

NOBLESSE OBLIGE. FOUR WAYS THE “TOP FIVE” LAW SCHOOLS CAN IMPROVE LEGAL EDUCATION

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I have often heard it said that American legal education is the best in the world. Indeed, this opinion is voiced not only by American law deans but by our foreign counterparts as well. This past summer I attended a conference on the future of global legal education, and I was struck by how many of my foreign counterparts expressed a desire to move closer to the American model.

But all is not perfect in our Langdellian world. I have been dean at Seton Hall for two years and have attended most ABA and AALS gatherings of deans where I have heard a common litany of concerns. While I will admit that I am still trying to understand some issues, there are several critiques with which I find myself in complete agreement. In this space I will speak to four of these and offer suggestions for addressing them. The title reveals who should lead the effort.

What are my four concerns? The first is *U.S. News & World Report*. We all rightfully bemoan its influence. A decade ago most of us paid little attention, ignoring its methodology, hoping for the best. That's no longer true. Whether we admit it or not, many decisions are now made with the proverbial eye on its *U.S. News* effect. My second concern is faculty recruitment by other law schools: many of us can attest to the negative effects of the loss of productive faculty members to other institutions. Third, student transfers to other law schools. I'm not talking about a student's independent decision to transfer; rather, I'm concerned with the promise of transfer during the initial unsuccessful application process, or worse, the active recruitment of students by other institutions at the end of their first year. Finally, there is the shift from need-based to merit-based tuition discounting. This one in particular raises ethical issues. Can we continue to ask those students statistically likely to finish in the bottom half of the class to provide a disproportionately large share of a school's revenue in order to underwrite a school's effort to maintain LSAT and GPA medians? Of course the culprit here again is *U.S. News & World Report*. Nevertheless, I think it's a problem deserving separate attention. Other concerns voiced by my fellow deans deserve mention, but my space is limited so I'll leave it at that.

What then can be done to address these concerns? Well, as it turns out, that's not the question; most of us know exactly what needs to be done. The real question is who should lead the effort. From the title of this essay no doubt you've figured out who I believe should lead the charge. Why the top five law schools? That again should be obvious. They've got the juice, both from a reputation and a financial standpoint. They won't suffer any loss from assuming leadership on these issues. On the contrary, those that assume the mantle are likely to see their reputations enhanced. Indeed, the rest of us have been disappointed with the response to some of these issues by the so-called elite schools.

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But why can't all the deans get together to address these concerns at the ABA's mid-year meeting? Because we've seen how solutions become rather diluted when left to us as a group. Take *U.S. News*, most of us sign the LSAC letter that advises applicants to be careful with how they use the rankings. I have yet to meet anyone who's read it, other than the deans who sign it. No, real change is going to depend on a smaller group. It's going to have to come from the schools at the top. For those to whom much has been given (okay, maybe earned), much is expected.

By now you are wondering who are the top five law schools that should lead this effort. I'm certainly not going to provide a list. I certainly won't resort to *U.S. News* or any other ranking to tell you who you are. But I will say that you should not think of the number five as an absolute, think of it more as a grouping. Calling you the top five sounds too much like a ranking, so I'll call you the Big Five, sort of like an athletic conference. The Big Ten has eleven teams, so the Big Five can include at least nine or ten. But the nine or ten of you in the Big Five need to get together and show real leadership, real solutions, not some watered down letter expressing concern. I'm confident that many schools would welcome your efforts. Having raised these concerns, however, let me offer the Big Five a few suggestions.

I don't believe there is a single dean that can say he or she does not pay some attention to *U.S. News & World Report*. Moreover, I have yet to meet any dean who thinks we are fortunate to have this annual survey, that the ranking provides valuable consumer information. Applicants place too much emphasis on it, alumni ask too many questions about it, and university presidents set unrealistic goals based on it (with the exception of my president, of course). But while no one is happy with the ranking, many of us go online the first night it becomes available to see how we've done. It's just too important. It determines the quality of faculty a school can recruit. It determines applicant quality and a school's success at converting such applicants. It influences financial aid decision making, admissions policy, and publication efforts. When we do well, we trumpet our success to faculty, students and alumni, especially our alumni in the hope that it will encourage greater generosity. If the following year we slip a bit, we rail against the ranking as flawed and a cancer on the academic enterprise.

That it is flawed there can be little doubt. Any ranking that depends for forty percent of its overall score on the subjective and mostly uninformed opinion of educators, lawyers, and judges is entirely suspect. Each of us is asked to comment on the quality of one hundred eighty law schools. How can one really know? Most deans would agree that they are in a position to fairly assess, at most, five to ten schools. And I consider the deans, as a group, more informed than any other group of voters in the survey. I believe most lawyers and judges cannot fairly assess their own law school; how can they comment on one located on the opposite side of the country?

The next most heavily weighted component arguably has nothing to do with a school's quality; it has to do with student quality. Twenty-five percent of the overall score is based on the quality of entering students as measured by median LSAT and GPA. Does that mean that if you took the entering class from one of the Big Five and switched it with the entering class of a so-called fourth-tier school that all of a sudden the quality of the education delivered by these two schools would be dramatically different? I don't think so. Don't misunderstand me here: certainly a

high quality student body makes teaching more enjoyable. And yes, if the class is full of the brightest, you can teach at a higher level. But a recent study by the LSAC tells us that, within a certain range, which covers most of our entering classes, the LSAT does not serve as a statistical predictor of success. Simply put, a school's quality depends far more on its faculty than the median LSAT and GPA of its entering class.

The subjective surveys and the student quality component comprise sixty-five percent of a school's score. It is mind-boggling that a ranking whose methodology has almost no value in assessing quality has taken on such great importance. The rest of the methodology would appear to have some value, both as an assessment of quality and as consumer information. Bar passage rates, placement success, and how much of a school's revenue is devoted to instruction should be of interest to applicants. But if sixty-five percent of the survey is worthless, why do we participate in it? Aren't we party to a fraud? Here's what I propose the Big Five do in response: **BOYCOTT, REFUSE TO PARTICIPATE, BE AN ASTERISK.** Your refusal to participate will make the entire ranking suspect. Don't use the excuse that the ABA collects the same information so you have no choice. Remember, you've got juice, you can withhold the information from the ABA for a year or two; we trust your academic program won't suffer and that your accreditation is safe. If you are worried about consumer's access to information, publish the necessary information on your web site.

There is one thing, however, the rest of us just outside the Big Five can do this year to address this problem. When filling out the survey, comment only on those schools we really know about based on current information, not on long-standing reputation or the success of its athletic teams the past year. Maybe, just maybe, the editors at *U.S. News* will realize that these subjective surveys are of little value. Moreover, how can we convince applicants to take our caution about the rankings seriously unless we are willing to address the part of the rankings we find most flawed.

My second issue is lateral faculty hiring. What's the problem? Let's take my institution. In the last three years, Seton Hall faculty have been contacted by twelve other institutions and counting. We have been successful in convincing most that we have something special here and that the future is bright. We have lost three of our colleagues, we are currently endeavoring to keep one, and we are expecting at least two others to receive inquiries this year. I know, I'm supposed to be happy that I have a faculty that's getting enough notice to be sought out by other institutions. And I am. But I'm also concerned about the morale of our faculty and students. These bright lights are the beacon that attracts scholars and students. They invigorate the scholarly enterprise. I'm concerned about the effect the scholarly recruiting wars have on salary structure. I'd hate to create a system where faculty felt the need to encourage offers from other institutions. But most of all, I'm concerned that the investment made by the institution in developing quality scholars and teachers is not recouped through productive years of service and enhanced reputation for the school. I'm concerned that a school receives no compensation in return.

Don't misunderstand, I'm not advocating a reserve clause, even baseball had to give that up. Faculty should be free to go where they will. But it is odd that the

institution guarantees employment for life while the faculty member remains a free agent. Nor would I be foolish enough to advocate a trade system, although I'm sure many of my fellow deans would find amusement determining the "professor to be named later." But I do think an institution should be left with more than the fond memory that this former faculty member began a distinguished career there. If we were like baseball, part of the costs of the Triple A and Double A teams would be borne by the big league teams. So here's my idea. When a school loses a faculty member to another institution, and the faculty member is being given a chair, the hiring institution should compensate the developmental school with a payment equal to two years of the professor's salary at the new school. This amount would go to a research endowment that would help the developmental school attract and support more fine scholars. The amount of money involved is modest for a school possessing a chair to recruit the faculty member. The payment would allow the developmental school to recoup part of its investment. The departing faculty member and the new institution could feel that they had made an important contribution to the developmental school's future.

The next issue, student transfers, is becoming a real problem. Students have always transferred to other schools for a variety of reasons. Sometimes it's because they want to be closer to home. Perhaps a spouse or partner is being relocated to a different part of the country. Sometimes they don't like the culture of the school they're in or feel the school is not strong in the area of law in which they'd like to practice. And yes, sometimes the student has done very well and wants to use that success to attend a "higher ranked" school. But in each case it is the student who initiates the transfer; they make a decision independent of any outside influence. The situation is changing and rapidly.

About five years ago an applicant told me that he was coming to Seton Hall but that he had been told by another school if he had a "B" or better average at the end of his first year he could transfer to the "higher ranked" school. That student did do well but, happily for us, decided to remain at Seton Hall. With each passing year, however, I see this situation more and more, to the point that it has become a trend. I believe I know why *U.S. News* is exerting such a strong influence that many schools, in their effort to protect LSAT and GPA medians, reject students to whom they would otherwise offer admission. As a result, the school brings in a smaller entering class resulting in a revenue loss. One way to compensate for this lost revenue is to be much more aggressive recruiting transfers.

The problem exists and we need to end it. I have no quarrel with a student wrestling with a decision to transfer. I don't want to lose students from the top of the class to other institutions. But if it's their decision, reached after careful thought, then I wish them well. I worry, however, when they tell me how happy they are at Seton Hall but that they feel they have no choice but to pursue a transfer because they were told that if they did well at Seton Hall they would be accepted at the transferee school. This problem is not confined to my school. I know how important these students can be to a school, both in the classroom and in leadership roles. Moreover, in many cases the school has made a significant investment of financial aid to attract the student. The school may also have made efforts on the student's behalf in securing a federal clerkship or another coveted position. In most cases where these students do end up transferring, it's solely because the other

school is, in their words, “more highly ranked.” When we sit down to discuss their decision, they can’t tell me about the faculty at the other school. They know little about the curriculum other than what’s found in the student handbook. They haven’t met with anyone in the career services office. Surprisingly few have even talked to students at the school.

There is a need for an explicit set of guidelines to eliminate this practice. Maybe this one shouldn’t be left to the Big Five. We all need to address this concern before the cannibalizing gets out of hand. Competition for the best students will always exist. We put a lot of resources into our admissions efforts. Each institution is unique and the more time and effort we invest in the process, the more likely we are to attract students suited to the culture of our schools. These efforts, however, should involve only the entering class. Indeed, we should be encouraging students to remain at an institution if they are successful and satisfied. Of course, if we could lessen the influence of *U.S. News*, I wouldn’t be surprised if this problem went away by itself.

The final issue of concern to me is also in large part the result of the *U.S. News* wars, the growth in merit-based as compared to need-based financial aid budgets. The effort to secure a certain LSAT and GPA median has led to a “brain buying” craze. I don’t know how it got started or when, but we have all had to respond to it in one way or another. Top applicants have quickly adjusted to this buyer’s market, attempting to play one school against the other. The shame of it is that most schools are using operating revenue to fund this increase in merit-based grants. Tuition dollars are substantially debt funded. As a result, we have a situation where students with lower admission’s profiles are borrowing money to enable schools to recruit students with higher profiles. Yet, statistics tell us that those with the higher profile will perform better and, if they so desire, these same students will be the ones securing the higher paying jobs upon graduation. The lower profile students invariably end up with the highest loan balances, the weaker job prospects and, ultimately, higher default rates.

I’m not saying that success should not be rewarded. But we have moved so far toward a merit-based system that our priorities can only be described as distorted. Here’s where the Big Five can show true leadership. Your reputations are such that you don’t need to recruit with dollars. You can distinguish yourselves in other ways. With respect to financial aid, address the need of your students. Allow for some merit if necessary, but bring the focus back to need. Within a short time this approach could become one of the distinguishing characteristics of a Big Five school. Just think then how many schools will begin to emulate your efforts, hoping to be considered one of your peers. There will be other benefits as well. More students with limited resources will be able to pursue a legal education. More students with lower entering academic profiles will be able to pursue public interest careers. And, given the socio-economic status of our society, this change in emphasis will inevitably lead to a more diverse student body and, ultimately, a more diverse profession.

Hopefully I have not offended anyone with my concerns or my suggestions. It is not my intention. I share the view that today’s law schools are doing an excellent job overall at preparing the next generation for the practice and criticism of the law. What I am attempting to do is merely to present some food for thought. Certainly

I realize that there are impediments to implementing some of my suggestions, antitrust concerns, for example. Nevertheless, I do believe that we can begin a useful dialogue about a few real concerns that threaten the quality of what we do and the collegiality with which we do it. I believe that this dialogue should start, initially at least, with those schools in the best position to bring about change and that many of my colleagues share this view with me. We'll be waiting to see who answers the call.