

I've been in a blue funk since last Tuesday, when my home institution, the University of Missouri Law School, fell into the third tier in the U.S. News & World Report annual ranking of law schools. Since the rankings began, Missouri has pretty consistently ranked in the 50s and 60s. Last year, we fell to 93. This year, to 107. That's pretty demoralizing.

It's completely ridiculous, of course. On the metrics that really matter (academic reputation, student quality, bar passage, etc.), we do pretty well — near the top of tier 2 (schools 50-100). With respect to scholarly productivity, our faculty ranks [sixth](#) among law schools outside the top fifty. We do less well with employment, but that's largely because (1) we don't [manipulate the numbers](#), as many schools do, and (2) many of our graduates go into prosecution and public defense, where hiring decisions are not made until after the bar examination. Where we really get beat up is on expenditures per "full-time equivalent" student. Last year, we ranked 173 out of 190 on that measure. In my view, that means we're efficient — we get a heck of a lot out of our financial resources. According to U.S. News, though, the fact that we spend less money educating our students means that the quality of our educational offering must be sub-par. Non sequitur, anyone?

Despite the stupidity of the U.S. News rankings, they matter. We will have a harder time attracting top students next year. In the past, we've been able to attract sharp students that were accepted at, say, Iowa, Illinois, or Washington University because our tuition (especially in-state tuition) is much, much lower. Given all this talk of [higher education bubbles](#) and the widespread questioning of whether law school is [really worth](#) the steep price, this should be an ideal time for Missouri to exploit its low tuition. Unfortunately, that's tougher to do when you've fallen into the U.S. News third tier and prospective students, who don't yet realize the insanity of the rankings metrics, wrongly perceive that you're selling a shoddy product. We may also have a harder time attracting high-quality faculty, though this fall's outstanding class of entrants (two John Roberts clerks, a Jose Cabranes clerk, and an outstanding Virginia J.D./Ph.D) will surely help on that front. We Missouri professors may even have a harder time placing our scholarship, given that the third-year law students who select articles for publication tend to evaluate scholarship, in part, on the basis of the author's "prestige" as measured by the ranking of her home institution.

So what should we do? If I were dean, I believe I would simply opt out of U.S. News. I'm serious. We know the rankings are a joke, and *they're actually hurting us*. I would simply refuse to fill out the magazine's survey form and then take out explanatory ads, on the day the 2012 rankings were released, in the *New York Times* and *Wall Street Journal*. [Reed College](#) has taken this sort of principled stand in the U.S. News college rankings and has gotten loads of favorable media attention. I believe its stance has actually boosted its excellent reputation.

Of course, if a school fails to fill out the U.S. News form, the magazine will simply incorporate a somewhat [punitive](#) "estimate" of the uncooperative school's data, so its ranking may be artificially depressed. But at this point, what do we at Missouri have to lose? We're already down to 107! Anyone who does the slightest bit of investigation will

see that Missouri Law — one of the oldest law schools west of the Mississippi River, the flagship public law school in a fairly populous state with two significant legal markets, the home of a productive faculty that also cares deeply about teaching — is not what participants on the Princeton Review's old message board used to call a "Third Tier Toilet." If we opt out of the rankings (a decision U.S. News will have to note), readers will surmise that our low ranking results from our decision not to play with U.S. News. Right now, they think there's something wrong with Missouri, not with the screwy rankings system. Our opt-out would at least draw attention to the stupidity of the ranking metrics.

Of course, this move would entail significant risk. As it did with Reed College, U.S. News would likely adopt punitive estimates of the data we refused to provide, causing us to fall further in the rankings. Readers might not notice the disclaimer that we refused to return our survey and that our ranking is therefore based on estimated data. The media (mainstream and other) might not draw as much attention to our bold stand as I expect they would. While I think it would take a perfect storm for an opt-out strategy to tarnish our reputation even further, such storms do occasionally occur.

We could reduce the riskiness of our strategy if we could persuade some other law schools — perhaps other low-tuition, efficient schools that find themselves similarly disadvantaged by the rankings' inapposite focus on expenditures per student — to withhold data from U.S. News. This would require U.S. News to include more "based on estimated data" asterisks, which would reveal the punitive nature of the magazine's estimates and undermine confidence in the flawed ranking system.

But would this sort of concerted strategy run afoul of the antitrust laws? Initially, I thought it might. After all, what I'm contemplating is essentially an agreement among competitors to withhold information from a publication that tends to enhance competition among those very rivals. Moreover, the cooperating rivals would be withholding this information precisely because they think the competition stimulated by the publication is, to use the old fashioned term, "ruinous." It smells pretty fishy.

The more I think about it, though, the less troubling I find this strategy. The fact is, the methodology underlying the U.S. News rankings is so unsound that the rankings themselves are misleading. And the misrepresentations they convey actually hurt a number of schools like Missouri. I believe we who are unfairly disadvantaged by the U.S. News methodology could, without impunity, bind together in an attempt to undermine the flawed rankings.

Indeed, it is in our ***individual competitive interests*** to do so.

So how would a court evaluate a boycott of U.S. News by a group of law schools that perceive themselves to be disadvantaged by the magazine's ranking methodology (say, less expensive, more efficient law schools with low per-student expenditures)?

First, the court would likely determine that the agreement not to participate in the ranking survey is ancillary, not naked. As Herb Hovenkamp has explained, "[a] serviceable definition of a naked restraint is one whose profitability depends on the exercise of market

power” (i.e., on a constriction of output aimed at artificially raising prices so as to enhance profits). The agreement I’m contemplating makes perfect business sense apart from any exercise of market power. Each law school that would participate in the agreement is personally injured by the screwy rankings scheme, and each has an independent incentive — regardless of what other schools do — to refrain from participation. The participating law schools, it is true, would prefer to have others join them, but that is not because they are seeking to exercise market power; rather, they realize that the message their non-participation will convey (i.e., that U.S. News’s rankings methodology is nonsense) will be stronger if more schools join the boycott.

Since the restraint I contemplate is ancillary, not naked, it would be evaluated under the rule of reason. Indeed, any court that sought to utilize a less probing analysis (per se or quick look) would have to confront the Supreme Court’s [California Dental](#) decision, which held that a pretty doggone naked restraint among competing dentists was entitled to a full rule of reason analysis because it could enhance competition by reducing fraudulent advertising.

Under the rule of reason, the arrangement I’m contemplating would likely pass muster. Because widespread misinformation among consumers reduces the competitiveness of a market, an effort to reduce such misinformation, even a concerted effort, is pro-, not anti-, competitive. Because the “agreement” aspect of my contemplated restraint increases the degree to which the arrangement undermines the misleading, competition-impairing U.S. News rankings, it enhances the restraint’s **procompetitive** effect.

So what do others think? Am I underestimating the antitrust risk of this strategy? The business risk? My TOTM colleagues from Illinois and George Mason, both of which do quite well under the U.S. News formula, probably have little personal interest in these musings. But I suspect others do. What do you think?

Filed under: [antitrust](#), [cartels](#), [Education](#), [law school](#), [universities](#)

