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## SUCCESS, STATUS, AND THE GOALS OF A LAW SCHOOL

*Jay Conison\**

### INTRODUCTION

WE all want to be successful, even if we can't quite articulate what "success" means. Some of us measure success by wealth—a bumper sticker reads, "Whoever dies with the most toys, wins." Some measure success by power. Others measure it by positive influence on the lives of others—hence, the many who choose public service, or teaching, or a career in one of the helping professions. Still others—the Aristotelians among us—measure success synoptically, by the ability to look back on a fulfilled and moral life.

The desire for success characterizes not only individuals, but also institutions—which are, of course, composed of individuals. This certainly is true for institutions designed to compete. A basketball team wants success; so does a business corporation. But so do many other enterprises not competitive by design. Churches, hospitals, symphony orchestras, eleemosynary organizations—all of these want success just as much as the business corporation, although usually in very different ways. The urge to reap the rewards of success, whether tangible or intangible, is an ineluctable part of what it is to be human.

In a great many cases, it is easy to say whether an institution is or is not successful. It is relatively unproblematic for institutions set up to compete. A basketball team is successful if it wins the championship or defeats a hated rival. A business corporation is successful if it returns a profit to its shareholders or gains a large market share.<sup>1</sup> Even in some other cases, gauging success can be fairly straightforward. A church might measure its success by size of congregation or number of souls saved. A symphony orchestra might measure success by tickets sold or number of recording contracts. An organization that helps homeless schizophrenics might measure success by number of clients set on the path to normal life.

Yet, in other cases, it is not so easy to measure success. What determines it for a hospital? The number of gall bladder operations? Patient satisfaction as gauged by surveys? How does one measure success for the American Hospital

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1. This is somewhat of an oversimplification, since the larger and more complex the corporation, the more difficult it becomes to measure financial success. See, e.g., Julia Kirby, *Toward a Theory of High Performance*, HARV. BUS. REV., July-Aug. 2005, at 30.

Association? By the overall health of the American people?<sup>2</sup> Or, closer to home, for the American Bar Association?<sup>3</sup> Or closer to home still—and the subject of this essay—for a law school? We tend to think that a law school's ultimate purpose is to serve students, the legal profession, and our system of justice. But this is very abstract. How does it translate into a means to gauge success?

This is an important question. For, at bottom, it is a question about the vision, mission and larger goals of the institution; about its progress and prospects; and about its sense of self and sense of possibilities. It is a question about the value of the work done by the individuals who make up the school.

Yet, it is a strangely neglected question. Law schools are composed of highly analytical, ceaselessly questioning individuals. But we tend to avoid analysis of our own school's mission, goals, values, and practices. We prefer to put our heads down and focus on our immediate task—our teaching, our scholarship, and our public service. We leave it to others (if anyone) to ask and answer the fundamental questions about what we do institutionally.

As we shall see, there is danger in this inattention. For we may be induced to gauge success in ways that do not reflect our goals and values; in ways that are ill-conceived, ill-informed, or even harmful to our true aims. The wrong measure of success can lead to misallocation of resources, pursuit of wrong goals, anxiety, or even a misplaced sense of failure for not measuring up.

There is no easy cure for this inattention. A dislike of planning and goal setting is also part of the human condition. Still, examination of the causes of inattention, and its consequences, can at least make us aware that there is a problem waiting to be solved. To explore those causes and consequences is the aim of this essay.

## I. SUCCESS AND THE LAW SCHOOL: A PRELIMINARY ANALYSIS

Success is one of the many concepts we use every day but rarely take time to analyze. It is value-laden, but has not been subjected to much analysis, philosophical or otherwise. To understand success for our purposes, we must start with the basics—the everyday concept as applied to people—and then

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2. The vision and mission of the American Hospital Association are as follows:

**Vision:** The AHA vision is of a society of healthy communities, where all individuals reach their highest potential for health.

**Mission:** To advance the health of individuals and communities. The AHA leads, represents and serves hospitals, health systems and other related organizations that are accountable to the community and committed to health improvement.

AHA Vision and Mission, <http://www.aha.org/aha/about/about.html#vision> (last visited Nov. 8, 2005).

3. The mission of the ABA is “to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.” For a full statement of mission and broad goals, see ABA, <http://www.abanet.org/about/goals.html>.

determine how it should be adapted to law schools as a special case.

A. *The Basic Metaphor and Its Qualifications*

Like many everyday concepts, the meaning of “success” is rooted in metaphor. The basic metaphor here is *reaching the goal*.<sup>4</sup> Dictionaries generally define “success” in this way<sup>5</sup> and books of quotations abound with epigrams that build on the thought. Yet the metaphor is only the start of analysis. Standing alone, it does not permit particularized judgments about success or lack of it in an individual case. There are three main reasons why this is so.

*First*, merely *reaching* some goal is not enough to predicate success. There must be a modicum of striving. The purchaser of a winning lottery ticket or the inheritor of great wealth is counted as fortuitous, not successful, even if becoming rich is the lucky person’s highest goal.

*Second*, some goals, even if reached through striving, do not justify the ascription of success. They are either trivial or evil. The person who, through concerted effort, achieves the perfect tan presents a doubtful case for success; the accomplished mass murderer presents no case at all. We decline to ascribe success in these cases because success is a term with ethical consequences.<sup>6</sup> To ascribe success is ordinarily to ascribe a good and to designate the result a source of praise and pride.<sup>7</sup> But not every attainment of a goal is a good. Not every attainment is a basis for praise and pride. Society as a whole, as well as other sources of values and norms, place constraints on what goals count, and when.

*Third*, even if a goal can, in principle, be the basis for an ascription of success, people may differ over whether and when it does. They might have different perspectives and criteria. Consider a typical case. Young Jones, the son of a pair of large-firm lawyers, decides to forgo college and pursue hair styling instead. Jones and his parents can differ profoundly over whether he is now, or ever can be, a success. To young Jones, the goal of becoming an accomplished and

4. For a philosophical analysis of a related metaphor, see GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* 60-63 (1999).

5. *E.g.*, “The achievement of an endeavor, the attainment of a desired end.” *NEW SHORTER OXFORD ENGLISH DICTIONARY* 3128 (1993).

6. It is what Bernard Williams has labeled a “thick concept.” As he explains:

The way these notions are applied is determined by what the world is like (for instance, by how someone has behaved), and yet, at the same time, their application usually involves a certain valuation of the situation, of persons and actions. Moreover, they usually (though not necessarily directly) provide reasons for action.

BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 129-30 (1985).

7. The qualifier “ordinarily” is needed because success is a functional term and can have uses other than prompting praise and pride. For example, success can be a source of envy. *Cf.* AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* 189 (1999) (“Success, *n.* The one unpardonable sin against one’s fellows.”). *See also* JOSEPH EPSTEIN, *ENVY* 74 (2003). Another use is as indicator that it is time to cease one’s efforts; that one has done enough.

financially secure hair stylist might be fundamental to his life and values, and he might use it as the basic measure of his success. But to Mr. and Ms. Jones, that goal might be on a par with accumulating the world's largest ball of string—incapable of predicating *their* son's success.

Thus, although the underlying notion in success is reaching a goal, the nature of the goal matters. Because success is evaluative and normative, there are societal constraints on what goals can count, and potential differences in judgment for individual cases.<sup>8</sup>

*B. The Sources of Success for a Law School*

Success for a law school is equally a matter of goals and their attainment. No reason is evident to toss out the basic metaphor and its elaboration. Still, some refinement is needed to accommodate the fact that a law school is not a single person but an institution, and indeed a complex one.

Institutional character and complexity are significant in the following way. A law school has a multitude of people—faculty, deans, staff, students, alumni, boards, university officials—as well as units—library, research centers, advancement office, and others—that articulate goals and act on the school's behalf. In many cases, the successes of these people and units are successes of the school or else contribute to those successes. A law school, thus, has a host of goals, large and small. It has a myriad of ways in which it can achieve success, ranging in scale from replacing ten chairs in the library, to the students' winning a moot court competition, to closing a seven-figure gift or assembling a highly diverse student body. And because of the many people intimately involved in the school, there are a wealth of perspectives as to which achievements really *do* count as successes of the school, and under what circumstances.

To capture the notion that a success must belong to the school, rather than just to a person associated with it, or a department or other unit, the analysis needs to be tightened to put bounds on the range of relevant goals and achievements. Specifically, the focus needs to be on goals and accomplishments that are substantial and fundamental enough to constitute (or at least contribute to) *institutional* successes, and as to which there is (or would likely be) reasonable agreement among the participants of the law school as to this status.

There are four areas in which one potentially can find such goals and successes.<sup>9</sup> There are two areas of core *action* by the faculty—(a) the education of students, and (b) what is collectively referred to as scholarship and service.

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8. Although less relevant to the discussion in this essay, one should note for completeness that the determination of success in any given case may also depend on factors other than goals and striving. One is stage of life, which can affect the judgment in obvious ways. Another is character. Since success is evaluative, a bad character on the part of the actor can discredit the achievement of a worthy goal. For half of the nation today, Bill Clinton can never be counted a successful President, no matter what his accomplishments, because of his supposedly bad character. For the other half of the nation, the same is true of George W. Bush.

9. One can count these areas in other ways, combining some and dividing others. The description in the text constitutes one useful listing.

There are the core *characteristics* of the school, both tangible and intangible—in particular, mission and highest level goals, and the resources to achieve them. And there are the core *outputs* of the school, namely the successes and characteristics of the alumni.

The first of the fundamental areas is educating students. Every law school is primarily an institution that educates students to become lawyers and law-trained individuals,<sup>10</sup> and ABA Standard 301 directs that “[a] law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.”<sup>11</sup> A school whose faculty does a poor job of preparing its graduates to be competent lawyers, or that produces large numbers of unethical or unreliable lawyers, cannot claim to be a successful institution, no matter what else the school accomplishes.

A second fundamental area encompasses the professional (non-teaching) work of the faculty: scholarship, law reform, service to the profession and the public, and the like. Scholarship and service are usually counted, along with teaching, as the core functions of *any* law school,<sup>12</sup> and the quality and impact of faculty work in these respects bear upon the success of the institution. It is noteworthy that alumni magazines and dean’s letters—forums for boasting—typically emphasize the scholarly work and other contributions of the faculty.

A third area of goals and attainments comprises those relating to the core characteristics of the institution. Here, there are two components. First, there is the school’s mission and high-level goals, explicit or implicit. As, so to speak, the first page of the strategic plan, they are ipso facto central in measuring success. If a school wishes to be a leading center for communications law, or be

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10. *See, e.g.*, HERBERT F. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 24 (1972) (report prepared for The Carnegie Commission on Higher Education). This distinguishes law schools from some other graduate programs whose faculties are primarily engaged in research, rather than teaching.

11. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 301 (2005-06) [hereinafter ABA STANDARDS], *available at* <http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf>. Moreover, AALS Bylaws state:

A member school shall have as its central academic feature a program of resident study and instruction leading to the Juris Doctor degree .... The school shall have a program of appropriate duration and rigor to assure its graduates have a comprehensive understanding of legal institutions and an appreciation for the role of law and lawyers in society, and that they are academically qualified to participate effectively and responsibly in the legal profession.

AALS Bylaws §§ 6-7(a), *available at* <http://www.aals.org/bylaws.html>.

12. *See, e.g.*, AALS Bylaws, which state:

The Association values and expects its member schools to value a faculty composed primarily of full-time teachers/scholars who constitute a self-governing intellectual community engaged in the creation and dissemination of knowledge about law, legal processes, and legal systems, and who are devoted to fostering justice and public service in the legal community.

AALS Bylaws, *supra* note 11, § 6-1(b)(i). *See also* ABA STANDARDS, *supra* note 11, Standards 401 & 404(a).

known for highly personalized instruction, then the degree to which it meets these aspirations is fundamental in determining whether it is successful.

The other component comprises the resources—money, people, facilities, and anything else—that enable the school to realize mission and fundamental goals. Fulfilling mission and fundamental goals usually demands financial resources. Hence, the fact that a law school amasses a large endowment or otherwise builds reliable sources of revenue may be a significant factor in measuring success. Depending on mission and goals, so, too, might be assembling a substantial research library, or recruiting and maintaining a diverse student body.

The final set of key goals and attainments consists of those relating to the graduates. Graduates are the primary output of a law school; what they become and what they do are necessarily relevant to the school's success. Relevance here takes two forms. First, there are the graduates' own successes—general counselships or bar service awards, for example. These are not only matters in which the law school can take pride; they count as achievements of the law school itself where the school helped make the graduate's success possible. This is why law schools love to highlight alumni who were admitted on weak credentials, but subsequently became leaders in their fields. For these individuals, the law school arguably made a difference; through them, the school hit the goal of producing distinguished alumni.

The second form of relevance is the nature of the graduates' careers. Law schools typically have goals (even if vague) regarding what graduates should do with their lives and work. Thus, a law school with a strong commitment to public interest law that seeks to promote public interest practice will properly take it as a success if substantial numbers of graduates pursue this type of career.<sup>13</sup>

There is much to be said about each of these areas of goals and achievements. In the remainder of this essay, however, we will focus attention on some goals in the first and third areas, to see how not clarifying them can lead law schools astray.

## II. THE EDUCATIONAL FUNCTION OF A LAW SCHOOL: GOALS AND SUCCESSES

Though preparing students for the profession is the core function of a law school, schools have long failed to think seriously about what they are doing or should be doing in this regard. Seventy years ago, Karl Llewellyn famously remarked that “no faculty, and, I believe, not one percent of instructors, knows what it or they are really trying to educate for”;<sup>14</sup> and his was but the first of a stream of like observations by those who examine law schools' educational practices.<sup>15</sup>

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13. The goals relating to graduates overlap in part with goals relating to preparation of students for practice, and with the mission and large-scale goals of a school. Still, the former are distinctive enough that it is useful to treat them separately.

14. See, e.g., Karl Llewellyn, *On What is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651, 653 (1935).

15. E.g., PACKER & EHRLICH, *supra* note 10, at 33 (“Law teachers are confused about legal

Several broad-scale efforts at redress have tried to identify particular skills, competencies, and values, the teaching or instilling of which should guide all law schools' educational programs. The best known and most influential has been the report of the *American Bar Association's Task Force on Law Schools and the Profession: Narrowing the Gap*, commonly known as the MacCrate Report.<sup>16</sup> That report sought to develop a "statement of the skills and values with which a well-trained generalist should be familiar before assuming ultimate responsibility for a client," or, stated otherwise, "with what it takes to practice law competently and professionally."<sup>17</sup> The MacCrate Report focused on the goals of legal education in general, during law school as well as before and after. A more recent effort, which builds on the MacCrate Report, is a project of the Clinical Legal Education Association to identify "best practices" specifically for law schools in preparing students for practice.<sup>18</sup>

These and other efforts to identify necessary skills, competencies, and values, have had some impact on curriculum, particularly on skills training; and some impact on the ABA's Standards for Accreditation. But they have changed little the approach law schools take toward analyzing and planning their educational work. Law schools still tend not to assay what it means to prepare their graduates to be competent and responsible lawyers; articulate the educational goals of the curriculum<sup>19</sup> or of individual courses or groups of courses; identify intended outcomes; or determine the best means to gauge the attainment of those goals and intended outcomes.<sup>20</sup> In recent years, there has been a modest move to bring outcomes assessment to the teaching practice of law schools,<sup>21</sup> but the impact has been limited. As a result, law schools' aims regarding preparation of students for practice remain vague and schools are left without a sound basis for determining whether they are succeeding in meeting this fundamental educational goal.

Lacking a sound and well-conceived basis for assessment, law schools turn to less sound ones. In particular, they turn to the bar examination, and so first-time

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education and the form that it has been forced to take by the interplay of bar admission requirements, professional organizations, and the law schools."). For an historical and thematic overview, see GREGORY S. MUNRO, *OUTCOMES ASSESSMENT FOR LAW SCHOOLS* chs. 3-4 (2000).

16. See generally LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

17. *Id.* at 125.

18. Clinical Legal Education Association, *Best Practices of Law Schools for Preparing Students to Practice Law* 1-3 (Aug. 25, 2004), available at <http://www.cleaweb.org/resources/bp.html> [hereinafter *Best Practices*]. See also John O. Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 J. LEGAL EDUC. 189 (1986).

19. Save, perhaps, for the nebulous one of teaching students to "think like lawyers." For a critique of this often invoked goal, see John O. Mudd, *Thinking Critically About "Thinking Like a Lawyer"*, 33 J. LEGAL EDUC. 704 (1983).

20. MUNRO, *supra* note 15, at 46 n.113; *Best Practices*, *supra* note 18, at 6.

21. MUNRO, *supra* note 15; *Best Practices*, *supra* note 18, at 17-18. See also John L. Lahey & Janice C. Griffith, *Recent Trends in Higher Education: Accountability, Efficiency, Technology, and Governance*, 52 J. LEGAL EDUC. 528, 528-30 (2002).



bar passage rate has become the measure of a school's success in educating its students.

The bar examination has been the subject of merciless criticism and impassioned defense.<sup>22</sup> Our concern here is not whether the bar examination serves the purpose for which it was designed. Rather, our concern is use of the bar examination for a different purpose: by law schools as a measure of success in their core education function.<sup>23</sup> There are four important consequences to this usage.

First, and most obviously, as a measure crafted by persons outside the law school, for a purpose other than measuring a law school's educational success, it can be changed by others at their pleasure. A board of bar examiners (or other state authority) chooses the subjects to be tested, as well as the tests used—self-designed essays, Multistate Bar Examination, Multistate Performance Test, Multistate Essay Test, or any other. Moreover, as recent controversies have made plain, a jurisdiction can change the pass rate, whether for good reasons, ill-considered reasons, or no articulated reason at all.<sup>24</sup> As a result, the judgment of a school's success is subject to the vagaries of choices made by others.

Second, there is a strong element of oversimplification, since the touchstone is first-time pass rate, rather than eventual pass rate. Perhaps it would make more sense to use *ultimate* pass rate of a school's graduates, since there is an obvious difference between knowledge and knowledge displayed on a given test.<sup>25</sup> But this information is not always collected or readily available.

Third, because it serves as a fundamental measure of success, the bar exam can drive law school decisionmaking in key areas. The goal of attaining a high, first-time bar passage rate can drive admissions decisions, curricular decisions, and choices on how to test—for example, the increased use of multiple choice questions on law school examinations tracks the rise of the Multistate Bar Examination.<sup>26</sup>

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22. For an exhaustive criticism of the bar examination, see Kristin Booth Glen, *Thinking Out of the Bar Examination Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343 (2003).

23. To preclude misunderstanding, nothing said here should be construed as an argument that the ability of graduates to pass the bar examination is unimportant. Schools should be concerned with consistently low bar passage rates since, for many, if not most, students, inability to secure admission to the bar undermines the value of the law degree. The argument here is directed toward use of bar passage rate—specifically, first-time bar passage rate—as the fundamental determinant of success in the school's educational function.

24. See Deborah J. Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929 (2001). On the current controversy in New York, see John Caher, *Kaye Pledges Further Study Before Full Exam Score Hike*, N.Y. L.J., June 14, 2005, at 1, available at <http://www.law.com/jsp/article.jsp?id=1118666121877> (entitled *Further Study Pledged Before N.Y. Full Bar Score Hike*).

25. For a study of differences between first-time passage rates and ultimate passage rates, see Linda F. Wightman, LSAC National Longitudinal Bar Passage Study (1998), available at <http://lsacnet.org> (follow "Research Reports" hyperlink under "Research" hyperlink).

26. See Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, With a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. REV. 657, 684-85 (1997).

Fourth, reliance on the bar examination as a measure of success can produce enormous anxiety in law schools. The anxiety of students is well known and understandable, because so much depends on their passing the exam. But it can also produce anxiety in faculty, deans, and others connected with the school, because a fundamental judgment of the school's—and the faculty's—success depends on factors outside its and their control.

As we will see, these same four consequences of relying on an extrinsic measure of success not tied to a school's own goals are found in other core areas.

### III. INSTITUTIONAL CHARACTERISTICS: GOALS, SUCCESSES, AND STATUS

Each year, every accredited law school compiles and reports data to the ABA Section of Legal Education and Admissions to the Bar concerning finances, student demographics, faculty teaching loads, library holdings, and other fundamental features of the school. Each year, every school also reports data about recent graduates to the National Association for Law Placement, and may report data on a periodic basis to other organizations as well. Schools also compile, or at least can compile, a host of other information about themselves. These data tell a great deal about a school's strengths, weaknesses, resource allocation choices, progress, opportunities, and market position. The reports and data surely provide *evidence* that bear upon a school's success.

Hence, one might expect schools to set goals relating to such data, and treat attainment of the more important ones as successes, particularly where they affect capacity to pursue mission and strategic goals. For example, one might expect a law school to articulate key goals relating to financial resources, and that these goals would be significant factors in measuring success. Similarly, one might expect law schools to establish goals relating to its library holdings or library services, and treat the achievement of these goals as successes, since the library is the primary research tool for the faculty in its scholarly and other academic work.

Some schools carefully think through their financial and library goals. Yet it is striking how much law schools focus their goal-setting in the area of school characteristics on the LSAT profile—in particular, the median LSAT score—of incoming students. Anyone who attends a Law School Admission Council Annual Meeting hears stories about heavy pressure from deans or faculties to raise incoming LSAT scores. Deans' reports to alumni and friends, especially those in the fall, proudly announce the achievement of an increase in incoming LSAT scores. Law librarians at their national and regional meetings share news (and laments) about their schools' concern with LSAT profile and the impact on the library budget. Why this goal? Why its overriding importance?

The reason is that LSAT median (or other statistic) is not so much the goal as the measure. For just as bar passage rate is the measure of success in preparing students for practice, LSAT profile has become the measure of success in recruiting a high-quality student body.

As with bar passage rate, a principal reason LSAT profile is used is that law schools have failed to clarify the underlying goal. The meaning of "high-quality student body" is not self-evident, and it depends on a school's particular interests

and purposes. A reason for wanting a high-quality student body is to ensure a strong learning environment. A law school might determine from experience and analysis that a strong learning environment demands a certain proportion of students with business experience, a certain proportion from elite undergraduate institutions, a certain proportion with graduate degrees, and so forth. But this is a complex task. Some schools go through an analysis of this type and those that do have tailored goals and measures of success. But many schools do not and in default rely on the far simpler criterion of LSAT median as the touchstone of student body quality.

Thus, LSAT profile conveniently fills a vacuum. But there is another reason schools use it as a measure. Many schools are concerned with student body quality, not only because of the educational benefits, but because a high-quality student body is a mark of status or prestige. People not only crave success, they may crave status or prestige. In higher education, a key mark of institutional status is selectivity in admissions and prestige of the student body; and a longstanding determinant of the latter is the standardized test profile of incoming students, whether LSAT or, in the case of undergraduate programs, SAT.<sup>27</sup> Thus, in the absence of a measure of success tailored to a school's own goals, LSAT profile is not only convenient; it is almost inevitable.<sup>28</sup>

The consequences of relying on LSAT in this way are quite similar to the consequences of relying on bar passage rate. To begin, the LSAT was crafted by others—the Law School Admission Council—for purposes other than measuring student body quality.<sup>29</sup> Moreover, the *particular* LSAT-profiling statistic used—the median or some other—is also chosen by persons outside the school and thus subject to the vagaries of those other persons' motivations and aims.

The significance of the latter point can be appreciated through some recent developments. The ABA used to collect and publish median LSAT scores, and this facilitated the law schools' use of the median as a measure. But several years ago the ABA stopped collecting and reporting these figures and began collecting and reporting 75th and 25th percentile scores instead. Meanwhile, *U.S. News & World Report* continued to collect and publish median LSAT scores, facilitating, if not encouraging, law schools' continued use of the measure. Recently, however, *U.S. News* decided to stop reporting medians and to report instead a pseudo-median,<sup>30</sup> and some schools treat this as a strong

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27. See, e.g., DOMINIC J. BREWER ET AL., IN PURSUIT OF PRESTIGE: STRATEGY AND COMPETITION IN U.S. HIGHER EDUCATION 29, 31-32 (2002). The reasons for relying on standardized test score profile to measure are complex but seem to be based on the fact that institutions (or people) seeking status try to acquire the trappings of institutions (or people) that already have it, and a salient, near-universal characteristic of high-status institutions of higher education is high standardized test profile and a high level of selectivity in admissions. See *id.* at 31-35.

28. To preclude misunderstanding, nothing said here should be construed as an argument that LSAT score is irrelevant or even unimportant in the admission process. The argument here is directed toward use of a single LSAT-related statistic, chosen by persons outside the law school, as the fundamental determinant of the school's success in assembling a high-quality student body.

29. To its credit, the LSAC has been highly vocal in urging that the LSAT not be used for any purpose other than that for which it was intended—predicting first year law school performance.

30. Determined as the arithmetic mean of the 75th percentile score and the 25th percentile

reason to use the pseudo-median as the new canonical measure. At the same time, the ABA has been considering a return to collection of median LSAT. These latter two developments have prompted a great deal of agitation, particularly among deans, and a great deal of anxiety in law schools over the effect on their assessment. But in truth none of the changes or proposed changes has the slightest impact on the underlying *facts* about a law school's students: they only change the way those facts *appear*. The appearance, however, becomes a reality when the appearance is deemed to measure success in assembling a high-quality student body.

Another consequence of using median LSAT (or some other statistic) is that it drives law school decisionmaking, particularly in the area of admissions. Law schools today notoriously tailor their admissions practices to focus on LSAT scores, often to the near-exclusion of other characteristics. Similarly, use of LSAT profile as a measure can drive resource allocation, as schools redirect assets from other areas of law school operations toward scholarships used to compete for high-LSAT students.

Finally, reliance on LSAT median (or other statistic) as a measure of success produces enormous anxiety. As with any statistic, there are inevitably year-to-year changes. Some of these changes have statistical significance; some do not. Some are normal fluctuations, some (as noted) result from changes in choice of measure. But any decline grips deans and faculties with apprehension that the school is somehow falling short.

We saw this resulting anxiety in the case of bar pass rate; it was largely a consequence of ceding control over how one measures success. But the anxiety here is exacerbated by another factor. Compare the goals of assembling a high-quality student body and having a high-LSAT student body. Any number of schools can succeed in the former, since the meaning one school gives to "high quality" need not conflict with any other. One school can achieve a high-quality student body, say, by focusing on students with engineering and science backgrounds; another can achieve a high-quality student body by focusing on students with substantial work experience in professional or managerial positions. But seeking to assemble high-LSAT student bodies is a zero-sum game. There is a limited population of high-LSAT students and if some schools win, others necessarily lose. The competition—and resultant anxiety—is all the more severe in times—which are inevitable—of declining applicant pools.

#### IV. SUCCESS AND STATUS

Thus, there are two core areas where law schools can find success, but fail to clarify fundamental goals and so deprive themselves of means to gauge it properly. Lacking measures tailored to their goals, they opt for inappropriate ones; this results in a common set of problems. The two core areas we have

examined are not isolated. One can find much the same in the areas of faculty work and alumni success.<sup>31</sup>

The root of the problem is that law schools are composed of people and people do not like to frame goals and plans. To observe this, merely visit a bookstore, with its shelves of practical guides to planning and goal setting, which seek to help people overcome their discomfort. In an organization, the higher and more strategic the goal, the more acute the problem. For people also dislike collaborating with others to set organizational mission and strategic goals. Too often the process is painful, productive of ill feelings, and ultimately valueless, since what emerge are likely to be vague compromises that palliate rather than clarify and guide. Thus, mission statements of law schools tend to the anodyne, and look alike. Except to the extent they incorporate a specific religious mission or narrow geographic orientation, they are quite fungible—many schools could trade plans without anyone noticing. They do little to help a school judge when it is succeeding in the most fundamental respects.

Yet, although people do not like to frame goals, they still want to be able to mark progress and celebrate success. And they crave this, not just in discrete areas, such as teaching, but in toto. They want to know if the organization, all things considered, is a success. They want to know that the organization and their investment in it are worthwhile. Yet, without clear goals and means to measure, a vacuum again results. In this case, however, there is a further difficulty. It is impossible to find an extrinsic measure of all-things-considered success that could be universally relevant: law schools differ too much in their character, size, history, commitments, attitude toward risk, and inchoate goals. Thus, what many schools adopt instead are measures of *status*.

Success and status are not the same thing. Success is mainly an individualized assessment. Subject to the qualifications noted, it is principally a matter of achieving one's valued goals. There is no logical contradiction or practical absurdity in everyone being successful, although not necessarily in the same respect. Indeed, most would call it a good thing if everyone were to be successful in some fashion.

Status, by contrast, is a matter of position in a relevant society.<sup>32</sup> Like success, it has evaluative and normative consequences. But whereas the evaluative consequence of success is pride or praise, the evaluative consequence of status is social sorting: high status means high importance and high value in the relevant society. That is why status is necessarily determined by the society's, rather than any individual's, norms and values.

And that is why status is a limited resource: it is not possible for every individual to have prestige.<sup>33</sup> In the realm of status, one person's gain generally spells another person's loss. We have already seen one aspect of this in the use

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31. Jay Conison, Presentation at the 2005 Law School Admission Council Annual Meeting (June 2, 2005) (addressing the question of how law schools should gauge the success of their graduates).

32. See, e.g., ALAIN DE BOTTON, STATUS ANXIETY vii, 175-80 (2004).

33. PAUL FUSSELL, CLASS: A GUIDE THROUGH THE AMERICAN STATUS SYSTEM 19 (1983) (“[W]here everybody is somebody, nobody is anybody.”).

of LSAT profile as a partial gauge of status. Hence, the pursuit of status, or the choice to measure oneself by status, is risky and a constant source of anxiety over the possibility of loss.<sup>34</sup>

Status and its pursuit can have benefits. For law schools, one potential benefit is recruiting value: high status and the indicia of high status can signal prospective law students, faculty members, and donors that the school is one with which the recipient of the signal would want to associate.<sup>35</sup> Another benefit is financial: pursuit of status can be a sound strategy for increasing giving to or (in appropriate cases) state support for the school.<sup>36</sup> Yet, the pursuit of status can also have harmful consequences,<sup>37</sup> particularly if status is confused with institutional success.

In the world of law schools today, status is measured primarily by *U.S. News & World Report* rankings.<sup>38</sup> It is easy to criticize this measure, but as our prior discussion suggests, *any* measure of status that functions as a measure of institutional success would be problematic. Still, the *U.S. News* measure is especially insidious. It practically forces a school to compete for prestige, whether it wants to or not, because *U.S. News* ranks *every* school, even those (for example, new law schools) that are implausible candidates for high status. And it is very public—it is published to millions of readers, thereby increasing the pressure on schools to compete for status, if not to take status as a substitute for success.

If the *U.S. News* measure of status did not exist, law schools would surely use some other. History suggests this, since the law school world has always been pervaded by status and stratification; the prior system was just more impressionistic, less centrally controlled, and less subject to short-term change.<sup>39</sup> *U.S. News* merely elaborates on that pre-existing system and purports to make it objective, even scientific. Perhaps an alternative measure of status masquerading as a measure of success would be less insidious, but it would still have many of the same adverse effects.

And those adverse effects are precisely the ones we have already seen in other

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34. DE BOTTON, *supra* note 32, *passim*.

35. Jay Conison, *Financial Management of the Law School: Costs, Resources, and Competition*, 34 U. TOL. L. REV. 37, 41-42 (2002); Dominic J. Brewer, Susan M. Gates, & Charles A. Goldman, *In Pursuit of Prestige: Strategy and Competition in U.S. Higher Education*, Technical Papers 25-28 (2001), available at <http://www.rand.org/publications/DRU/DRU2541>.

36. BREWER ET AL., *supra* note 27, at 84.

37. In some areas, the cost of pursuing status can exceed the benefits. *See, e.g., id.* at 62-64, 109-17, 135.

38. Although *U.S. News* purports to rank schools on the basis of quality, the factors it uses relate mainly to status. This is obvious for the heavily weighted factor of reputation, based on surveys, but many of the other factors (e.g., LSAT pseudo-median, selectivity in admissions, graduation placement rate) are substantially related to status as well.

39. *See* Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311, 329-30 (1978); Scott van Alstyne, *Ranking the Law Schools: The Reality of Illusion?*, 1982 AM. BAR FOUND. RES. J. 649, 652-59; Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 J. LEGAL EDUC. 480, 481-82 (2002).

cases of reliance on external measures of success. The effects include: (1) being subject to unpredictable and uncontrollable changes in the measure by the outside entity that controls it; (2) oversimplification; (3) the external measure's driving law school decisionmaking in fundamental areas; and (4) anxiety produced by fear of not measuring up. These effects have been described above and need not be revisited. The additional point to make here is that the problems—particularly the last—are aggravated by the fact that the measure is substantially one of status, so that a school's sense of self-worth and value to society are heavily at stake. The agitation and anxiety that result are plain to see, and the cycle of agitation and anxiety—frenzied efforts in the fall, and joy or depression in the spring—has come to be as predictable as the cycle of the seasons.<sup>40</sup>

#### CONCLUSION

A number of substantial problems in the law school world have a common origin: a failure to clarify goals in core areas and develop measures for gauging success in those areas. This failure leads to the adoption of externally devised measures that are not designed to gauge institutional success and that mislead when so used. The problems are exacerbated where the extrinsic measure is substantially a measure of status—something very different from success.

The basic cure is easy to state: law schools need to be more thoughtful in clarifying their goals and in developing means for assessment. The effort by the ABA in recent years to encourage a more thorough self-study process and demand a better self-study document will be helpful.<sup>41</sup> But identifying the cure is not itself the cure. Law schools are composed of people and people notoriously do not like to set goals or to plan. To some degree, this basic problem must always be with us.

But if an ultimate cure is unattainable, there is still room for therapy. One form of therapy is for schools to realize that they can find genuine successes in the work of the faculty, in the careers and deeds of alumni, and in countless other ways; and to recognize that these are true gauges of success—truer than those determined by extrinsic measures. As a second form of therapy, schools can understand better the difference between success and status, and recognize that some putative measures of success are substantially measures of status. Many institutions will continue to seek status, just as they seek success. But by recognizing the difference, measures of status at least can be given their proper place.

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40. For an overview of some of this year's anxiety, see Leigh Jones, *Law Schools Play the Rank Game*, NAT'L L.J., Apr. 18, 2005, at 1, available at <http://www.law.com/jsp/article.jsp?id=1113555914350> (entitled *Law Schools Play the Ranking Game*).

41. ABA STANDARDS, *supra* note 11, Standard 202.