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# RECLAIMING OUR ESSENTIAL FREEDOM TO DETERMINE WHO MAY BE ADMITTED TO STUDY LAW

JEFFREY EVANS STAKE\*

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.<sup>1</sup>

The freedom to determine who may be admitted to the community of students is essential to an institution of higher learning. How has this freedom been used at law schools in the United States? Over time, it has been used to prefer students who are honest over those who are ethically challenged. It has been used to admit students who obey legal rules over those who break them. It has been used to prefer residents of a state. It has been used to prefer veterans who have served our nation in foreign wars. It has been used to prefer outspoken conservative writers on student newspapers. It has been used to prefer students who overcame great obstacles to get to college and through. It has been used to admit students who wrote gripping or humorous personal statements. It has been used to admit students belonging to racial minorities. It has been used to admit relatives of major donors.<sup>2</sup> It has been used to admit students who fit well

\* Robert A. Lucas Chair of Law, Indiana University Maurer School of Law, Bloomington, Indiana. I thank Prof. Leonard Baynes, St. John’s University School of Law, and the Society of American Law Teachers for inviting me to participate in the Opening Doors symposium. I also thank Janet Stake, Carole Silver, Dan Conkle, Kevin Brown, and Robert Stake for helpful comments, and Leonard Fromm for data.

<sup>1</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (quoting *Sweezy v. N.H.*, 354 U.S. 234, 263 (1957)) (Frankfurter, J., concurring in result).

<sup>2</sup> It will be sadly ironic if the 14th Amendment is read to say that admissions at state-supported schools may be used to establish and perpetuate a mostly white American legal aristocracy and at the same time may not be used to promote effective representation of slave descendants in positions of legal power.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found

into important substantive programs. It has been used to prefer students who get A's over students who get C's. It has been used to prefer students who get high scores on the Law School Admission Test (LSAT) over those who had a bad day on the wrong day. It has been used to prefer students who have taken challenging courses over those who have signed up for the "easy A." It has been used to prefer students with the talent and persistence to obtain a PhD over those fresh out of college. It has been used to admit students who look like they will make good lawyers and responsible citizens. It has been used to construct a class drawn from a diversity of backgrounds and reflecting a broad spectrum of perspectives.

But this freedom has been usurped. This essential freedom of American law schools to choose their students has been eviscerated by the annual ranking published by *U.S. News and World Report* ("USN&WR"), which relies heavily on data collected by the American Bar Association ("ABA"). It is unlikely that USN&WR and the ABA originally intended to gut our freedom,<sup>3</sup> but gut it they have. The ABA demands our data and USN&WR cranks them through a formula that commands us, on penalty of low rank,

in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

\* \* \*

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

. . . We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

Slaughterhouse Cases, 83 U.S. 36, 71-72, 81 (1872). The Court subsequently proved itself wrong, expanding the scope of the Amendments beyond their core historical purpose. See *Bakke*, 438 U.S. at 405 (Blackmun, J., Concurring) ("This enlargement [beyond its original 1868 concept] does not mean for me, however, that the 14<sup>th</sup> Amendment has broken away from its moorings and its original intended purposes.").

<sup>3</sup> In personal conversations with me, Robert Morse, the USN&WR editor in charge of the ranking, has expressed eagerness to use factors that put less pressure on schools to exclude diversity students, and his actions have backed up his words. After I explained why the 25<sup>th</sup> percentiles constrain schools more than the medians, discussed below, he used the medians as long as possible and then switched back to the medians as soon as that became practical (when the ABA collected the data again). The evidence regarding the intent of the ABA is more ambiguous. Despite my plea many years ago to a member of the questionnaire committee, that ABA committee decided to eliminate the medians from the surveys, thus undermining their use by USN&WR. The ABA did not resume collecting the medians until law school deans recognized the damage being done by USN&WR's use of the 25<sup>th</sup> percentiles and asked the ABA to resume collecting medians.

to focus admissions solely on the LSAT and undergraduate grade point average (“UGPA”) and to turn a blind eye to all other indicators of merit. The ABA and *USN&WR* have unwittingly pressed schools to exclude minority students, and schools have found it hard to resist.<sup>4</sup>

*USN&WR* gives 12.5% of the total score to the median LSAT and 10% of the total score to the median UGPA of first-year students matriculating at each law school. Since the median is the number in the middle of a group of numbers, for a school to achieve a median LSAT of 155, more than half of the class must have recorded an LSAT of 155 or above. To maximize the median, a school would set a target median as high as might be achieved and admit all eligible applicants having a number above the target.<sup>5</sup>

As a practical matter, the median LSAT taken alone does little to discourage schools from admitting students they want to admit. Most schools do not want to exclude large numbers of students with LSAT’s above the school’s median and, because the median is the middle number, it does not matter whether the numbers in the lower half of the distribution are close to the median or a long way below it. Maximizing the median LSAT thus leaves half of the class minus one for admission according to other criteria deemed important to the school. In addition, because there are many students at most LSAT levels, a school can deny a substantial number of students above the target LSAT and still hit the target. For example, a school aiming for a 155 LSAT will likely have many applicants with a 155 or above. It can deny admission to a fair number of students with LSAT’s from 155 to 180 and still hit the 155 target, even if it would have been impossible for the school to hit a 156. Because the LSAT is a good predictor of law school performance and the median is determined by only half of the class, the ABA-*USN&WR* command to maximize the median LSAT infringes only a bit on the freedom to choose students.

The restriction on freedom in building a class goes from minimal to severe, however, when the rankings add the goal of maximizing the median

<sup>4</sup> The annual *USN&WR* ranking creates many other problems, none of which are addressed in this short article. For a broader discussion of defects in rankings and incentives created by them, see, e.g., Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L. J. 229 (2006) (merely one article in an issue publishing a symposium on rankings); Malcolm Gladwell, *What College Rankings Really Tell Us*, THE NEW YORKER Feb. 14, 2011, at 68.

<sup>5</sup> As a matter of admissions tactics, setting the target LSAT is somewhat easier than setting the target UGPA because UGPA’s are divided more finely. For example, a school might know that it is possible to achieve a 155 LSAT median, but not a 156, and can set the bar at 155. The same school might know that it can achieve a 3.45 UGPA median but not be sure whether it can achieve a 3.47. If the bar is set at 3.47 and applicants with a 3.45 or 3.46 are denied, the school might fail to make the 3.47 goal and drop to 3.44. The same mistake can be made on the LSAT, but it is less likely because the wider steps make it easier to predict what is possible and what is not.

UGPA to the goal of maximizing the median LSAT. First, maximizing the UGPA median is a problem on its own because many schools would like to deny and do deny admission to substantial numbers of students with high grades. Some college courses are easy and high grades in them do not indicate high potential for learning law. Some college courses are hard and low grades in them do not indicate low potential for learning law. For these reasons and others, the UGPA does not work as well as the high LSAT for predicting first-year law school performance (as measured by the first-year grade point average (“FYA”). The Law School Admission Council (“LSAC”) reports that the 2010 mean and median correlation between FYA and the UGPA is .28, compared to .36 for the LSAT.<sup>6</sup> Furthermore, the predictive value of the UGPA might be worse than is indicated by the correlation coefficient of .28. Schools look through the UGPA to the underlying course grades, discounting grades that are not predictive of success in law school. They deny admission to students with high UGPA’s when those high grades were achieved in easy courses. They also admit students with low UGPA’s when the low grades were acquired in hard courses. If the former group is larger than the latter, if schools eliminate more students with a high UGPA and low FYA than they admit with a low UGPA and high FYA, the attention to course grades increases the correlation between UGPA and FYA, making the UGPA appear more predictive than it is. If, in their attempts to raise or keep their ranks in *USN&WR*, schools become less discriminating in their admission of high UGPA applicants, the correlation between FYI and UGPA will diminish. In short, one reason that the UGPA limits admissions freedom more than the LSAT does is that the UGPA is less predictive of performance and thus is less aligned with what a school wants to do.

The median UGPA presents problems alone, and becomes a debilitating constraint when added on top of the median LSAT. Because the LSAT and UGPA are far from perfectly correlated,<sup>7</sup> the available students who would bring a higher-than-median LSAT to a school are not all the same as those who would bring a higher-than-median UGPA. Because the two groups do not overlap enough, admissions offices could devote all of the seats in their entering classes to maximizing those two numbers. As far as I know, that

<sup>6</sup> Lisa Anthony Stilwell, Susan P. Dalessandro & Lynda M. Reese, *Predictive Validity of the LSAT: A National Summary of the 2009 and 2010 LSAT Correlation Studies*, LSAC T.2 (Oct. 2011), available at <http://www.lsac.org/docs/default-source/research-%28lsac-resources%29/tr-11-02.pdf>. The difference is greater (.44 versus .58) if one looks at Table 3, which presents unselected results. Not all schools participated in the correlation study.

<sup>7</sup> Stilwell, Dalessandro & Reese, *supra* note 6.

hasn't happened yet at any law school, but the ABA and *USN&WR* have done nothing to reduce the pressure to admit the entire class according to those two criteria. The forces of resistance favoring broader societal and professional considerations have not been entirely wiped out by the march of the LSAT and UGPA, but they have lost ground.

Take, for one socially important example, three dimensions of student diversity: enrollment of African Americans, Mexican Americans, and Puerto Rican Americans. Between the school years 1999-2000 and 2009-2010, total JD enrollment climbed by 16% from 125,184 to 145,239.<sup>8</sup> During that same period, the percentage of the total enrollment shrank for each of those three groups, from 7.4% (9,272) to 7.0% (10,173) for African Americans, from 2% (2,483) to 1.8% (2,592) for Mexican Americans, and from .5% (646) to .4% (626) for Puerto Rican Americans.<sup>9</sup> We can expect continued diminution in diversity, many forms of diversity, not just racial and ethnic, as time passes and the constraints of LSAT and UGPA medians continue their relentless squeeze on some groups of applicants.<sup>10</sup>

Moreover, the law schools' attempts to maximize LSAT and UGPA medians are not limited to selecting students who have been badged with high numbers. The ABA collects medians only for incoming first-year students and not for all incoming students, so only the UGPA's and LSAT's of first-year students matter for the ranking. Because reducing the size of the first-year class reduces the number of students needed to achieve high medians, schools have used that tactic to improve their rank. This reduces revenue, but some schools have made up the lost revenue by admitting more JD transfer students and International Graduate Law School ("IGLS") students.

<sup>8</sup> LAW SCHOOL ADMISSION COUNCIL & AMERICAN BAR ASSOCIATION, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 871 (2012).

<sup>9</sup> *Id.* at 869-70. By contrast, two other minority groups showed percentage gains over that period, from 6.3% (7,883) to 7.8% (11,327) for Asian or Pacific Islanders and from .8% (978) to .9% (1,273) for American Indian or Alaska Natives. *Id.* at 868. The way that racial and ethnic minorities are counted has changed under new regulations promulgated by the Department of Education. Under these regulations, one question identifies Hispanic/Latino ethnicity. A separate question asks respondents to mark one or more of five racial groups, and those who mark more than one race will be counted in a new, "Two or More Races" category. For a discussion of the history and effect of the new regulations, see Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 HOW. L.J. 255, 256-57 (2011).

<sup>10</sup> Bright students who did not recognize the importance of grades during their freshman year in college (or even the importance of the grades in college courses they took while in high school!) are not usually singled out for sympathy in critiques of current law school admissions, but they surely have fewer law school options today than were open to them a few decades ago. Likewise, students who develop their talents in graduate school, perhaps by obtaining a PhD, do nothing to enhance their attractiveness on the criteria important to the ABA and *USN&WR*.

Transfer programs are bad for student learning. When I taught classes in Land-Use Controls and Wills and Trusts to American law school students studying in London,<sup>11</sup> I took class time away from the planned materials in both of those courses to explain some basic Property rules to students who had not been exposed to a Property course like those at Maurer.<sup>12</sup> This wasted the time of the students who took their first year at Maurer. I could have taken the other approach, plowing ahead despite some students' lack of a proper foundation, but I thought that would not be fair to those students. Similarly, when there are a substantial number of transfer students in a class, the teacher cannot make assumptions about what all of the students have studied in previous course work. Thus the presence of a large group of transfer students diminishes the efficiency of legal instruction for teachers who try to teach something more than "how to think like a lawyer."

Transfer programs also harm the social and educational fabric of the school the students transferred from. Because these negative externalities are not considered by the schools making the decision to admit them, it is possible that the external costs outweigh the internal benefits to the recipient schools, if indeed there really are any educational benefits.

To top it off, transfer programs may reduce the happiness of the transfer students and the effectiveness of their educational experience. Data from the Law School Survey of Student Engagement ("LSSSE") indicate that transfer students are less engaged in the community of learning at their new school than the students who started there. According to the 2005 report,

Transfer students were less likely to:

- Perceive their relationships with other students to be as positive as students who did not transfer.
- Work with other students outside of class to complete an assignment.
- Have serious conversations with students who are different from themselves.
- Discuss ideas from reading or assignments with others outside of class.
- Work on a paper or project that required integrating ideas.
- Participate in cocurricular activities.

<sup>11</sup> London Law Consortium, Spring 2008.

<sup>12</sup> I am not suggesting that the Property course at Maurer is better than the Property courses at the other schools represented in the program. I am only making a point about curriculum coordination.

These findings underscore that many of the strongest student relationships are formed during the first year of law school before transfer students join the campus community.<sup>13</sup>

The report had not changed much as of five years later. It said,

Transfer students were less likely than other students to participate in law journal, moot court, and law school organizations. . . . In the 2L year, transfer students also were less likely to participate in pro bono activities and to work in law-related settings, suggesting that transfer students may lose some opportunity for beneficial experiential education. In addition, transfer students were less likely to work with classmates outside of class to prepare assignments . . . or have serious conversations with students who differ from themselves. These data suggest that some opportunities for connection and integration are most salient during the first year of law school, and that transfer students might suffer the loss of such opportunities. For certain activities, the disadvantage related to transferring disappears in the 3L year, perhaps as students become integrated into their new schools.<sup>14</sup>

In addition to reducing student learning, transfer programs could be reducing minority representation in law schools. At Maurer, 94 students transferred out between 2000 and 2010, but only three of those transfers were African American students and only one was a Hispanic student.<sup>15</sup> It is not clear why minorities are under-represented in the population of students transferring out of Maurer. Perhaps it is all a matter of self-selection, and they are happy here. Or, minority students might be poorer and more dependent on their existing scholarships than non-minority students, making it more difficult for them to pay full freight at their new school. Whatever the cause, the schools that took transfer students from Maurer could have instead taken 94 more students into their first-year classes, and those matriculants would as a matter of probabilities have included a greater number of minority students.

In all, the transfer game appears to add up to a negative sum. If most of the transfers were replaced by first-year students, those students would be better integrated into the law school social network, their teachers in the upper level curriculum would be better able to predict what foundation is

<sup>13</sup> ALLISON GREY ANDERSON, THE LAW SCHOOL YEARS: PROBING QUESTIONS, ACTIONABLE DATA, *Law School Survey of Student Engagement, 2005 Annual Survey Results*, at 13–14 (2005), available at [http://lssse.iub.edu/2005\\_Annual\\_Report/pdf/LSSSE\\_2005\\_Annual\\_Report.pdf](http://lssse.iub.edu/2005_Annual_Report/pdf/LSSSE_2005_Annual_Report.pdf).

<sup>14</sup> LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2011 ANNUAL SURVEY RESULTS, *Navigating Law School Years: Paths in Legal Education*, at 12 (2011), available at [http://lssse.iub.edu/pdf/2011/2011\\_LSSSE\\_Annual\\_Survey\\_Results.pdf](http://lssse.iub.edu/pdf/2011/2011_LSSSE_Annual_Survey_Results.pdf).

<sup>15</sup> This information was supplied by former Maurer Associate Dean for Students, Leonard Fromm.



available for constructing course discussions, and the class might include a larger number of African American and Mexican American students. If schools have more freedom of admissions, the decision on how many transfer students to accept can be made more on the basis of the merits of those students and their addition to the intellectual life of the school along with their potential service to society and less on the basis of the need to make up revenue foregone in an attempt to maximize the LSAT and UGPA medians. An additional step that would reduce distortional incentives to expand transfer programs is to require schools to report median scores for all students entering the JD program each year, whatever class they are entering. If the ABA views student numbers as a measure of school quality and accreditability, those numbers should be gathered for all students, not just those who entered as first-year students.

IGLS programs are not as harmful to curriculum coordination as transfer programs, but classroom instruction may suffer somewhat because language difficulties discourage IGLS students from contributing to classroom discussions. Of course, IGLS students add to overall diversity because the IGLS students are foreign students. They do not, however, augment the representation of American minorities in American law schools. As IGLS programs expand, the proportion of American minorities will contract.

A couple of other factors in the *USN&WR* formula, bar passage ratio and employment ratio, could have some impact on minority representation in law schools and are worth a moment to consider. It will help a school on bar passage and employment if it can identify and exclude from admission those applicants that will be a problem after graduation. In its attempt to maximize its *USN&WR* rank, a law school might look unfavorably on applicants who belong to groups that have done poorly on the bar exam in the past. Similarly, law schools maximizing rank might look less favorably on first-generation law applicants than on students who have employment connections and safety nets in the law and business world.

This incentive to eliminate minority students and students who are the first in their families to apply to law school may continue even after admission. Both the bar pass ratio and the employment ratio are calculated with reference to the number of students graduating from a school, not the number of students that started three years earlier. For that reason, if it appears that students will not get a job, it is in the interest of the school to eliminate them from the class by flunking them out before they graduate. I am not aware of this happening, but it is a source of pressure worth avoiding and it could be avoided if *USN&WR* would quit using those two

ratios in its ranking. The bar pass ratio, even when compared to the bar pass ratio in the state, is a poor indicator of law school quality in any case,<sup>16</sup> and creates nasty incentives to teach to the test rather than teaching what students need to know to be good lawyers and responsible and influential citizens. *USN&WR* should drop it from the formula even if it does not have any undesirable effect on minority participation in law schools.

Some of those concerned about diversity have argued that *USN&WR* should include a diversity factor in its ranking formula. This is a bad idea. Even assuming such a number (or range) could be agreed upon, its inclusion would be the downfall of diversity and freedom of admissions. The power of the *USN&WR* ranking would indeed draw schools toward whatever new goal was established. But, that migration would bring with it two negative consequences. First, schools themselves would gravitate toward a common level of diversity and away from diversity regarding diversity. While diversity within each school matters, diversity across schools matters as well. Whatever *USN&WR* chooses as the goal will pull schools toward uniformity and away from diversity on that criterion.<sup>17</sup> Inclusion of a new diversity factor will not change the net effect, which is that the ABA defines a product and mandates that competition be narrowed to that product rather than allowing law schools to compete by offering different products.<sup>18</sup> Moreover, because there would be less diversity across law schools, it would look to outsiders like they are employing a racial quota.

Second, schools would have even less of the essential freedom of admission than the little they have today. That, itself, is reason enough to not to include diversity as a factor in the rankings. But that is not all. If law schools reduce their own freedom by pressuring *USN&WR* to adopt

<sup>16</sup> *USN&WR*'s mathematical manipulation of the bar passage numbers is especially problematic. *USN&WR* divides the bar passage rate of the school in one or more states by the bar passage rate of those states. This adjusts for the fact that some states have easier bar exams than others, but creates a different problem. The formula gives a big advantage to schools serving states also served by a lot of schools with low rates of bar passage. If the bar passage rate is 50% in some state, a school serving that state could have a bar passage ratio of 2/1. If the bar passage rate is 80% in another state, a school serving that state can achieve a bar passage ratio of 5/4 at best. The result is that some schools in California, for example, get a leg up in the annual rankings.

<sup>17</sup> *Stake, supra* note 4, at 242. *USN&WR* pushes schools to adopt the same balance of expenditures, whatever combination it is that will maximize the *USN&WR* score. Over time, this will tend to homogenize law schools.

<sup>18</sup> I am not making an argument against ABA accreditation or the application of standards in the process of accreditation. I am arguing that the ABA should consider whether the data it demands in the accreditation process will be picked up by *USN&WR* and, if so, do its best to ensure that the data demanded does not unduly restrict the scope of competition between law schools.

diversity as a criterion, they will inadvertently trumpet the message that the faculty's freedom to choose its students matters little to them. Seeing that law schools do not value what was once called an "essential freedom," and seeing that the impact of law school admissions is the same impact as would result from employing a quota, the Supreme Court might be moved to outlaw *any* consideration of race in admissions. Were that to happen, those favoring diversity would have traded a permanent loss to all law schools for a temporary gain at some law schools.

Another proposal occasionally in circulation is that the ABA discontinue its mandate that law schools require their applicants to take the LSAT. This idea is worse than bad. The LSAT is the best available single numerical predictor of performance in the first year of law school. If one of the two current numbers is to be discontinued, it ought to be the UGPA.<sup>19</sup> As noted above, the median correlation between the FYA and the LSAT is .36, which is higher than the .28 median correlation between the FYA and the UGPA.<sup>20</sup> But the difference between those correlation coefficients does not come close to telling the whole story of the loss that admissions will suffer if the LSAT is not required. First-year grades are even better predicted by an index made up of a weighted combination of the LSAT and UGPA. The LSAC calculates just such an index (hereinafter "Index") with a formula optimized separately for each law school choosing to avail itself of that service. The median correlation between FYA and these Indexes is .47, obviously far better than the .28 for UGPA alone.<sup>21</sup>

If the LSAT is no longer required and UGPA continues to be required, *USN&WR* will likely shift weight to the UGPA, and schools will step up their competition for students with high grades. One of the ways schools can compete is to be willing to admit students who have not taken the LSAT, which surely is contemplated by the proposal to discontinue the LSAT requirement, thus starting a race to the bottom at which point the LSAT will not be taken by students whose UGPA is higher than their expected performance on the LSAT. When that happens, not only will schools have lost the ability to compare applicants on the LSAT, they will

<sup>19</sup> If law schools focus solely on the LSAT, doing so will create fewer bad incentives for students in college than if law schools focus solely on the UGPA. (Current pressures have caused university personnel to advise undergraduate students hoping to go to law school to avoid courses that will reduce their UGPA.)

<sup>20</sup> *Stilwell, Dalessandro & Reese, supra note 6.*

<sup>21</sup> *Id.* The LSAC offers each school a number of choices on how to construct the Index, essentially letting the school choose how much weight to put on the LSAT and UGPA. The LSAC does not make it clear in its report whether the median correlation coefficient is based on the optimal index for each school, or the Index chosen by each school. *Id.*

have lost the ability to compare applicants on the Index.

And the story might worsen from there. As explained above, the UGPA may appear more predictive than it is because admissions offices have filtered out some students whose high UGPA's are based on easy courses. If the UGPA becomes more important, schools will more frequently ignore the easy courses and the UGPA may become less predictive. If it eliminates the LSAT requirement, the ABA will shift law schools from a system under which admissions offices can compare students on the Index, which has a median correlation coefficient of .46, to a system under which schools can compare students only on the UGPA, which could have a median correlation coefficient of something below .28. This is not a recipe for producing competent lawyers.

If adding a diversity factor would reduce freedom of admissions and eliminating the LSAT would diminish the quality of law graduates, what can be done to enhance the representation of minorities in law schools? One conceivable course of action is to exclude minorities when calculating LSAT and UGPA medians. But that would serve only the narrowest form of diversity, doing nothing to reclaim the broader freedom to admit majority students for reasons other than their numbers. Another approach would be for schools to ignore the ABA-*USN&WR* mandate and do what is right for the students and the nation. Indeed, this is what a member of the ABA questionnaire committee told me to do when I tried to explain why the data collected by the ABA put pressure on schools to deny admission to minorities.<sup>22</sup> Of course, that might be the right thing to do, but it is not going to happen at most schools. Law schools are in a prisoner's dilemma. Regardless of what other schools do, each school can enhance its rank by obeying the ABA-*USN&WR* mandate to admit applicants with high marks on past exams and ignore the social benefits of taking students that are predicted to be honest and competent lawyers. Not only will they reduce their own well-being by taking the high road, schools that do so will reduce their prestige and influence in the future by sacrificing their ranks. Thus, by acting in the public interest in the present they will reduce their power to act in the public interest in the future.<sup>23</sup>

<sup>22</sup> In addition to telling me to do what is right for the nation and to ignore what is good for my school, the ABA questionnaire committee member repeatedly asserted that it would make no difference to minority admissions if the ABA were to collect, and *USN&WR* were to use, the first quartiles and third quartiles rather than medians. To this day, I remain puzzled by that contention.

<sup>23</sup> Another way to view the situation is as a tragedy of the commons, see Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968), available at [http://www.garretthardinsociety.org/articles/art\\_tragedy\\_of\\_the\\_commons.html](http://www.garretthardinsociety.org/articles/art_tragedy_of_the_commons.html). Schools that do what is best for society will operate at a disadvantage compared to those that behave selfishly. Those behaving

A far more promising course of action would be for law schools to urge the ABA to stop collecting separate LSAT and UGPA statistics and start collecting the median on a Universal Index ("UI") composed of both the LSAT and UGPA of each student. The UI would be calculated by multiplying a student's UGPA by ten and adding that to the LSAT.<sup>24</sup> If the ABA would collect the median UI from each school, and *USN&WR* were to follow suit by replacing the separate LSAT and UGPA with the UI,<sup>25</sup> schools would naturally attempt to maximize that median. That shift from maximizing two separate medians to maximizing one median would dramatically expand the freedom schools have to admit the students they want to admit. Even if one half of the class were taken entirely by reference to the UI, the other half could be admitted by reference to all of the factors in the file, weighted however the school wished to weight those factors. Every school would have more freedom to admit students by whatever criteria the school considered to be most important to it, and it could use that freedom however it wished to exercise it.

No sacrifice in student quality as measured purely by numbers would result from implementing this change. Consider the seats in a school's entering class that are going to be allocated wholly by reference to the LSAT and UGPA. The best a school can do is to allocate those seats according to the Index, which combines the LSAT and UGPA for each student. As noted above, the median correlation between FYA and the UGPA is .28, between FYA and the LSAT is .36, and between FYA and the Index is .46.<sup>26</sup> The Index improves on the LSAT more than the LSAT improves on the UGPA. Admittedly, the UI would be less predictive than the Index for some schools because the latter is optimized for each school rather than being generalized to a UGPA/LSAT ratio of 10 to 1.<sup>27</sup> But that

altruistically will, in the exercise of that altruism, gradually give away their power to do good.

<sup>24</sup> It is not possible to use the existing Index for this purpose because the formula for the Index is different for each school. In other words, although there is an Index for each applicant at each school, there is no single Index for each applicant at all schools. Only a newly-created Universal Index could serve for comparing schools. In addition, this calculation is beyond the power of *USN&WR* to do on its own because it does not have the individual data needed to calculate the UI for each student. *USN&WR* could ask schools to calculate and report this median, but it is doubtful that schools would comply. However, if *USN&WR* would request the median UI and all schools would report it, action by the ABA would not be needed.

<sup>25</sup> At the Opening Doors symposium, Robert Morse expressed willingness to consider this possibility. This makes sense, as the UI would better serve *USN&WR*'s interest in assessing the quality of law schools since the UI is a better measure of student quality than the separate measures of LSAT and UGPA. Moreover, any unexpected reluctance on the part of *USN&WR* could be overcome if the ABA were to discontinue collecting the LSAT and UGPA medians and thus deprive *USN&WR* of reliable data on those factors.

<sup>26</sup> *Stilwell, Dalessandro & Reese, supra* note 6.

<sup>27</sup> Multiplying the UGPA by 15 gives it about 50% of the weight. Multiplying the UGPA by 8

does not mean that the new system would lead to admitting less qualified students than are now being admitted. At some schools, the UI would be only slightly less predictive of FYA.<sup>28</sup> In addition, many of the students having an admissible Index would have an admissible UI. And, most important, students with admissible Indexes but insufficient UI's could be admitted in the half of the class not dedicated to the UI. The shift from two measures to one would give the school complete control of half of the class and complete freedom to admit applicants with below-median UI's into that half. Not only would admission by numbers not get worse, in fact, perhaps surprisingly, numerically predicted performance could improve. The current system considers LSAT and UGPA separately, while a system based on the UI would push schools to consider a combination of the LSAT and UGPA. Shifting the focus of admissions to the UI will increase the quality of students admitted primarily according to their numbers.

Calculating the UI would not be burdensome. Admissions offices would simply add one column to their admissions spreadsheets and add one cell that calculates the median of that new column. Indeed, it would probably be easy for the ABA together with the Association of American Law Schools to convince the LSAC to do the calculation of each applicant's UI and report it as a part of each file, along with the Index that it currently reports to some law schools, obviating the need for the admissions offices to do even that simple calculation.<sup>29</sup>

If, for whatever reason, this UI proposal is unworkable, those who favor diversity and freedom of admissions should try to convince the ABA to stop collecting any statistics relating to the UGPA of students entering law schools. That would leave the LSAT as the primary numerical admissions goal. The LSAT, unlike the UGPA, will remain a reasonably robust predictor of first-year law-school performance in the future, although probably not as predictive as the UI. Focusing the eyes of law school admissions personnel on the LSAT does not distort student choices of undergraduate schools or curricula, and on this point is superior to the UI.

gives it about 25% of the weight. Multiplying the UGPA by 10 would be easy and probably quite predictive (see the next footnote) but the ultimate choice would, of course, be somewhat arbitrary. Perhaps the best choice for the UGPA multiplier would be the median ratio of the coefficients used by LSAC in its calculation of the Indexes for participating schools.

<sup>28</sup> At Maurer, the maximum correlation of FYA with the Index is .515. But the curve is fairly flat on top and the correlation stays above .50 as long as the LSAT is accorded anywhere from 50% to 75% of the weight in the formula (and the UGPA has the other 50% to 25% of the weight) LSAC Report to Indiana Univ. Maurer School of Law (on file with Indiana University Maurer School of Law).

<sup>29</sup> I proposed to the LSAC that it initiate this change, but that came to naught. Perhaps the LSAC does not want to be perceived as interfering with law school admissions. The schools will probably have to make a formal request before the LSAC will act.

And, as explained above, eliminating the UGPA and shifting attention to the LSAT alone, like the UI alone, would restore to law schools most of their freedom to admit the students they would like to admit on the criteria they consider most important. That change would, in every way, be an improvement over the status quo. The simplest way to enhance freedom of admissions would be for the ABA to stop requiring schools to report UGPA statistics.

If the ABA is going to require law schools to report numbers regarding matriculants every year, the ABA should choose a single number (the UI) that has more value in predicting performance rather than a pair of numbers that, because they are not combined for each student, have less predictive value. If the ABA is going to require law schools to report numbers that could influence student choices of undergraduate coursework, the ABA should choose a number (the LSAT or, somewhat worse, the UI) that has less influence rather than a number (the UGPA) that distorts those choices. If the ABA is going to require law schools to report numbers that create incentives to grant some applicants admission and deny others, the ABA should choose one number (either the UI or the LSAT) that puts little pressure on schools to deny African American and Mexican American applicants rather than two numbers that together exert great adverse pressure. If the ABA is going to require law schools to report numbers that constrain law schools in their choices of whom to teach, the ABA should choose a number (either the UI or the LSAT) that respects academic freedom rather than a combination of numbers that usurps it. But the ABA shows little interest in reducing its interference with law school admissions. Law schools will regain this essential freedom only if they take affirmative steps to reclaim it.



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