (to the extent possible) to recoup some or much of the lost revenue from their smaller first-year class (with no impact on their ranking given that the LSAT and UGPA of transfers are not accounted for in any of the rankings systems). To the extent that these law schools preserved profile by reducing their entering class size, they would be rewarded for their profile because size is not a factor in analyzing profile. To the extent that they “attracted” more transfers than other law schools, they would be rewarded again.

Moreover, there is no way based on existing available data to account for the “quality” of the transfers in a meaningful way. Only law schools with more than 12 transfers in are required to report the law schools from which transfers were received and the 75th, 50th, and 25th first-year GPA profile for the transfers.¹⁷ Thus, there is an incomplete data set for trying to assess the “quality” of “transfers in.” Nonetheless, when one looks at the available data—which focuses on law schools from whom transfers were received and on first-year GPA at those law schools, it is pretty clear that the quality of “transfers in” diminishes significantly once one moves down the rankings chart from Harvard, to NYU, to Georgetown, and beyond.¹⁸ It is not a stretch to assert that at many of these law schools, the transfer students represent students who would not have been admitted in the first instance because they would have diluted or diminished the seeming quality of the student body based on entering class profile.

15. *Id.*

16. Jerry Organ, *Better Understanding the Transfer Market*, LEGAL WHITEBOARD (Dec. 10, 2014), <https://lawprofessors.typepad.com/legalwhiteboard/2014/12/better-understanding-the-transfer-market.html> [<https://perma.cc/A779-J97E>].

17. See *ABA Required Disclosures*, *supra* note 11.

18. Jerry Organ, *2018 ABA Data Show Continued Decline in Number and Percentage of Transfers*, TAXPROF BLOG (Dec. 17, 2018), https://taxprof.typepad.com/taxprof_blog/2018/12/2018-transfer-data-shows-continued-decline-in-number-and-percentage-of-transfers.html [<https://perma.cc/G3UX-LUVH>].

CONCLUSION

The failure to account for the ability of law schools to manipulate size and average net tuition to produce a law school first-year class with a given LSAT and UGPA profile present significant “gaps” in terms of the claim that the Revealed-Preferences Ranking accurately and objectively measures the law school “preferences” of first-year law students who made choices about where to attend law school. I would suggest that the authors of the Revealed-Preferences Ranking at least acknowledge the significant “margin of error” that is embedded in the Revealed-Preferences Ranking given that it fails to account for size and average net tuition.