

**PAINTING BEYOND THE NUMBERS: THE ART OF
PROVIDING INCLUSIVE LAW SCHOOL ADMISSION TO
ENSURE FULL REPRESENTATION IN THE PROFESSION**
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I. INTRODUCTION

African-American¹ and Mexican-American enrollment in law schools has declined sharply since 1993.² Disconcertingly, this decline occurred during a time when both groups applied at a relatively constant rate, saw their numerical entry indicators increase, and saw the number of seats in law schools grow by over 3,000.³ This decrease in enrollment occurred because law schools place an unwarranted premium on numerical criteria⁴

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¹ Because articles that address race and ethnicity issues use varying terminology, this article will use the term used by each original source.

² See *A Disturbing Trend in Law School Diversity*, SOC’Y AM. L. TCHRS., <http://blogs.law.columbia.edu/salt/> (last visited Sept. 30, 2011). The representation of both groups has declined since 1993. *Id.* The proportion of African-Americans in the 2008 class decreased 7.5% as compared with the 1993 class. *Id.* The proportion of Mexican-Americans in the 2008 class decreased 11.7% as compared with the proportion entering law school fifteen years ago. *Id.*

³ *Id.* Including provisionally accredited schools, between 1992 and 2008, the number of law schools increased from 176 to 200. *Id.*

⁴ See Michael A. Olivas, *Higher Education Admission and the Search for One Important Thing*, 21 U. ARK. LITTLE ROCK L. REV. 993, 995 (1999) (“[A]dmission committees overwhelmingly rely upon previous cumulative GPAs and standardized test
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to predict success in law school and increase minimum levels for qualification to improve school rankings.⁵

Lawyers have a duty to ensure fair and just legal processes and to protect the rights of all people, regardless of race, religion, nationality, or gender.⁶ By the same token, law schools, the initial gatekeepers of those entering the profession⁷ and the educators of future lawyers, have a similar

scores to make their admissions decisions.”). These numerical criteria include Undergraduate Grade Point Averages (UGPA) and Law School Admission Test (LSAT) scores. *Id.* at 994.

⁵ *Id.* at 996 (“Admissions committees use UGPAs and standardized test scores in order to predict how students will do in the first-year of study.”). Most law schools use a formula to compute an admission index; they weigh the LSAT between 55%–65% in the formula. *Id.* at 1003 n.32. “Despite any shortcomings in testing the abilities of a variety of test-takers and types of learners, the LSAT weighs heavily in the law school admissions process. LSAT scores are a large component of law school rankings; thus, they have a great impact on law school admissions decisions.” Jennifer Jolly-Ryan, *The Fable of the Timed and Flagged LSAT: Do Law School Admissions Committees Want the Tortoise or the Hare?*, 38 CUMB. L. REV. 33, 35–36, (2007). See also Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN’S L. REV. 41, 67 (2006) (noting that some law schools have raised the indicators used by *U.S. News & World Report*, such as median LSAT score, to increase their rankings).

⁶ See generally *Preamble: A Lawyer’s Responsibilities*, AM. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html (last visited Nov. 10, 2011). Some argue that discriminatory hiring practices undermine the administration of justice and may violate the ABA Model Rules of Professional Conduct and the Model Code of Professional Responsibility. See, e.g., Akshat Tewary, *Legal Ethics as a Means to Address the Problem of Elite Law Firm Non-Diversity*, 12 ASIAN L.J. 1, 29–31 (2005).

⁷ See NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2011 (Erica Moeser & Claire Huisman eds., 2011), available at http://www.ncbex.org/assets/media_files/Comp-Guide/2011CompGuide.pdf. Eighteen states require a J.D. or L.L.B. to take the bar exam. *Id.* at 8–9. Moreover, of the 74,259 people taking a bar exam nationwide in 2006, only forty-four of them did “law office study,” meaning they did not matriculate from a law school. See Jerry Harkavy, *Self-Taught Lawyers Vanish as More States Require Law School*, BOSTON GLOBE, Jan. 18, 2008, http://www.boston.com/news/education/higher/articles/2008/01/18/self_taught_lawyers_vanish_as_more_states_require_law_school/.

duty to ensure that they employ inclusive, fair, and just admission practices.⁸ Unfortunately, the majority of law schools are failing to meet that charge.⁹

Law schools have abandoned “access admission” practices¹⁰ and view their heavy reliance on numerical indicators as necessary to increase their rankings in the *U.S. News & World Report*.¹¹ In addition, law schools may misinterpret the compliance requirements for American Bar Association (ABA) Accreditation.¹² Citing concerns about the current anti-race-

⁸ See ASS’N OF AM. LAW SCH., AALS HANDBOOK: MEMBERSHIP REQUIREMENTS §§ 6-1–6-3, available at http://www.aals.org/about_handbook_requirements.php (last updated Jan. 2008). This duty is more than a moral imperative; it is required by the AALS. *Id.* The AALS requires that member schools have faculty “who are devoted to fostering justice and public service in the legal community.” *Id.* at § 6-1(b)(i). In addition, it expects schools to select “students based upon intellectual ability and personal potential for success in the study and practice of law, through a fair and non-discriminatory process designed to produce a diverse student body and a broadly representative legal profession.” *Id.* at § 6-1(b)(v). Finally, it requires member schools to engage in non-discriminatory practices. *Id.* at § 6-3. The same can be said of law firm hiring practices. See Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist’s Perspective*, 95 MICH. L. REV. 1005, 1011 (1997). As stewards of justice, the legal profession, more than any other profession, must employ just practices. See *id.*

⁹ Thomas Adcock, *Law School Deans, Profs Ponder Reasons for Decline in Minority Enrollment*, N.Y. L.J., Nov. 20, 2008, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426164067>. The current admissions practice is “‘an outrageous form of institutional discrimination’ . . . ‘If this were in the employment area, you’d see disparate impact lawsuits.’” *Id.*

¹⁰ See Haddon & Post, *supra* note 5, at 55, 96–97; Paula Lustbader, *Hanging Ten: Law School Academic Support Programs Coming of Age in the Wake of the Carnegie Report, the Minimal Bar Passage Requirements for ABA Accreditation Rules, and the U.S. News and World Report Rankings 21* (Mar. 3, 2011) (unpublished manuscript) (on file with author). “Access admission” practices are those that enable a law school to consider criteria beyond numerical indicia to increase enrollment of the underrepresented. Lustbader, *supra* at 22.

¹¹ Haddon & Post, *supra* note 5, at 98. *U.S. News & World Report* ranks law schools based upon the twenty-fifth to seventy-fifth percentile of LSAT scores of entering first year law students. U.S. NEWS & WORLD REPORT, BEST GRADUATE SCHOOLS: SCHOOLS OF LAW 69–71 (2012 ed. 2012).

¹² Actually, the ABA may have created an unintended conflict. Standard 501-2 requires that admission practices be consistent with standards 211 and 212, which address diversity,
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conscious legal climate, many law schools also believe that they cannot provide access admission—even with the proliferation of Law School Academic Support Programs (ASPs) and professionals with specialized expertise to ensure students' success.¹³

By relying primarily on numerical criteria¹⁴ and adopting less comprehensive admission practices, law schools disregard the fact that

and interpretation of Standard 503 requires law schools to “use the test results in a manner that is consistent with the current guidelines regarding proper use of the test results provided by the agency that developed the test.” AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 37–38 (2011–2012). These standards suggest that law schools that over-rely on the numerical indicators could actually be in noncompliance. Standard 501(b), however, requires that law schools “not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar.” *Id.* at 37. When combined with Standard 301–6, which requires a minimum bar passage rate, the standards suggest that law schools ought to rely more on numerical indicators so that they have an “objective” rationale for their admission practices. *Id.* at 18–19.

¹³ See Lustbader, *supra* note 10, at 21. The abandonment of ASPs and the fear of potential litigation over race-conscious practices deterred many ASPs from explicitly addressing issues of underrepresentation. *See id.* Instead, most of these programs serve the bottom quartile or identified at-risk student populations. *See id.* at 3. Many of these students happen to also be from underrepresented populations. *See, e.g.,* Paula Lustbader, *Walk the Talk: Creating Learning Communities to Promote a Pedagogy of Justice*, 4 SEATTLE J. FOR SOC. JUST. 613, 630 (2005). In not addressing underrepresentation directly, law schools lose the opportunity to empower and enhance the learning experience of these students. Moreover, by not making the issues facing the underrepresented explicit, these ASPs further the stigmatization of members of these groups.

“Academic support [programs] . . . emerged in the 1980[is], largely as an outgrowth of the influx of minorities into law school and the desire to diversify the legal profession and legal education.” Ellen Yankiver Suni, *Academic Support at the Crossroads: From Minority Retention to Bar Prep and Beyond—Will Academic Support Change Legal Education or Itself Be Fundamentally Changed?*, 73 UMKC L. REV. 497, 497–98 (2004).

¹⁴ Admission practices vary between law schools. Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Ranking of ABA Law Schools*, ASS'N AM. L. SCH. (Feb. 18, 1998), <http://www.aals.org/reports/validity.html>. *U.S. News & World Report* calculates an index score that combines an applicant's UGPA and LSAT score. *Id.* *U.S. News & World Report* places different weights on these two factors—40% of the index score on UGPA and 60% on the LSAT. *Id.* Some schools create presumptive admissions for the seventy-fifth percentile and presumptive denials for the bottom twenty-fifth

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numerical criteria are poor measures of merit and predictors of success in school¹⁵ and in practice.¹⁶ Moreover, law schools disregard the importance of students' experiences prior to law school.¹⁷ These experiences often enhance a student's potential for success in law practice because they reflect more than specific cognitive and practice skills, and they encompass

percentile. See Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309, 344, 346–47 (2006). Regardless of the exact admission practices used, it is clear that the reliance on numerical indicators is at an all-time high.

¹⁵ Haddon & Post, *supra* note 5, at 57–58. Nor do numerical criteria predict how well an applicant might do when given the right kind of pedagogy and support. Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839, 843 (1997). ASPs demonstrate that with the right kind of intervention and pedagogy, students can outperform their predictors. *Id.* Specifically, students learn best when teachers provide both copious feedback and frequent exams on small amounts of material. See *id.* at 852–53; Lustbader, *supra* note 13; Lustbader, *supra* note 10.

¹⁶ Haddon & Post, *supra* note 5, at 57–58. Although many in the academy resist the idea of becoming a trade school and rebuke the notion that law schools should teach to the bar exam, the main concept of success in law school is tied directly to bar passage. See Cheng-Han Tan, *The Goals and Objectives of Law Schools Beyond Educating Students: Research, Capacity Building, Community Service—The National University of Singapore School of Law Experience*, 29 PENN ST. INT'L L. REV. 67, 75 n.27 (2010) (“As the academic ideal dominates law schools, clinical programs also sometimes face internal opposition as tending to make law school resemble more of a trade school.”); Jay Conison, *Success, Status, and the Goals of a Law School*, 37 U. TOL. L. REV. 23, 30–31 (2005) (“[F]irst-time bar passage rate has become the measure of a school's success in educating its students.”). This narrow definition of success, which is unique in graduate studies, disregards the variety of careers that graduates enter and the many successes they enjoy even if they do not take or pass a bar exam. See Jesse Rothstein & Albert Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649, 663 (2008). Also, while the combination of LSAT score and UGPA is generally a better predictor of first year grades than either LSAT score or UGPA alone, numerical indicators are less reliable for the underrepresented. See LISA ANTHONY STILWELL ET AL., LAW SCH. ADMISSION COUNCIL, LSAT TECHNICAL REPORT 98-02, ANALYSIS OF DIFFERENTIAL PREDICTION OF LAW SCHOOL PERFORMANCE BY RACIAL/ETHNIC SUBGROUPS 11, 14 (1998), available at <http://www.lsac.org/lisacresources/Research/TR/TR-98-02.pdf>.

¹⁷ See Haddon & Post, *supra* note 5, at 55, 57–58, 97; Lustbader, *supra* note 10, at 22.

professional skills and ethical values.¹⁸ Thus, by relying solely on numerical criteria, law schools disproportionately disqualify otherwise meritorious candidates from underrepresented populations¹⁹ and deprive the public of the opportunity to be represented by those aspiring lawyers.

Law schools can, and should, address concerns about their ranking and accreditation, as well as the anti-race-conscious legal climate, by modifying “by-the-numbers” admission decisions, and not by abandoning access admission practices.²⁰ To do so, schools should shift their current paradigm in three ways. First, they need to recognize that the numbers by themselves do not accurately reflect the merit or potential for success of the underrepresented. Second, law schools need to move away from the heavily charged discourse of “affirmative-action” and “race-conscious practices.”²¹ Instead, the goal of law school admission should be to ensure that all applicants receive a fair, accurate, and holistic review, especially for those applicants whose numerical criteria are unreliable, inaccurate, or non-predictive. Finally, law schools need to broaden their pedagogy and

¹⁸ See Haddon & Post, *supra* note 5, at 55, 57–58, 97.

¹⁹ If admissions eliminated racial preferences there would be a “substantial net decline in the number of African-Americans entering the bar.” David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855, 1857 (2005). Without affirmative action, fewer blacks would attend law school or enter the bar. *Id.* at 1857–60. See also Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759, 1759–1808 (2007). The elimination of race-based admissions policies would lead to a decline of approximately two-thirds in black matriculates at all law schools and a 90% decline at elite law schools. Rothstein & Yoon, *supra* note 16, at 652.

²⁰ “Effective race-neutral programs can and do consider race and ethnicity to increase and diversify the pool of applicants; such programs, however, do not consider an applicant’s race or ethnicity when selecting from that pool.” Eboni S. Nelson, *What Price Grutter? We May Have Won the Battle, but Are We Losing the War?*, 32 J.C. & U.L. 1, 6 (2005).

²¹ See *infra* Part II.A, which argues for a definition of diversity that includes members from underrepresented communities in higher education. This necessarily extends the term beyond race.

Although Alex M. Johnson, Jr. cogently argued for law schools to embrace affirmative action in 2006, he acknowledged that the pressure to increase school rankings would make it impossible for schools to embrace it today. See Johnson, *supra* note 14, at 313–14 (2006).

expand their curriculum to be responsive to a more diverse student body and to better serve the profession and public.²²

Section II of this article articulates the benefits of inclusion of the underrepresented. Section III postulates that overreliance on numerical criteria causes barriers to access. It also demonstrates that numerical criteria do not correlate to success in practice and explains why numerical criteria are less accurate indicia of merit or potential for success for underrepresented applicants. Finally, Section III displays the relevance on non-numerical factors. Section IV argues that despite concerns about rankings, ABA accreditation, and the current legal anti-race-conscious climate, law schools can fulfill their duty to provide fair and accurate admission practices. Lastly, Section V provides a prescription for inclusive admission practices that ensure access and suggests that the benefits of inclusion outweigh its costs.

II. THE BENEFITS OF INCLUSION

A. A Broad Definition of Diversity

An inclusive definition of diversity ensures greater representation of all segments of society. Students of color, race, ethnicity, political race,²³ formal or cultural race,²⁴ low socio-economic status, as well as minorities

²² The pedagogy and curriculum in law schools have long been criticized for not adequately preparing law students for the actual practice of law. *See, e.g.*, ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 5 (2007) [hereinafter BEST PRACTICES]. The most recent of these critiques was the product of the Carnegie Foundation, which sponsored a two-year comprehensive examination of teaching and learning in American and Canadian law schools. WILLIAM M. SULLIVAN ET AL., THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, SUMMARY, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 3 (2007), available at http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf [hereinafter CARNEGIE REPORT]. The report recommends that legal education incorporate integrated curriculum that provides both professional training and legal analysis beginning in the first year of law school. *Id.* at 8–9. Roy Stuckey and his co-authors recommended that legal education improve professional preparation, expand educational objectives, and diversify methods for delivering instruction. BEST PRACTICES, *supra* at 3.

²³ “Political race” is a term that includes anyone who has been the victim of discrimination. *See* LANI GUINIER & GERALD TORRES, THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 12 (2002).

²⁴ “Formal race” is a term that refers to “socially constructed formal categories . . . unrelated to ability, disadvantage, or moral culpability [and] . . . unconnected
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are all terms that label segments of the population that are underrepresented in status positions in society.²⁵ Such terms are both over- and under-inclusive.²⁶ Race matters, as does socioeconomic disadvantage. Race cannot provide a proxy for class, and class cannot serve as a proxy for race.²⁷ If the legal profession's goal is to provide true diversity of perspective, representation, and values,²⁸ then diversity must be discussed in the largest sense: that of the underrepresented segments in the profession.²⁹ In this context, this article defines "underrepresented" as including:

- persons with diverse ethnic and racial compositions;

to social attributes such as culture, education, wealth, or language." Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 4 (1991). Black and white are examples of such categories. *Id.* "Cultural race" is a term that refers to "culture, community, and consciousness." *Id.*

²⁵ *Id.*

²⁶ See, e.g., *Jana-Rock Constr. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 206 n.5 (2d Cir. 2006) ("[E]very racial classification will necessarily be overinclusive and underinclusive in some respects.").

²⁷ See Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 40–45 (1997) (concluding that socioeconomic status is not an effective proxy for race and further that using socioeconomic status instead of race in admissions decisions will not result in a diverse student body). Programs that focus exclusively on race necessarily ignore the discrimination and disadvantage faced by those in the lower socioeconomic classes. Conversely, programs that focus exclusively on class ignore the damaging effects of discrimination based on race. Even middle- and upper-class students of color have had to overcome structural racism. See Douglas M. Massey & Mary J. Fischer, *Does Rising Income Bring Integration?*, 28 SOC. SCI. RES. 316, 317 (1999) (finding that African Americans continue to lag far behind other groups in achieving integration, regardless of their socioeconomic status).

²⁸ See *Association Goals*, AM. BAR ASS'N, http://www.americanbar.org/utility/about_the_aba/association_goals.html (last visited Sept. 25, 2011).

²⁹ The "forms of diversity that are linked to histories of oppression and exclusion—race, gender, ethnicity, class and sexual orientation—warrant special consideration and protection in admission policies." Wendy Espeland & Michael Sauder, *Rankings and Diversity*, 18 S. CAL. REV. L. & SOC. JUST. 587, 606 (2008).

Because "underrepresented populations" is the most inclusive term, it is the term used throughout this article; when referring to specific data or studies, however, terms referring to the particular segments of the population addressed by the supporting source are used.

- persons with socioeconomic disadvantages;
- persons who are first-generation college graduates or immigrants;
- persons with international citizenship;
- persons with physical or learning disabilities;
- persons with non-traditional backgrounds; and
- persons who have experienced discrimination.

1. *The Value of Inclusion*

Full and meaningful participation by all segments of society is vital in a democracy.³⁰ Although early affirmative action policies and rhetoric invoked a rationale of reparations for past discrimination,³¹ these policy considerations have, over the past several decades, focused more on the value that diversity brings to numerous professional and educational settings and to military service.³² Increasing diversity in the legal profession ensures a more representative political, economic, and legal system; promotes and provides access to justice for the underserved; enriches the profession and the educational experience for all clients and students; and provides role models for future generations and promotes civic participation.³³

³⁰ *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (Ginsburg, J., concurring) (“Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”). See also Lia Epperson, *Undercover Power: Powering the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 146, 165 (2008) (quoting *Grutter*, 539 U.S. at 332). See generally Brief for Am. Bar Ass’n as Amici Curiae in Support of Defendants-Appellants, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 01-01447), available at http://www.vpcomm.umich.edu/admissions/legal/gru_amicus/aba.html.

³¹ See Nelson, *supra* note 20, at 1, 8–9.

³² See Epperson, *supra* note 30, at 161–72. Epperson notes that over 300 amicus briefs supporting diversity were filed in *Grutter*. *Id.* at 165.

³³ The ABA identifies four rationales for diversity: democratic, business, demographic, and leadership. AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 5* (Cie Armstead ed., 2009), available at http://new.abanet.org/centers/diversity/PublicDocuments/Diversity_Summary_Report.pdf.

Increasing diversity promotes greater trust and participation in the American political, economic, and legal systems.³⁴ A democracy must reflect the values and perspectives of all of its citizens.³⁵ Lawyers play a significant and powerful role in governing this country.³⁶ Including Barack Obama, approximately 59% of U.S. presidents have been lawyers.³⁷ Law is the most dominant profession of both houses of the U.S. Congress.³⁸ Approximately 59% of U.S. senators and 40% of U.S. house representatives are lawyers.³⁹ Further, approximately 24% of current U.S. governors are lawyers.⁴⁰ Lawyers also serve vital roles in private industry.⁴¹ Even if they are not in leadership positions, lawyers often

³⁴ *See id.* The ABA's "Democracy Rationale" argues that "[l]awyers and judges have a unique responsibility for sustaining a political system with broad participation by all its citizens. A diverse bar and bench create greater trust in the mechanism of government and the rule of law." *Id.* A prime example is that Barack Obama's presidential candidacy increased minority participation in the election process. Greg Ruffing, *Blacks Match Whites in Voting Races in 2008*, USA TODAY, April 30, 2009, http://www.usatoday.com/news/nation/2009-04-30-black-vote_N.htm. "In 2008, about 65% of blacks went to the polls, nearly matching the 66% voting rate for whites. Black women had the highest rates of participation among all voters at 69% . . . Blacks . . . had their sharpest increase in voter participation in more than a decade, with 15.9 million casting ballots to make up 12.1% of the electorate." *Id.*

³⁵ Brief for the Am. Bar Ass'n, *supra* note 30, at 35.

³⁶ *See* Chris Smith, *From Courtrooms to Capitols*, 44 TRIAL 54 (2008). "[L]awyers are well-trained in the skills that comprise the politician's basic toolset, including the abilities to communicate well, simplify the complex[, and argue persuasively]. These skills allow . . . attorneys to better craft legislation and lead legislative activity . . ." *Id.* at 56.

³⁷ *See generally* AMERICA'S LAWYER-PRESIDENTS: FROM LAW OFFICE TO OVAL OFFICE (Norman Gross ed., 2004).

³⁸ *See generally* MILDRED AMER, CONG. RESEARCH SERV., RS 22007, MEMBERSHIP OF THE 109TH CONGRESS: A PROFILE 3 (2006), *available at* <http://www.senate.gov/reference/resources/pdf/RS22007.pdf>.

³⁹ *See generally* AM. BAR ASS'N STANDING COMM. ON THE FED. JUDICIARY RATINGS, RATINGS OF ARTICLE III JUDICIAL NOMINEES 111TH CONGRESS, <http://www.abanet.org/scfedjud/ratings/ratings111.pdf> (last updated Dec. 3, 2010).

⁴⁰ *See generally* NAT'L GOVERNORS ASS'N, <http://www.nga.org> (last visited Sept. 30, 2011).

⁴¹ *See generally* CLARA N. CARSON, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 (2000), *available at* http://new.abanet.org/marketresearch/PublicDocuments/lawyer_statistical_report_2000.pdf.

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negotiate deals or set policy for businesses. In addition, lawyers serve as judges, legislators, and advocates, and thus make, enforce, and interpret the law and protect the citizens. Because lawyers play a dominant role in these governmental systems, their values and experience significantly shape society.

Increasing diversity in the legal profession also promotes and provides access to justice as a vehicle to political power and to the administration of justice.⁴² Legislation, enforcement, and interpretation of laws are more likely to promote justice when diverse lawyers are part of the equation. Inclusion of diverse perspectives and experiences can lead to results that more accurately reflect a client's values.⁴³ Both the profession and future clients benefit by having practitioners with rich, diverse life experiences because those practitioners will bring their perspective to the practice.⁴⁴

Moreover, increasing diversity within the legal profession promotes justice as a vehicle of upward economic mobility and also as a vehicle to enhance legal services for the underrepresented. The ability to practice law enables members of underrepresented communities to increase their upward economic mobility by entering a profession with greater earning potential.⁴⁵ In turn, these members can then use their increased economic

Further, approximately 8.4% of employed lawyers are in private industry and 0.6% are in private associations. *Id.* at 28.

⁴² See Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO J. LEGAL ETHICS 1079, 1102 (2011) (“[F]ormal diversity is intimately related to access to lawyers and justice and to the quality of representation of the under-privileged.”).

⁴³ Consequently, some majority law firms are forming alliances with minority law firms to enhance their diversity. Molly McDonough, *Demanding Diversity: Corporate Pressure in Changing the Racial Mix at Some Law Firms*, ABA J. (Mar. 28, 2005, 7:04 AM), http://abajournal.com/magazine/demanding_diversity/.

⁴⁴ See AM. BAR ASS'N PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, *supra* note 33, at 5 (“[A] diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes.”). Clients and large corporations similarly recognize the value of diversity. See, e.g., Derede McAlpin, *More Law Firms Face the Consequences of Poor Diversity Performance*, 27 OF COUNSEL 1, 1 (2008) (noting that both Shell and Wal-Mart recently fired firms that did not have adequate numbers of diverse attorneys).

⁴⁵ See generally Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329 (1986). That article emphasized:

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status to ensure more access to justice by providing both economic and pro-bono services to their communities.⁴⁶ Practitioners from underrepresented populations often promote and provide access to justice for underserved communities.⁴⁷ For example, one study found that minority alumni from the University of Michigan Law School were more likely than their white peers to represent minority clients, “begin their careers in government public service or public interest law, do more pro bono work, mentor young attorneys and serve on boards of community organizations.”⁴⁸

Inclusion of the underrepresented in the legal profession also provides role models for future generations of diverse students⁴⁹ and promotes greater civic participation, which fulfills the principles of a democratic society.⁵⁰ Studies show that a significant factor in minority students’ success during higher education is the presence of minority faculty.⁵¹

Affirmative action has . . . engender[ed] self-perpetuating benefits: the accumulation of valuable experience, the expansion of a professional class able to pass its material advantages and elevated aspirations to subsequent generations, the eradication of debilitating stereotypes, and the inclusion of black participants in the making of consequential decisions affecting black interests.”

Id.

⁴⁶ See Espeland & Sauder, *supra* note 29, at 592 (“[M]inority law graduates are more likely to serve minority clients than their white counterparts . . .”).

⁴⁷ See *id.*

⁴⁸ *Id.*

⁴⁹ Rothstein & Yoon, *supra* note 16, at 656 (citing Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 1022–34 (1996)). Although both articles focus on racial minorities, the reasoning relied upon is also applicable to all other underrepresented groups.

⁵⁰ See AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *supra* note 33, at 5.

⁵¹ See, e.g., Linda Serra Hagedorn et al., *An Investigation of Critical Mass: The Role of Latino Representation in the Success of Urban Community College Students*, 48 RES. IN HIGHER EDUC. 73, 89 (2007) (noting that the presence of Latino faculty had a substantial impact on Latino student success). See also NAT’L COLLABORATIVE ON DIVERSITY IN THE TEACHING FORCE, ASSESSMENT OF DIVERSITY IN AMERICA’S TEACHING FORCE: A CALL TO ACTION 6 (2004), available at <http://www.ate1.org/pubs/uploads/diversityreport.pdf>
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In addition to the value diversity brings to the legal profession, increasing diversity enriches the educational experience for all students.⁵² The United States Supreme Court “acknowledged that all students benefit from racially inclusive systems of public education.”⁵³ These benefits include a “better cross-racial understanding, a better-prepared citizenry, and more effective economic and national security systems.”⁵⁴

Racial isolation and segregation in public education harm both minority and white students.⁵⁵ Integrated learning environments in grades K–12 benefit all students through “improved critical thinking skills, higher graduation rates and college attendance, and greater civic participation”⁵⁶ Before college, the average white student attends schools that are 80% white,⁵⁷ thus, increasing diversity in the educational institution helps all students learn different perspectives and different points of view that they may not otherwise learn.⁵⁸ Having diverse peers in

(“Students of color tend to have higher academic, personal, and societal performance when taught by teachers from their own ethnic groups.”).

⁵² See Epperson, *supra* note 30, at 150–51 (“In the twenty-first century, social science research almost universally concludes that more racially integrated academic environments provide significant educational and social benefits for students of all races.”).

⁵³ Epperson, *supra* note 30, at 166 (citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

⁵⁴ *Id.* (citing *Grutter*, 539 U.S. at 330).

⁵⁵ See Epperson, *supra* note 30, at 151. The following discussion focuses on racial diversity because that was the purpose of the study, but the implications of the study extend beyond race. In many respects, the underrepresented are often invisible because their membership in an underrepresented community may not be apparent on the surface, so it is difficult to assess to what degree those students contributed to the classroom experience and discourse. See Bettina Spencer & Emanuele Castano, *Social Class Is Dead. Long Live Social Class! Stereotype Threat Among Low Socioeconomic Status Individuals*, 20 SOC. JUST. RES. 418, 421 (2007).

⁵⁶ Epperson, *supra* note 30, at 151.

⁵⁷ *Id.* at 150.

⁵⁸ See Patricia Gurin et al., *Diversity in Higher Education: Theory and Impact of Educational Outcomes*, 72 HARV. EDUC. REV. 330, 330 (2002). Students who interact with diverse students in classrooms and in the broad campus environment are “more motivated and better able to participate in an increasingly heterogeneous and complex society.” *Id.*

the classroom also helps to educate future lawyers, who will represent an increasingly multicultural clientele.⁵⁹

Notwithstanding the myriad ways in which diversity benefits society, especially in the legal and educational systems, the underrepresented are nevertheless disproportionately excluded from the legal profession and law schools.⁶⁰ This is true despite the overwhelming benefits of increased inclusiveness and the professed mission of the ABA,⁶¹ the Association of American Law Schools (AALS),⁶² the Law School Admission Council (LSAC),⁶³ and numerous other public and private law-related agencies to improve diversity.⁶⁴ The agencies that study data on hiring and retention narrowly define diversity only in terms of racial and gender minorities.⁶⁵ These studies reveal that although minorities comprise roughly 25% to 30% of the population,⁶⁶ they comprise less than 16.4% of the legal profession.⁶⁷ In fact, the legal profession has a lower representation of

⁵⁹ See Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17, 32 (2004).

⁶⁰ See *A Disturbing Trend in Law School Diversity*, *supra* note 2.

⁶¹ *Association Goals*, *supra* note 28.

⁶² ASS'N OF AM. LAW SCH., *supra* note 8, at § 6-1.

⁶³ See *Diversity in Law School: Racial/Ethnic Minority Applicants*, L. SCH. ADMISSION COUNCIL, <http://lsac.org/JD/Diversity/minorities-in-legal-education.asp> (last visited Oct. 2, 2011) (noting that the LSAC created a Diversity committee designed to increase the number of minorities in law school).

⁶⁴ See, e.g., *Diversity Statement*, U.S. DEP'T JUSTICE, <http://www.justice.gov/jmd/eos/diversity.htm> (last visited Oct. 2, 2011).

⁶⁵ See, e.g., AM. BAR ASS'N, HOUSEHOLD DATA ANNUAL AVERAGES, <http://new.abanet.org/marketresearch/PublicDocuments/cpsaat11.pdf> (last visited Oct. 22, 2011); Press Release, The Nat'l Ass'n for Legal Career Prof'ls, Law Firm Diversity Demographics Show Little Change, Despite Economic Downturn: Representation in Some Markets Declines While Others Show Small Gains (Oct. 21, 2009), <http://www.nalp.org/uploads/PressReleases/09NALPWomenMinoritiesRel.pdf>.

⁶⁶ See Elizabeth M. Greico & Rachel C. Cassidy, *Overview of Race and Hispanic Origin: Census 2000 Brief*, U.S. CENSUS BUREAU (Mar. 2001), <http://www.aasc.ucla.edu/cic/data/c2kbr01-1.pdf>.

⁶⁷ AM. BAR ASS'N, *supra* note 65, at 210. Within the legal profession, 19.67% of associates in law firms are of color, and approximately 6% of minority attorneys are partners. Press Release, The Nat'l Ass'n for Legal Career Prof'ls, *supra* note 65, at 1. A recent Diversity Scorecard of the large law firms found that although the percentage of minority attorneys in law firms rose from under 10% in 2000 to 13.9% in 2008, that
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minorities than any other profession.⁶⁸ There is also a similar trend in legal education for African-American and Mexican-American applicants.⁶⁹ The lack of diversity in the profession and in the schools is partially the result of law firms making “by the numbers” hiring decisions⁷⁰ and law schools making by the numbers admission decisions.⁷¹

percentage dipped to 13.4% in 2009. Emily Barker, *One Step Back: For the First Time in Years, the Population of Minority Lawyers at Big Firms Is Shrinking*, AMERICAN LAWYER, Mar. 2010, at 71. Even if this decrease is attributable to the general downsizing of firms, more minorities than Caucasians lost their jobs. *Id.* Although some firms were able to maintain their minority percentages, on average, big firms lost 6% of their overall attorneys but 9% of their minority attorneys between 2008 and 2009. *Id.* Observers fear that the findings from the annual Diversity Scorecard survey of attorneys of color may signal the start of a new downward trend. *Id.*

⁶⁸ See AM. BAR ASS'N, *supra* note 65, at 210 (showing that of the employment categories listed, “legal occupations” had the lowest percentage of minorities).

⁶⁹ Tamar Lewin, *Law School Admissions Lag Among Minorities*, N.Y. TIMES, Jan. 7, 2010, <http://nytimes.com/2010/01/07/education/07law.html> (“[F]rom 2003 to 2008, 61 percent of black applicants and 46 percent of Mexican-American applicants were denied acceptance at all of the law schools to which they applied, compared with 34 percent of white applicants.”). Of the 46,500 matriculates in law schools during 2008, only 7.3% were African-American and only 1.4% were Mexican-Americans. *Id.* Professor Conrad Johnson has asserted that enrollment of African-Americans and Mexican-Americans decreased from 1993 to 2008. *Id.* The LSAC argues that this analysis did not factor for the changes in how the LSAC collects data. Press Release, Stephen T. Schreiber, Exec. Vice President, Law Sch. Admission Council, From the LSAC in Response to Disturbing Trend in Law School Admissions (Jan. 14, 2010), <http://www.saltlaw.org/userfiles/1-14-10LSACResponse.pdf>. LSAC claims that diversity among law schools has increased from 26% in the fall of 2001 to 29% in the fall of 2008. *Id.* See also John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN'S L. REV. 167, 175 (2006) (“[C]ut-off [LSAT] scores may have a greater adverse impact upon applicants from minority groups than upon the general applicant population.”).

⁷⁰ Tewary, *supra* note 6, at 11. Firms with lower success in increasing diversity place greater emphasis on law school grades and law review membership. See *id.* at 11. These criteria often negate other indicators of success, such as recommendations from professors, course work, and community service. See *id.*

⁷¹ Haddon & Post, *supra* note 5, at 57–58, 95–97. In looking at law school application data from 1991, Professors Jesse Rothstein and Albert H. Yoon contend that utilization of race-blind admissions procedures would cause black enrollment to decline by ninety
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III. OVERRELIANCE ON NUMERICAL INDICATORS CAUSES UNDERREPRESENTATION

Some studies suggest that 70%–80% of law school admission decisions are based solely upon Undergraduate Grade Point Averages (UGPA) and Law School Admission Test (LSAT) scores.⁷² By over-relying on numerical indicators in admission practices, law schools limit opportunities for large segments of the underrepresented.⁷³ Numerical indicators are the least reliable predictors for the historically underrepresented in higher education and in the profession.⁷⁴ By basing admission decisions on numbers alone, these institutions disregard the value of experience, character development, and determination.⁷⁵ In doing so, they undermine the promise of the “American Dream” that one’s accident of birth will not determine one’s opportunities.

Most law schools rationalize their reliance on numerical criteria because they feel the pressure to increase selectivity ratings from the *U.S. News & World Report* rankings, comply with the demands of ABA Accreditation Standards, and avoid potential litigation in the current anti-race-conscious legal climate.⁷⁶

percent in the most selective law schools, and would reduce the number of “new black lawyers by at least 50%.” See Rothstein & Yoon, *supra* note 16, at 652.

⁷² Hadden & Post, *supra* note 5, at 55, 96.

⁷³ See Nussbaumer, *supra* note 69, at 175.

⁷⁴ See Haddon & Post, *supra* note 5, at 55, 95–97. As stated by LSAC President Phil Shelton, “[T]he evidence is very clear that the test has a disparate impact based on race, and if the test is being used contrary to LSAC guidelines that could provide a valid basis for proving racial discrimination.” Nussbaumer, *supra* note 69, at 175 (alteration in original).

⁷⁵ See Hadden & Post, *supra* note 5, at 97.

⁷⁶ *Id.* at 66–67, 73–74. This article noted:

Litigation and political pressure to maintain preferences that work in favor of middle-class whites who have traditionally been disproportionately accepted works against reform challenging the reliance on test scores. Law schools have generally espoused a commitment to greater diversity than admissions decisions based primarily on the numbers would produce, but they are also afraid of lawsuits alleging reverse discrimination and political reaction that would follow.

Id. See also *supra* note 12. In addition to these concerns, many schools claim that admissions based on numerical criteria is more cost-effective than conducting holistic
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Many law schools find solace in the “mismatch” theory to rationalize their under-enrollment of the underrepresented with LSAT scores lower than the school’s average.⁷⁷ The argument is that numerical indicators accurately represent potential; therefore, applicants with lower numbers would fare better in schools that accept students with those numbers.⁷⁸ Professor Richard Sander, a key promoter of the theory, postulates that because access admission students are mismatched to their school, they do not perform as well as they would if they were in a lower tiered school.⁷⁹

However, the mismatch theory has weak statistical support:

Half or more of the black-white gap in law school outcomes can be attributed to differences in entering academic credentials that have nothing to do with the selectivity of the schools that students attend. What mismatch effects there may be are concentrated among the black students with the weakest entering academic credentials; moderately qualified students do not appear to experience mismatch affects even when they attend highly selective law schools.”⁸⁰

Without access admission, black enrollment at selective schools would decline by 90%,⁸¹ leaving the few black students who remain in selective schools without a critical mass or academic support.

In addition, the mismatch theory ignores the studies which show that minority students’ academic performance is enhanced when they are in more challenging and integrated learning environments.⁸² Another problem with the mismatch theory is that it erroneously presupposes that

reviews or offering ASPs to ensure success of the underrepresented with lower numerical indicators. Hadden & Post, *supra* note 5, at 99–100.

⁷⁷ See generally Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

⁷⁸ *Id.* at 370–72.

⁷⁹ *Id.* For a thorough critique of Sander’s position, see Beverly I. Moran, *The Case for Black Inferiority? What Must Be True if Professor Sander Is Right: A Response to Systemic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L.J. 41 (2005).

⁸⁰ Rothstein & Yoon, *supra* note 16, at 652.

⁸¹ *Id.*

⁸² See, e.g., *id.* at 660–63 (citing studies which show that minority students’ academic performance suffers in challenging and integrated learning situations due to mismatch effects).

academic performance correlates with professional performance.⁸³ Many exceptional practitioners did not do well academically, and some even failed the bar their first time.⁸⁴ Finally, denying access to the more elite schools effectively denies access to many of the opportunities for positions of prestige and power in this country.⁸⁵

Numerical indicia are not capable of quantifying other attributes, such as character, discipline, personal skills, and motivation, which are all equally important in assessing who has “earned” a right to participate and who brings value to the school, the profession, and the community.⁸⁶ Moreover, when admission personnel treat merit as an objective truth, they neglect to take into account that all people are products of their environment;⁸⁷ as a result, “merit” based on the numbers often reflects a person’s relative privilege and opportunity.⁸⁸ Although numerical criteria can be reliable predictors of potential for success in law school for some segments of the population, they do not necessarily predict success in practice.⁸⁹ Moreover, the LSAT and the UGPA less accurately predict

⁸³ See Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1245 n.59 (1991). Thus, because law schools focus less on practical training, students who are struggling academically in law school may not necessarily struggle in practice.

⁸⁴ See, e.g., James Bandler & Nathan Koppel, *Raising the Bar: Even Top Lawyers Fail California’s Tough Examination*, WALL ST. J. ASIA, Dec. 6, 2005, at 32, available at ProQuest, Doc. No. 937425901. In addition, even those who do not sit for or pass a bar exam may use their law degree in other ways and have very successful careers. Rothstein & Yoon, *supra* note 16, at 663 n.52. Thus, failure on a bar exam does not equate with failure in life.

⁸⁵ See David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1934–41 (2005) (noting that obtaining an elite law degree is especially valuable for African-American attorneys, who must overcome significant barriers that make whites “skeptical of their competence” and hesitant to give them “important opportunities”).

⁸⁶ See Hadden & Post, *supra* note 5, at 57, 60–61, 97.

⁸⁷ See *id.* at 57.

⁸⁸ See *id.* at 77–83 (noting that group-based differences in performance on the LSAT persist with respect to race, gender, and class).

⁸⁹ See Jonathan D. Glater, *Study Offers a New Test of Potential Lawyers*, N.Y. TIMES, Mar. 11, 2009, at A22 (discussing a study that showed the LSAT was not “‘particularly useful’ in predicting lawyer effectiveness”).

potential for success in law school for the underrepresented.⁹⁰ Finally, such reliance on numerical indicators discounts the predictive value of non-numerical factors.⁹¹

A. Numerical Indicators Do Not Correlate to Success in Practice

LSAT scores do not correlate to success in practice because the LSAT measures only cognitive skills, not the other skills necessary for success in the practice of law.⁹² In other words:

The LSAT does not measure motivation, perseverance, character, interpersonal skills, problem-solving skills, oral communication, empathy for clients, commitment to public service, or the likelihood that the applicant will work with underserved communities. Law schools, by neglecting these important qualities, do a disservice to the legal profession and its clients, and they limit the legal profession's ability to provide meaningful access to legal services to all segments of society.⁹³

Professors Marjorie M. Shultz and Sheldon Zedeck are designing an alternative to the LSAT test that would measure potential to succeed in practice.⁹⁴ They designed a test to measure factors necessary for success as a lawyer, including “the ability to write, manage stress, listen, research the law and solve problems.”⁹⁵ They found that the “Shultz-Zedeck” test was useful in predicting effectiveness in practice, but was “no better” than the LSAT in predicting law school performance.⁹⁶ However, they also found that the LSAT was not “particularly useful in predicting lawyer effectiveness.”⁹⁷ Unlike the LSAT, however, the Shultz-Zedeck test did

⁹⁰ See William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Education Attainment?: A Study of Equally Achieving “Elite” College Students*, 89 CAL. L. REV. 1055, 1101–02 (2001) (citing studies which demonstrate that the LSAT is a weak predictor for minority student performance in law school).

⁹¹ See Hadden & Post, *supra* note 5, at 60, 97.

⁹² See Hadden & Post, *supra* note 5, at 53–54, 60, 97.

⁹³ *Id.* at 97.

⁹⁴ Glater, *supra* note 89, at A22. LSAC helped fund the research to develop this test. *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

not produce different results based on race.⁹⁸ Given this disconnect, law schools might consider using both the Shultz-Zedeck test and the LSAT in conjunction with other indicators to help achieve less discriminatory admission practices.⁹⁹

Results from a University of Michigan Law School study demonstrate strong evidence that numerical indicators do not correlate with success on the bar exam or in practice.¹⁰⁰ Researchers studied alumni who graduated between 1970 and 1996.¹⁰¹ They found a “strong statistically significant relationship” between UGPA and LSAT scores and law school grades,¹⁰² but no “significant relationship” between those indicia and success in the practice of law.¹⁰³ The study reported that 97.2% of the minority alumni passed at least one bar exam.¹⁰⁴ Although it is unknown whether the remaining 2.8% had attempted and failed to pass a bar exam or whether

⁹⁸ *Id.*

⁹⁹ This study highlights what both the MacCrate and Carnegie Reports cited as a major problem in legal education: the large disconnect between law school and practice. CARNEGIE REPORT, *supra* note 22, at 6; ROBERT MACCRATE ET AL., AM. BAR ASS’N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT]. If the Shultz-Zedeck test is useful in predicting success in practice but not useful in predicting success in law school, and the LSAT test is useful in predicting success in law school for a particular segment of the population but not useful in predicting success in practice, then the legal academy needs to continue its efforts to address the disconnect. *See* Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 SEATTLE U. L. REV. 51, 82 (2010) (“The MacCrate Report stimulated a great deal of controversy and a great deal of discourse and scholarship on teaching, lawyering, professionalism, and core skills.”). The education of professionals is a complex process, and its value depends in large part upon how well several aspects of professional training are understood and woven into a whole. That is the challenge for legal education: linking the interests of legal educators with the needs of legal practitioners and with the public the profession is pledged to serve. *See* CARNEGIE REPORT, *supra* note 22, at 6.

¹⁰⁰ *See* David L. Chambers et al., *Doing Well & Doing Good: The Careers of Minority and White Graduates of the University of Michigan Law School*, 42 L. QUADRANGLE NOTES 60, 63 (1999).

¹⁰¹ *Id.* at 61.

¹⁰² *Id.* at 70.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 63.

they never took a bar exam, those alumni reported “high satisfaction” with their non-law careers, and two-thirds indicated that their legal education was a “great value” in their current career.¹⁰⁵ Researchers found that African-American, Latino, Latina, and Native American alumni who entered law school with lower LSAT scores than their white colleagues achieved a similar level of success, as measured by income levels, job satisfaction, and pro bono service.¹⁰⁶

The Seattle University Academic Resource Center (ARC)¹⁰⁷ alumni’s success¹⁰⁸ also demonstrates that UGPA and LSAT scores do not correlate with success in practice. ARC alumni make a difference and thrive professionally.¹⁰⁹ They work as state and federal court clerks; partners and associates in big, medium, and small firms; solo practitioners; prosecutors and defense attorneys; U.S. and state assistant attorneys general; public interest lawyers; policy advisors for governors, state and federal legislators, corporations, and not-for-profit organizations; educators;¹¹⁰

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 62.

¹⁰⁷ The Academic Resource Center (ARC) at Seattle University School of Law started in 1987 with the purpose to provide access and “help diverse and non-traditional students adjust, succeed, and excel in law school.” *Academic Resource Center Program Overview*, SEATTLE U. SCH. L., http://law.seattleu.edu/Academics/Academic_Resource_Center/Program_Overview.xml (last visited Sept. 25, 2011). Its pedagogy centers around “acculturating and empowering those who may or do feel disenfranchised by the law school experience.” *Id.* Students admitted under the Access Admission Program typically have an average LSAT score ten points lower than the presumptive admit scores. Paula Lustbader, *The ARC Program at Seattle University: The Value Added 1* (unpublished study) (on file with author). These students attend a “mandatory seven-week summer course that combines Criminal Law, Legal Writing, and Study Strategies, all taught by faculty for credit. In addition, the formal program includes voluntary study sessions through the entire first year and selected upper-level courses that are taught by student teaching assistants.” *Academic Resource Center Program Overview, supra.*

¹⁰⁸ Paula Lustbader, *SU Academic Resource Center Alumni Pay It Forward*, SEATTLE U. SCH. L. (Sept. 2010), <http://www.law.seattleu.edu/x9031.xml>.

¹⁰⁹ The information in this section is derived from the author’s personal knowledge and experience with ARC alumni. For additional information or details relating to information in this section, please contact the author.

¹¹⁰ Specifically, the author is aware of one alumnus who was a law professor, two who are currently working as academic support professionals in law schools, others who teach or are administrators at undergraduate and community colleges, one who is dean of the school
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corporate counsel in large corporations; and judges. One works as the general counsel for a Native Alaskan Corporation. Another alumna, who lives a traditional tribal life on a reservation and who had to traverse the significant cultural divide between the reservation and the law school, recently served as the Chief Justice of the Spokane Tribal Court. Another alumna works as a policy analyst and director of a nonprofit organization that focuses on issues of immigrant rights, health, and domestic violence. She successfully introduced and passed a bill to provide human trafficking and domestic violence victims with access to Medi-Cal, cash assistance, and job training. Another alumna works as the Washington State Bar Diversity Manager.

Many alumni broke barriers. One alumnus was the first African-American on the Pierce County Superior Court. Another was the first African-American woman and another was the first woman elected prosecutor in their respective counties. ARC alumni assume leadership roles in the profession. They serve as Washington State Bar Association Leadership Institute Fellows, including five of the twelve 2010 Fellows. Two are serving on the Washington State Bar Association Board of Governors, and several are on the boards of various bar committees. Three of the most recent presidents of the Loren Miller Bar Association have been ARC alumni, as have four of the most recent presidents of the Latino and Latina Bar Association of Washington.

ARC alumni are recipients of countless bar association awards, including one African-American alumnus who received the Washington State Bar Association Award for Courage for representing a white supremacist. Most recently, one alumnus received the 2009 Champion of Justice Award from the Washington Association of Criminal Defense Lawyers for his work as president of the Seattle King County NAACP; one received the Washington State Bar Association's 2009 Courageous Award and is the president of the Young Lawyers Division in his county; and one was named one of five top community college presidents in the country.

B. Why LSAT Scores Are Less Predictive for the Underrepresented

The LSAT measures “acquired reading and verbal reasoning skills . . . that are considered essential for success in law school.”¹¹¹

of education at a prestigious university, and another who is president of a community college.

¹¹¹ *About the LSAT*, L. SCH. ADMISSION COUNCIL, <http://www.lsac.org/JD/LSAT/about-the-LSAT.asp> (last visited Sept. 25, 2011).

Although a “modest” correlation exists between LSAT scores and first year law school grades,¹¹² it was never intended to trump other factors in admission decisions.¹¹³ The LSAC¹¹⁴ continually cautions that the LSAT is not a perfect predictor of potential for success, and it impresses upon law schools to adopt a more holistic approach to making admission decisions.¹¹⁵ The LSAC guidelines specifically state that law schools

¹¹² Johnson, *supra* note 8, at 313. In fact, the LSAT score may be as predictive, if not more predictive, of first year law schools grades for black, Hispanic, and Mexican-Americans. *Id.* at 340.

¹¹³ See Hadden & Post, *supra* note 5, at 55.

¹¹⁴ The LSAC is the designer and administrator of the LSAT. *About the Law School Admission Council*, L. SCH. ADMISSION COUNCIL, <http://www.lsac.org/aboutlsac/aboutlsac.asp> (last visited Sept. 25, 2011).

¹¹⁵ See Leonard M. Baynes, Introduction, *The Ronald H. Brown Center for Civil Rights and Economic Development Symposium: The LSAT*, U.S. News & World Report, and *Minority Admissions*, 80 ST. JOHN’S L. REV. 1, 7 (2006).

In its efforts to dissuade law schools and other organizations such as the *U.S. News & World Report* rankings from over-relying on LSAT scores, the LSAC has sponsored research on the accuracy of the LSAT as a predictor of success. ANDREA E. THORNTON ET AL., LAW SCH. ADMISSION COUNCIL, LSAC TECHNICAL REPORT 01-01, PREDICTIVE VALIDITY OF ACCOMMODATED LSAT SCORES 2 (1998), available at <http://www.lsac.org/LSACResources/Research/TR/TR-01-01.pdf>. It has also supported efforts to design an alternative test that measures skills necessary for success in the legal profession. See Hadden & Post, *supra* note 5, at 86. It tried to provide law schools with models for admissions that place less emphasis on the LSAT. For example, in 2000, the LSAC created the “Initiative to Advance Education on the LSAT.” Pamela Edwards, *The Shell Game: Who Is Responsible for the Overuse of the LSAT in Law School Admissions?*, 80 ST. JOHN’S L. REV. 153, 158 (2006). It devoted ten million dollars to this five-year project. *Id.* The Initiative’s purpose was to promote greater diversity by providing law schools admission models that place less emphasis on the LSAT. *Id.*

LSAC has also experimented with its reporting methods such as reporting score-bands instead of individual scores. See Hadden & Post, *supra* note 5, at 88. Despite these efforts, it is the author’s belief that most law schools sacrifice accuracy and fairness for efficiency. Part of the pressure for law schools to base admission decisions on numerical criteria may come from applicants who want a quick response, and the increase in online applications has likely only made matters more urgent. In an effort to compete for the best applicants, schools often engage in a race to admit first. Schools may require applicants to accept admission within a short deadline, so when a prospective student applies to schools A and B and is accepted at B, the prospective student must sometimes give an answer before hearing
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should use the scores “as only one of several criteria for evaluation and should not be given undue weight solely because its use is convenient,” and that “[c]ut-off LSAT scores . . . are strongly discouraged” because “cut-off scores may have a greater adverse impact upon applicants from minority groups than upon the general applicant population.”¹¹⁶

Despite the LSAC’s efforts and the lack of correlation between LSAT scores and success in practice, law schools continue to over-rely on LSAT scores.¹¹⁷ In doing so, they significantly reduce enrollment of the underrepresented.¹¹⁸ All applicants of color, except for Asian-Americans, have significantly lower mean LSAT scores than white applicants.¹¹⁹ A

from A, and thereby abandon holistic reviews. Some scholars argue that because of the LSAT’s disparate impact and limited predictive value, law schools should reduce or eliminate their reliance on it. See, e.g., Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1, 10 (2001).

¹¹⁶ LAW SCH. ADMISSION COUNCIL, CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES 2 (2005), available at <http://www.lsac.org/LSACResources/Publications/PDFs/CautionaryPolicies.pdf>.

¹¹⁷ See Haddon & Post, *supra* note 5, at 54–55.

¹¹⁸ Johnson, *supra* note 8, at 332–44. Although no evidence suggests that the drafters of standardized tests intend to discriminate, the fact remains that standardized tests, including the LSAT, disparately burden the underrepresented. See Spencer & Castano, *supra* note 55, at 419. Additionally, significant achievement gaps exist between English language learners and native English speakers. John W. Young et al., *Validity and Fairness of State Standards-Based Assessments for English Language Learners*, 13 EDUC. ASSESSMENT, 170, 172 (2008).

¹¹⁹ Johnson, *supra* note 8, at 334. Since the mid-1990s, the total enrollment percentage of African-Americans in law schools has decreased. *Legal Education Statistics: African American J.D. Enrollment 1971–2010*, AM. BAR ASS’N., <http://www.abanet.org/legaled/statistics/charts/stats%20-%202013.pdf> (last visited Sept. 30, 2011). In 1995–1996, African-Americans comprised 7.6%, but in 2008–2009, they comprised only 6.8%. *Id.*

The model-minority myth presumes all Asian ethnic groups are similarly represented in higher education. See Marty B. Lorenzo, *Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest*, 2 MICH. J. RACE & L. 361, 412–13 (1997). However, this presumption is not the case. The number of Asian-Americans entering law schools has risen, but these students are predominately of Chinese, Japanese, and Korean ethnicity. *Id.* at 413. Students from Southeast Asia and the Pacific Islands are still significantly underrepresented. *Id.* at 413–14. See also Paul Wong et al., *Asian Americans As a Model Minority: Self-Perceptions and Perceptions by Other Racial Groups*, 41 SOC. PERSP. 95, 98 (1998) (“Even though the model minority stereotype may describe Asian Americans of

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low LSAT score creates a barrier for applicants in three ways: (1) it reduces their chances of getting accepted into law schools of their choice; (2) it reduces their chances of getting accepted into any law school at all;¹²⁰ and (3) it reduces their chances of receiving merit scholarships.¹²¹ The lower LSAT scores both restrict opportunities for the underrepresented and do not accurately predict a student's ability and potential.

The LSAT inaccurately predicts student potential for four reasons. First, there is bias in the test.¹²² Second, the LSAT less accurately predicts potential for applicants who underperform on the LSAT because of stereotype threat or psychological stress.¹²³ Third, the LSAT's tenuous correlation to first year grades in law school does not account for other factors that might influence grades, and it does not correlate with grades or

higher socioeconomic status, it does not describe Southeast Asians and Pacific Islanders who, for the most part, are poorly educated, underemployed, and trapped in low-paying menial jobs.”).

¹²⁰ African-American applicants are the most severely impaired. They score lower than their Caucasian counterparts and have almost double the rejection rate; 63% of the African-American applicants were rejected as compared to 35% of the Caucasian applicants. Lewin, *supra* note 69. For 2002 and 2004, Professor and Associate Dean John Nussbaumer evaluated admissions data from eight law school markets: California, New York, Florida, Washington D.C. Area, Illinois, Ohio, and Texas. Nussbaumer, *supra* note 69, at 170–74. He found that 82% of the schools raised their twenty-fifth percentile LSAT scores and that 62% of those schools saw a decrease in their African-American enrollment by 19%. *Id.* at 174. Additionally, a review of enrollment data from 1976–1979 and 1985 shows that an African-American applicant with a 3.75 UGPA had a lower chance of acceptance than a Caucasian applicant with a 3.25. William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African-American, Latino, and American Indian Law School Admissions, 1950–2000*, 19 HARV. BLACKLETTER L.J. 1, 26–27 (2003).

¹²¹ See William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 22–24 (2000).

¹²² Roy Freedle, *How and Why Standardized Tests Systematically Underestimate African-Americans' True Verbal Ability and What to Do About It: Towards the Promotion of Two New Theories with Practical Applications*, 80 ST. JOHN'S L. REV. 183, 214–15 (2006). See generally ELIZABETH CHAMBLISS, *MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION* (2004).

¹²³ See Claude Steele et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 4–28 (1999); Haddon & Post, *supra* note 5, at 57.

other indicia of success after the first year.¹²⁴ Finally, the LSAT under-predicts potential for success where schools provide appropriate interventions such as ASPs.¹²⁵

First, the LSAT under-predicts potential because of racial and ethnic bias inherent in the test.¹²⁶ This bias is demonstrated by a consistent achievement gap between minority students and white students.¹²⁷ While urging law schools to use the LSAT for the limited purpose for which it was intended, supporters of the LSAT argue that the test is not biased or discriminatory against racial minorities because the achievement gap exists in all standardized tests, not merely the LSAT.¹²⁸ For example, Dean Alex Johnson Jr., and Professor William S. Pattee at the University of Minnesota Law School also defend the test by noting that new questions on the LSAT are tested three times to ensure both that there is equality in performance among subgroups and that the test validly, albeit “imprecisely,”¹²⁹ predicts first year law school grades.¹³⁰

The argument that the achievement gap on standardized testing is not limited to the LSAT does not show lack of bias on the LSAT; rather, it suggests bias in all standardized tests. Such bias could be the result of the way these tests are constructed.¹³¹ Dr. Roy Freedle, a retiree from the

¹²⁴ Jolly-Ryan, *supra* note 5, at 62; Haddon & Post, *supra* note 5, at 57, 60.

The type of reading required to [complete] all of the questions on the LSAT within time limitations does not equate to the type of reading one must do in law school or in an effective practice of law . . . Thus, while the ability to [complete] all one hundred-plus questions on the LSAT within strict time limitations might predict first year success, that correlation might have more to do with the types of assessment methods utilized in law schools, rather than with the realities of how lawyers and law students need to read.

Jolly-Ryan, *supra* note 5, at 62.

¹²⁵ Lustbader, *supra* note 15, at 843.

¹²⁶ See Freedle, *supra* note 122, at 214–15.

¹²⁷ See *id.*

¹²⁸ See, e.g., Johnson, *supra* note 8, at 340–41.

¹²⁹ See *id.* at 347 (“[O]ne should not rely too heavily on the numbers in the admissions process because although the LSAT and UGPA provide reliable and comparable information, those numbers alone do not predict precisely (or anywhere close to precisely) how students will perform in the first year of law school.”).

¹³⁰ *Id.* at 338–42.

¹³¹ See Freedle, *supra* note 122, at 215.

Educational Testing Service, asserts that the LSAT is biased because “[i]t leads to mean racial differences” and “it probably contains significant individual item bias.”¹³² First, Dr. Freedle argues that no racial disparity exists on standardized verbal intelligence test scores, but racial disparity exists on LSAT scores; therefore, the LSAT is an inherently biased test.¹³³ Second, the LSAT is constructed in a way that perpetuates bias.¹³⁴ To maintain the reliability of the test, new test questions are constructed from a sample of potential questions included in a previous testing cycle.¹³⁵ Before a question is included in a future test, the results of the previous testing cycle must show that there is not a different outcome for individuals in different subgroups answering the question.¹³⁶ Because inherent bias exists in the test to begin with, the test questions that receive the highest number of such responses likely come disproportionately from white test-takers; thus, future questions will continue to bias in favor of white test-takers. As a result, the LSAT does not accurately measure the intelligence or aptitude of the underrepresented because it has inherent bias.

Furthermore, the LSAT also inaccurately predicts potential for these populations because it does not factor in stereotype vulnerability.¹³⁷ The fear of perpetuating a negative stereotype of a stigmatized group of which the test taker is a member impairs ability to perform.¹³⁸ Studies demonstrate that on standardized tests, stereotype threats impair the performance of African-Americans, Latinos, Latinas, athletes, white men,

¹³² *Id.* at 214.

¹³³ *Id.* at 214–15.

¹³⁴ *Id.* at 215.

¹³⁵ Johnson, *supra* note 8, at 338–39.

¹³⁶ *Id.* Johnson provided an example:

For example, if 63% of the white test-takers who score between 158–160 answer an item correctly, one would assume that approximately 63% of African-American test-takers with the same score range should also answer the item correctly. If, however, only 30% of these African Americans answer the question correctly, the item would be deemed suspect and would not be used.

Id.

¹³⁷ See Haddon & Post, *supra* note 5, at 57.

¹³⁸ Steele et al., *supra* note 123, at 6; Spencer & Castano, *supra* note 55, at 422.

gay men, and women taking math tests.¹³⁹ This same stereotype vulnerability applies to the socioeconomically disadvantaged.¹⁴⁰ In one study at the University of Michigan, researchers gave college students enrolled in an introductory psychology course an exam consisting of difficult math questions.¹⁴¹ The exam consisted of eleven questions, six questions comprising the first test and five comprising the second.¹⁴² Researchers told the first group of participants that the first test had been shown to produce gender differences in mathematical abilities and that the second test had not been shown to produce gender differences.¹⁴³ The second group of participants was told just the opposite.¹⁴⁴ The women significantly underperformed compared to the men when the participants were told that the test was sensitive to gender differences.¹⁴⁵ However, when participants thought the test was insensitive to gender differences, the women performed at the same level as the men.¹⁴⁶ Thus, the concern of perpetuating the negative stereotype that women do not do well in math had an extra psychological barrier for the women to work through while they were taking the test.¹⁴⁷

Even positive stereotypes can have negative implications. For example, the “model minority” stigma attached to Asian-Americans would lead one to expect superior law school outcomes.¹⁴⁸ Asian-Americans are stereotyped as successfully assimilated into American society because they

¹³⁹ Spencer & Castano, *supra* note 55, at 422. One interesting study revealed the impact of both positive and negative stereotyping. Asian-American women, when prompted to think of their ethnicity, performed better than the control group on math tests, which reinforced the positive stereotype that Asians have superior mathematical abilities; however, they performed worse than the control when they were prompted to think of their gender, which reinforced the negative stereotype that women have inferior mathematical abilities. *Id.*

¹⁴⁰ *Id.* at 428.

¹⁴¹ Steele et al., *supra* note 123, at 10–11.

¹⁴² *Id.* at 11.

¹⁴³ *Id.* at 11–12.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 12.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 13.

¹⁴⁸ Timothy L. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 *LAW & SOC. INQUIRY* 711, 760 (2004).

are “hardworking, intelligent, and successful,” especially when they are compared to other people of color.¹⁴⁹ These “positive” stigmas of Asian-Americans surround math, science, and technical competencies.¹⁵⁰ The other side of this stereotype pigeonholes Asian-Americans as having lower verbal abilities and community skills, as being one-dimensional “grinds,” and as lacking in personality and individuality.¹⁵¹ Fear of confirming this negative aspect of the stereotype impairs their academic performance.¹⁵²

As stereotype vulnerability studies show, the psychological burden on test-takers can be paralyzing and result in lower performance on standardized tests.¹⁵³ The presence of stereotype vulnerability, coupled with expectations of underachievement and negative educational experiences can combine to create “dispositional test anxiety.”¹⁵⁴ A recent study showed that first-time bar takers with such anxiety had a greater chance of failing than those takers with similar first year law school GPA.¹⁵⁵ More significantly, second-time bar takers with such anxiety showed a stronger predictor of failure than first year law school GPA.¹⁵⁶

To overcome test anxiety and do well on these tests, students must have confidence in their own abilities.¹⁵⁷ That confidence quickly erodes for those students who went through an educational process where they were expected to underachieve.¹⁵⁸ It also erodes when they are only one in

¹⁴⁹ See Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 238 (1995).

¹⁵⁰ Clydesdale, *supra* note 148, at 760 (citing Frederick Y. Yu, *One Minority's Reaction*, 67 B. EXAMINER 22, 23 (1998)).

¹⁵¹ See Wu, *supra* note 149, at 240–41.

¹⁵² See Clydesdale, *supra* note 148, at 759–60.

¹⁵³ See Spencer & Castano, *supra* note 55, at 421–23.

¹⁵⁴ Keith A. Kaufman et al., *Passing the Bar Exam: Psychological, Educational, and Demographic Predictors of Success*, 57 J. LEGAL EDUC. 205, 207 (2007). Dispositional test anxiety, as compared to worry, causes test takers to “react with intrusive thoughts, mental disorganization, tension, and physiological arousal” when taking tests. *Id.*

¹⁵⁵ *Id.* at 213–14.

¹⁵⁶ *Id.* at 216.

¹⁵⁷ *Id.* at 217.

¹⁵⁸ See Richard Rothstein, *Class and the Classroom: Even the Best Schools Can't Close the Race Achievement Gap*, AM. SCH. BD. J., October 2004, at 17, 20. One study showed that by age three, children from professional parents heard 500,000 words of encouragement and 80,000 discouragements, as compared to children from parents on welfare, who heard 80,000 words of encouragement and 200,000 discouragements. PAUL

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a small percentage of peers who have made it this far.¹⁵⁹ It erodes when few role models exist to show how it can be done.¹⁶⁰ Finally, confidence erodes when students had inadequate educational intervention the first time they performed poorly on a standardized test.¹⁶¹ Students build confidence by having a series of little successes, not a series of poor test results. A test that does not account for the psychological impact of stereotype vulnerability and related test anxiety does not accurately predict the potential of underrepresented students.

LSAT scores also inaccurately predict potential by failing to predict success in grades beyond the first year¹⁶² and other indicia of success.¹⁶³ Although there may be some correlation between the LSAT and first year grades, African-American students' grades increase in the second and third year more significantly than Caucasian students.¹⁶⁴ Most students' grades increase after the first year for a variety of reasons, including that students become more familiar with what is expected of them and how to study.¹⁶⁵ The fact that the grades of the African-American students increased more than the Caucasian students may be the result of the "late blooming" phenomena where undergraduate minorities and economically disadvantaged students in elite schools "rose" and became competitive with their counterparts.¹⁶⁶ Denying admission based on a correlation with

TOUGH, WHATEVER IT TAKES: GEOFFREY CANADA'S QUEST TO CHANGE HARLEM AND AMERICA 42 (2009).

¹⁵⁹ See Edwin J. Peterson, *The Oregon Supreme Court Task Force on Racial Issues in the Courts: A Call for Self-Examination*, 32 WILLAMETTE L. REV. 609, 611, 615 (1996) (noting that from 1989 to 1993, entering first year law school classes in Oregon included an average minority representation of 12%, with an average attrition rate of 25% among those students, caused at least in part by the damage wrought to minority student self-esteem and self-confidence by express or implicit indication that minority students need special help).

¹⁶⁰ See Rothstein, *supra* note 158, at 19–20.

¹⁶¹ See Kaufman et al., *supra* note 154, at 217.

¹⁶² See Hadden & Post, *supra* note 5, at 57, 70–71.

¹⁶³ See Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107, 142 (2006).

¹⁶⁴ Freedle, *supra* note 122, at 216.

¹⁶⁵ *Id.* at 216–17.

¹⁶⁶ *Id.* at 218–19.

first year grades is unfair because students can and do learn those skills necessary for success in law school.¹⁶⁷

Moreover, the LSAT does not predict other indicia of success such as networking, relationship building, leadership, and interpersonal success, which are all vital to success in law school and beyond.¹⁶⁸ For example, despite their lower-than-average LSAT scores, ARC students at Seattle University School of Law, make a disproportionate contribution to the law school. As of June 2009, although ARC students comprised only about 10% of the entire student body, nine of the last twenty-three Student Bar Association presidents were ARC students; four of the most recent graduation speakers were ARC students; and countless ARC students participated in the leadership positions in student organizations such as Moot Court, Alternative Dispute Resolution, Law Review, and the Seattle Journal for Social Justice.¹⁶⁹ The LSAT does not provide an accurate picture of such applicants' strengths and potential to contribute to the educational environment.

Finally, the LSAT does not accurately predict success for underrepresented students who are supported with the right type of mentoring, academic support, or educational environment.¹⁷⁰ Consider the psychological distress many underrepresented students experience that may create dispositional exam anxiety.¹⁷¹ This anxiety impairs learning, studying, exam taking, and bar passage.¹⁷² Any university counseling center can provide effective interventions to help students overcome such anxiety.¹⁷³ For example, students in the Academic Excellence Program (AEP) at the University of Dayton School of Law outperformed their

¹⁶⁷ See, e.g., Randall, *supra* note 163, at 123 (“[A]s LSAC acknowledges, the LSAT is a skills test and not an abilities test. This is an important distinction, as skills can be taught, but abilities cannot.”).

¹⁶⁸ See Haddon & Post, *supra* note 5, at 60.

¹⁶⁹ See Lustbader, *supra* note 108.

¹⁷⁰ See Randall, *supra* note 163, at 129–30.

¹⁷¹ See Kaufman et al., *supra* note 154, at 213–14; Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 277 (2007).

¹⁷² Kaufman et al., *supra* note 154, at 216.

¹⁷³ *Id.* Interventions that can ameliorate such anxiety include “systematic desensitization, cognitive restructuring, stress inoculation training, relaxation therapy, cognitive-behavior modification, and cognitive-behavioral hypnosis . . .” *Id.*

predictors.¹⁷⁴ The majority of black students participated in the AEP where they received academic support.¹⁷⁵ Over the seven-year program, only eleven students were dismissed.¹⁷⁶ The average first year GPA of students who scored lower than 145 on the LSAT was 2.326, compared to students who received an LSAT score of 145 and above whose average first year GPA was 2.38.¹⁷⁷

A recent study of ARC students mirrors the success at Dayton. As much as 92.5% of the ARC students admitted between 2001 and 2005 graduated from law school.¹⁷⁸ Approximately 71% of the ARC students outperformed their predictors and graduated above the bottom 10% of the class, 11% graduated in the top 50% of their class, and one was ranked tenth in his class at graduation.¹⁷⁹ As of 2009, many ARC students appeared on the Dean's List and graduated with honors, and five were named faculty scholars—an award given by the faculty to graduating students who exemplify academic excellence and service.¹⁸⁰ These successes are occurring throughout law schools with access admission and strong ASPs to serve those students.¹⁸¹

¹⁷⁴ Randall, *supra* note 163, at 128–31.

¹⁷⁵ *Id.* at 120–21.

¹⁷⁶ *Id.* at 130.

¹⁷⁷ *Id.*

¹⁷⁸ Paula Lustbader, Graduation Rate 2001–2005 (unpublished report) (on file with author).

¹⁷⁹ Paula Lustbader, ARC Student Class Rank 2001–2005 (unpublished report) (on file with author); Paula Lustbader, Class Rank Summary 2001–2005: A.A. vs. Control vs. N.A. (unpublished report) (on file with author). During this five year period, the mean LSAT score of the general population was 156. Paula Lustbader, LSAT Scores 2001–2005 (unpublished report) (on file with author). The mean score for ARC students was 147; nine points lower. *Id.* With a standard deviation of 4.759, that makes the average ARC LSAT score within 1.89 standard deviations from the mean LSAT score. *Id.*

¹⁸⁰ *Access Admission Program and Academic Resource Center*, SEATTLE U. SCH. L., <http://www.law.seattleu.edu/Documents/academicresourcecenter/2010ARCFlyer.pdf> (last updated Aug. 2009).

¹⁸¹ *See, e.g.*, Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157, 200 (1995) (noting that UCLA's ASPs have greatly contributed to the success of its minority students); Kevin Deasy, *Enabling Black Students to Realize Their Potential in Law School: A Psycho-Social Assessment of an Academic Support Program*, 16 T. MARSHALL L. REV. 547, 555–57 (1990) (discussing the
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C. Why UGPAs Are Less Predictive for the Underrepresented

UGPAs are poor indicators of merit or potential for success because they do not address how the applicant has overcome a lack of resources, educational opportunity, or preparedness for academic study.¹⁸² Further, minorities typically have lower UGPAs than Caucasians.¹⁸³

UGPAs do not necessarily accurately reflect an applicant's intellectual ability.¹⁸⁴ The opportunity to develop that intellect is an essential factor that creates success.¹⁸⁵ The achievement gap between the underrepresented and the privileged starts in elementary school¹⁸⁶ and the difference in achievement tests grow each year thereafter.¹⁸⁷

increased retention rate and academic success of black students who participated in the Mellon Legal Writing Program).

¹⁸² See generally Michael T. Nettles et al., *Comparative and Predictive Analyses of Black and White Students' College Achievement and Experiences*, 57 J. HIGHER EDUC. 289, 309 (1986).

¹⁸³ See, e.g., *id.* at 302.

¹⁸⁴ See, e.g., MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 91–96 (2008) (discussing the story of Chris Langan, a very bright individual whose UGPA reflected not his intellectual ability, but rather an early departure from college due to his mother's failure to file a financial statement to renew his scholarship).

¹⁸⁵ See *id.* at 255–60.

¹⁸⁶ See, e.g., *id.* at 255–57 (noting the achievement gap in elementary school between levels of socioeconomic class). Studies show that programs to fight poverty and close the education gap for the poor, while inspiring, have only produced incremental gains. See David Brooks, *The Harlem Miracle*, N.Y. TIMES, May 8, 2009, at A31. Some programs, such as the Harlem Children's Zone, have produced significant results. *Id.* The typical student entering the charter middle school at a sixth grade level would, on average, score in the thirty-ninth percentile in math. *Id.* By the eighth grade, that student would score in the seventy-fourth percentile. *Id.*

¹⁸⁷ See, e.g., MCKINSEY & CO., SOCIAL SECTOR OFFICE, *THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS* 10 (2009). The achievement gap between Caucasian and minority elementary school children is linked to the fact that during the summer, privileged Caucasian children are in stimulating summer programs, while the non-privileged children are in less stimulating and structured programs. GLADWELL, *supra* note 184, at 255–60. It is also linked directly to the socioeconomic status of the family. TOUGH, *supra* note 158. Studies show that IQ directly links to vocabulary, and that by age three, children with professional parents have double the vocabulary than children with parents on welfare (1,100 words, as compared to 525). *Id.* at 42.

In the author's experience, most of the underrepresented students succeeded despite inadequate academic preparation¹⁸⁸ or encouragement, which may result in UGPAs that are not strong measures of their potential. Educational opportunities play a large role in preparing students for success in academic settings, and the lack of a solid educational background may create significant barriers to students' access to such opportunities. The problems created by inadequate educational opportunities escalate, as the lack of opportunities in pre-school creates a less prepared student in elementary school, which creates a less prepared student in middle school.¹⁸⁹ In turn, this situation creates an academically underprepared student in high school, which leads to lower high school grades.¹⁹⁰ Academically underprepared college students may or may not have access to the resources necessary to strengthen their study skills and fill in the gaps of their prior educational experience, thereby causing lower grades in college.

Because of the limited or non-existent educational opportunities available to underrepresented applicants, law school admission must consider UGPA in the context of these applicants' lives.¹⁹¹ In doing so, law schools can assess the true potential of the applicant. For example, consider an applicant with a 2.8 overall UGPA. That applicant might be working two jobs, be a single parent, or be unable to afford resources such as computers, study aids, and tutors. The applicant might also have had a more difficult time adjusting to college level expectations, as evidenced by an upward trajectory in grades over time. In that case, it would be wise to consider only the UGPA of students' junior and senior years and not their cumulative UGPA.

¹⁸⁸ One focus of the upcoming civil rights investigation will be the lack of access to college preparation programs offered to students of color and the achievement and opportunity gap. Arne Duncan, U.S. SEC'Y OF EDUC., U.S. DEP'T OF EDUC., Remarks on the 45th Anniversary of "Bloody Sunday" at the Edmund Pettus Bridge, Selma, Alabama (Mar. 8, 2010).

¹⁸⁹ See, e.g., MCKINSEY & CO., *supra* note 187, at 10.

¹⁹⁰ See, e.g., *id.*

¹⁹¹ An admissions preference based on applicants' "abilit[ies] to achieve academically while overcoming economic and social disadvantages is the central theme of class-based affirmative action. Inherent in this theme is a holistic, individualized approach to analyzing and making admissions decisions." Nelson, *supra* note 20, at 38–39.

Law school admission practices already consider factors that influence UGPA, such as rigor of the undergraduate school.¹⁹² Therefore, it is not unreasonable for them to consider additional factors, such as the obstacles that a particular applicant has overcome. The fact that an applicant overcame a lack of opportunity and defied the odds by completing high school, matriculating from college, and applying to graduate school¹⁹³ is a strong indicator that an applicant possesses character traits that suggest a potential for success.

D. The Relevance of Non-numerical Factors

Non-numerical factors account for differences in circumstances, character traits, expectations, and opportunities.¹⁹⁴ Therefore, assessing the character traits that enable applicants to overcome challenges should be part of the basis for admission decisions.¹⁹⁵ The significance is not that

¹⁹² LAW SCH. ADMISSION COUNCIL, 2011–2012 LAW SCHOOL ADMISSION REFERENCE MANUAL FOR LAW SCHOOL ADMINISTRATORS AND PRELAW ADVISORS 49 (2011).

¹⁹³ See generally Andrew J. Martin & Herbert W. Marsh, *Academic Buoyancy: Towards an Understanding of Students' Everyday Academic Resilience*, 46 J. SCH. PSYCHOL. 53, 53–83 (2008).

¹⁹⁴ See Nettles, *supra* note 198, at 182. In support of affirmative action in undergraduate admissions, Professor Mari Matsuda argues that a minority applicant who worked during school to help the applicant's family, who had a "B+" high school GPA and a below average SAT score, might actually be a more motivated and better student than an economically privileged Caucasian applicant who had no responsibilities other than to attend school, even though that applicant had an "A" high school GPA and a higher SAT score. Mari Matsuda, Opinion, *Guilt by Admissions*, Ms., June/July 1999, at 29.

¹⁹⁵ Many of the access admission students who have come through the ARC Program at Seattle University's law school overcame substantial obstacles. In the author's experience, some were homeless at one point in their lives. One was emancipated, homeless, and a seventh grade drop-out at the age of thirteen. Some immigrated with their families at young ages or were the first Americans born in their families. Some were children of migrant workers (a few of which were undocumented) and grew up working in the fields and watching their parents suffer from the effects of pesticides. Many had experiences directly relevant to the practice of law. For example, many acted as translator, advocate, and protector for their families. Some came as refugees, having survived unspeakable circumstances, and even witnessed family members' murders or unexplained disappearances. Some overcame drug or alcohol addiction. Some were in gangs. Some were teenage mothers (some as young as thirteen) who worked to support their children, finish high school, attend community college, and finally graduate from a university. Some
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some applicants have encountered difficult life challenges; rather, it is how these applicants managed to overcome those challenges that provided indicia of their ability to succeed. The UGPA and LSAT scores do not measure the applicants' character traits that enabled them to overcome substantial challenges, nor do they measure the applicants' potential to make the unique contribution they will make.

Justice Sonia Sotomayor represents a recent example of someone who has made significant contributions to the legal profession after overcoming significant obstacles. Justice Sotomayor grew up with a single-mother in the projects.¹⁹⁶ Although she had the advantage of attending a private Catholic school,¹⁹⁷ she scored lower on the SAT and LSAT than other applicants at both Princeton and Yale Law School.¹⁹⁸ Without affirmative action she would not have attended those schools, where she then excelled.¹⁹⁹ She graduated from Princeton *summa cum laude* and was a member of Phi Beta Kappa.²⁰⁰ She graduated from Yale Law School with

were survivors of and witnesses to violence, discrimination, and injustice. Many were the first in their immediate, if not their extended, family to attend college. Some had parents who never enrolled in or completed high school. Some had parents who only completed the fifth grade. More than half were told by their high school guidance counselor that they were not college material. Most had limited financial resources, and some were not able to qualify for supplemental student loans or find someone who could act as guarantor of their loans. As a consequence, they had the additional pressure of finding employment or scholarships and had to perform under even greater economic stress than many of their peers.

¹⁹⁶ ANTONIA FELIX, *SONIA SOTOMAYOR: THE TRUE AMERICAN DREAM* 15–18 (2010).

¹⁹⁷ *Id.* at 27 (noting that Justice Sotomayor's was accepted into Cardinal Spellman High School after passing the Catholic High School entrance exam).

¹⁹⁸ Charlie Savage, *Videos Reveal Sotomayor's Positions on Affirmative Action and Other Issues*, N.Y. TIMES, June 11, 2009, at A17 (revealing that Justice Sotomayor was admitted to both Ivy League schools despite scoring lower on standardized tests).

¹⁹⁹ *See id.* Justice Sotomayor admits to being an "affirmative action baby," noting that "it would have been highly questionable if [she] would have been accepted" if admissions examined test scores alone. *Id.*

²⁰⁰ Press Release, The White House, Office of the Press Sec'y, Background on Judge Sonia Sotomayor (May 26, 2009), http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor/.

honors and was on Law Review.²⁰¹ Had she attended less elite schools, she might not have enjoyed the opportunity to rise in the profession and make her impressive contributions. Her background and experience informed her decisions²⁰² as a trial judge, prosecutor, corporate litigator, lecturer, and adjunct professor.²⁰³ She now sits on the highest court in the land.²⁰⁴

There are many others who have benefitted from some form of affirmative action or holistic admission review and proceeded to make significant contributions to the legal field.²⁰⁵ Each of them brought their life experience to the table. Through overcoming substantial obstacles, people often learn essential skills and develop values that enable them to succeed.²⁰⁶

Although not all persons from underrepresented populations face compelling life challenges, they may have had to overcome some form of discrimination or other challenges by virtue of their ethnicity, economic class, or “otherness.”²⁰⁷ In doing so, they developed character traits that

²⁰¹ See Brooke Brown, ‘No Buried Skeletons’ in *Sotomayor’s Law Review*, NEWSWEEK, (May 27, 2009), <http://www.newsweek.com/blogs/the-gaggle/2009/05/27/no-buried-skeletons-in-sotomayor-s-law-review.html>.

²⁰² As a result of her background, Judge Sotomayor brings compassion and understanding to the courtroom.

²⁰³ See Press Release, The White House, Office of Press Sec’y, *supra* note 200; *Judge Sonia Sotomayor, Former Adjunct Professor at NYU Law, Nominated to the Supreme Court*, N.Y. U. SCH. L., http://www.law.nyu.edu/news/SOTOMAYOR_SUPREME_COURT (last visited Oct. 25, 2011).

²⁰⁴ Charlie Savage, *Senate Confirms Sotomayor for the Supreme Court*, N.Y. TIMES, Aug. 7, 2009, at A1.

²⁰⁵ See, e.g., Andrew Stephen, *The Fall of Condi*, NEW STATESMEN (Sept. 6, 2007), <http://www.newstatesman.com/politics/2007/09/british-rice-bush-state>. Condoleeza Rice conceded unguardedly: “I am myself a beneficiary of a Stanford strategy that took affirmative action seriously.” *Id.* See also WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 276, 284 (1998) (concluding from detailed statistical analysis that many black students have benefited from affirmative action).

²⁰⁶ See John U. Ogbu, *Minority Education in Comparative Perspective*, 59 J. NEGRO EDUC. 45, 49 (1990) (overcoming obstacles can lead to minorities developing, for example, distinct survival strategies and a distinct degree of trust).

²⁰⁷ See BOWEN & BOK, *supra* note 205, at 278–79. They noted:

An individual’s race may reveal something about how that person arrived at where [the individual] is today—what barriers were

(continued)

propel them to succeed and to make a contribution.²⁰⁸ Typically, these individuals overcame expectations to underachieve,²⁰⁹ a lack of financial resources,²¹⁰ and a lack of opportunities.²¹¹

Teachers' expectations of students are also a critical factor in promoting student learning, motivation, and achievement.²¹² Students rise to meet the level of what is expected of them. When parents, communities, institutions, and teachers have high expectations for students, students rise,²¹³ conversely, when others expect students to fail, they fail.²¹⁴

overcome, and what the individual's prospects are for further growth . . . [O]ther circumstances besides race can cause 'disadvantage.' Thus, colleges and universities should and do give special consideration to the hard-working son of a family in Appalachia or the daughter of a recent immigrant from Russia who, while obviously bright, is still struggling with the English language.

Id.

²⁰⁸ See Mavis G. Sanders, *Overcoming Obstacles: Academic Achievement as a Response to Racism and Discrimination*, 66 J. NEGRO EDUC. 83, 90 (1997).

²⁰⁹ See Nelson, *supra* note 20, at 619–20. Most of the underrepresented are not expected by society to achieve or have not had adequate opportunities to do so. See *id.* For example, approximately half of the students in the ARC Access Admission Program at Seattle University School of Law (ARC students) were the first in their family to attend college, let alone graduate school. Some even were even the first in their family to complete high school. In addition, the vast majority of ARC students were told by a guidance counselor or teacher, in one way or another, that they were not college material, and were instead steered to vocational schools. See Lustbader, *supra* note 108.

²¹⁰ See Nelson, *supra* note 20, at 619–20; Deborah Faye Carter, *Key Issues in the Persistence of Underrepresented Minority Students*, NEW DIRECTIONS FOR INSTITUTIONAL RES., Summer 2006, at 33, 35 (noting that adequate financial aid enabled minority students to overcome barriers related to their parents' education and income).

²¹¹ See Nelson, *supra* note 20, at 619–20; Carter, *supra* note 210, at 35 (noting that the lack of opportunity to take advanced courses created an obstacle for minority students, especially with respect to hindering high scores on the SAT).

²¹² See Robert A. Scott & Dorothy Echols Tobe, *Effective Undergraduate Education Communicates High Expectations*, in THE SEVEN PRINCIPLES IN ACTION: IMPROVING UNDERGRADUATE EDUCATION 79, 79–84 (Susan Rickey Hatfield et al. eds., 1995).

²¹³ *Id.* See generally Steele et al., *supra* note 123, at 23.

²¹⁴ See Steele et al., *supra* note 123, at 23; Thomas L. Good, *Two Decades of Research on Teacher Expectations: Findings and Future Directions*, 38 J. OF TEACHER EDUC. 32, 33 (1987).

Educational institutions have flagrantly maintained low expectations of African-American, Latino, and Latina students, and these institutions have tolerated abysmal failure rates for Native American students.²¹⁵ At least 50% of all African-American, Latino, and Native American high school students will not graduate.²¹⁶ “Blacks constitute 16.1 percent of elementary and secondary school students, 14.1 percent of high school graduates, 10.3 percent of entering college students, and 6.2 percent of college graduates.”²¹⁷ Only a small percentage of those graduates apply to law school.²¹⁸ Today’s educational institutions have failed these students and society. If schools were businesses producing a product with this rate of failure, they would be out of business.

Today’s educational institutions have also failed the socioeconomically disadvantaged because teachers have lower expectations of these students as well.²¹⁹ Teachers’ perceptions of students’ academic abilities and life skills are influenced by class and reflect bias.²²⁰ In a 1989 study, participants rated students as performing above grade level when they thought the students had high socioeconomic statuses, but rated the same students as performing below grade level when they thought the students had low socioeconomic backgrounds.²²¹ The underrepresentation of socioeconomically disadvantaged students in colleges mirrors that of racial minorities. For example, only 8% of the SAT test takers in 2005 came from households with incomes of \$20,000 or less,²²² while 27.1% of American households in 2005 had annual incomes of less than \$25,000.²²³

²¹⁵ See Epperson, *supra* note 30, at 151; Susan Rakosi Rosenbloom & Niobe Way, *Experiences of Discrimination Among African American, Asian American, and Latino Adolescents in an Urban High School*, 35 *YOUTH & SOC’Y* 420, 444 (2004).

²¹⁶ See Epperson, *supra* note 30, at 151.

²¹⁷ Rothstein & Yoon, *supra* note 16, at 665.

²¹⁸ See *id.*

²¹⁹ See Nelson, *supra* note 20, at 619–20.

²²⁰ See Rosenbloom & Way, *supra* note 215, at 424 (“The poor academic performance of Black and Latino students is caused, in part, by a ‘perceptual bias’ or teachers’ belief in lower degrees of academic performance by poor and minority students . . .”).

²²¹ See Spencer & Castano, *supra* note 55, at 420.

²²² *Id.* at 419.

²²³ CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005 31 (2006), available at <http://www.census.gov/prod/2006pubs/p60-231.pdf>. The U.S. Population and Housing Census is taken every ten years. *About Us*, U.S. CENSUS BUREAU, (continued)

Most underrepresented students can succeed in school despite having a lack of financial resources and an insufficient amount of time to devote to their studies. For example, many do not have resources for computers, study aids, tutors, or test preparation courses, as well as funds to retake tests.²²⁴ Many students must spend time researching and applying for financial aid and scholarships.²²⁵ Most do not have disposable income to go out and socialize with their peers,²²⁶ which may result in isolation from their peers and difficulty in forming study groups and learning communities. They also may not have resources to live closer to campus,²²⁷ and transportation may eat into what little time they have to study. In addition, many must work while they are going to school.²²⁸

<http://www.census.gov/aboutus/#> (last updated June 15, 2010). The 2000 U.S. Census found that 16% of U.S. households had an income less than \$15,000, and an additional 13.4% of households had an income between \$15,000 and \$24,999. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, MONEY INCOME IN THE UNITED STATES: 2000 17 (2001), available at <http://www.census.gov/prod/2001pubs/p60-213.pdf>.

²²⁴ See Claudia Buchmann et al., *Shadow Education, American Style: Test Preparation, the SAT and College Enrollment*, 89 SOCIAL FORCES 435, 440 (2010). These resources are vital for admission into law school. See, e.g., *id.* (concluding that differences in family income influence the likelihood that students will engage in SAT test preparation and consequently perform well on the test and gain admission to selective schools). See also JOSIAH EVANS ET AL., LAW SCH. ADMISSION COUNCIL, LSAT TECHNICAL REPORT 08-04, SUMMARY OF SELF-REPORTED METHODS OF TEST PREPARATION BY LSAT TAKERS FOR TESTING YEARS 2005–2006 THROUGH 2007–2008 9 (2008) (noting that 36.78% of 2007–2008 test takers used a commercial test-preparation course for the LSAT). As more and more people take preparation courses, the score median is skewed by those who can afford such courses and by those who can spend the time taking countless practice tests. See *id.* at 2 (concluding that test takers who used commercial test-preparation courses and other test-preparation materials scored higher on the LSAT than those who did not).

²²⁵ *College Admission Q&As: Where Should I Start My Scholarship Search?*, U.S. NEWS & WORLD REPORT (May 18, 2011), <http://www.usnews.com/education/blogs/college-admissions-experts/2011/05/18/where-should-i-start-my-scholarship-search> (advising students to start the scholarship search early as searching and applying for scholarships is time consuming).

²²⁶ See RUTH SIDEL, BATTLING BIAS: THE STRUGGLE FOR IDENTITY AND COMMUNITY ON COLLEGE CAMPUSES 190 (1995).

²²⁷ See *id.*

²²⁸ See *id.*

Some hold more than one job to support themselves, to help support their families, and to pay for tuition.²²⁹

Many underrepresented students can succeed despite having inadequate time or resources to enhance their analytic skills. Many may have care-giving responsibilities for family members because their families cannot afford child or in-home care.²³⁰ Others may spend time helping their immigrant families navigate through an English-speaking society.²³¹ Think about the educational experience of children who are in public or private high schools in privileged areas versus those who are in large public or inner-city high schools. Children in the private or privileged high schools are expected to attend college.²³² These children attend schools with smaller teacher-student ratios, broader course offerings, more honors-level instruction, better teachers, greater resources to support teachers, greater parent involvement,²³³ special instruction for students with learning challenges, more enrichment programs, and a greater ability to provide feedback.²³⁴ Students get explicit instruction on how to study and excel in an academic setting, and they have access to greater resources, such as tutors, computers, and special education.²³⁵ Most receive tutoring or take a

²²⁹ *See id.*

²³⁰ *See generally* Michele Friedman, Coalition on Human Needs, *Child Care*, ALMANAC POL'Y ISSUES, http://www.policyalmanac.org/social_welfare/childcare.shtml (last visited Nov. 14, 2011).

²³¹ *See* THE URBAN INSTITUTE, CHILDREN OF IMMIGRANTS: FACTS AND FIGURES (2006), available at http://www.urban.org/uploadedpdf/900955_children_of_immigrants.pdf.

²³² *See generally* Buchmann et al., *supra* note 224, at 437.

²³³ The lack of parental involvement in non-privileged schools is not because these parents do not care. *See* Patricia Van Velsor & Graciela L. Orozco, *Involving Low-Income Parents in the Schools: Communitycentric Strategies for School Counselors*, 11 PROF'L SCH. COUNSELING 17, 17–18 (2007). The schools need to understand that, in some areas, large percentages of single-parent households exist; moreover, even in two-parent households, most parents with blue-collar jobs are less able to leave work to attend school activities and field trips. *See generally id.*

²³⁴ *See* ROBERT PERRUCCI & EARL WYSONG, THE NEW CLASS SOCIETY: GOODBYE AMERICAN DREAM? 265–66 (3d ed. 2008).

²³⁵ *See* Mary McCaslin et al., *Change and Continuity in Student Achievement from Grades 3–5: A Policy Dilemma*, 13 EDUC. POL'Y ANALYSIS ARCHIVES 1, 3 (2005) (“Generally, schools that serve low-income students receive fewer funds than do schools serving affluent communities . . .”).

preparation course for standardized tests.²³⁶ They often have a family member or mentor who can provide advice about college and the college application process, including how to select schools, prepare for standardized tests, and write a compelling personal statement.²³⁷ Many hire professionals to help with the college application process.²³⁸ The majority have family and financial support.²³⁹

In contrast, underrepresented students do not have these opportunities.²⁴⁰ The majority of these students are not preparing for college.²⁴¹ “Despite the passage of time since *Brown v. Board of Education*²⁴² and its progeny, minority students” continue to attend poorly subsidized public school districts that do poor jobs of educating students.²⁴³

²³⁶ See Laura Fitzpatrick, *SAT in the Recession: Test-Prep Prices Drop*, TIME, Mar. 14, 2009, <http://www.time.com/time/nation/article/0,8599,1885239,00.html>. Although some schools provide test preparation through career services, most students take private preparation courses. See generally EVANS ET AL., *supra* note 224, at 9 (reporting that 36.78% of 2007–2008 LSAT test takers used a commercial test-preparation course as compared to 6.34% of test takers who used a test-preparation course provided by an undergraduate institution). The market for preparation courses and tutoring has skyrocketed, with costs ranging from \$1,000 to \$1,200 for classroom courses and \$1,500 to \$6,900 for private tutoring. See Buchmann et al., *supra* note 224, at 440. This four billion dollar industry has become cheaper and more accessible with the use of online courses; but preparation courses still create a financial barrier for many prospective students. See Fitzpatrick, *supra*.

²³⁷ See GLADWELL, *supra* note 184, at 69–73, 91–113, for discussion of a lack of familial support as a barrier for underrepresented populations. Gladwell examines the factors that contribute to high levels of success, focusing primarily on family, culture, friendship, and opportunity, and claims that where someone comes from is more important than innate natural abilities when it comes to success. *Id.*

²³⁸ See LIPMAN HEARNE, INC., A REPORT ON HIGH-ACHIEVING SENIORS AND THE COLLEGE DECISION 10 (2009), available at http://www.lipmanhearne.com/Libraries/Resources_Documents/Lipman_Hearne_High-Achieving_Seniors_Study_2009.pdf (noting that 26% of students surveyed by the author used a paid service or consult to assist with the college application process).

²³⁹ See GLADWELL, *supra* note 184, at 111–12.

²⁴⁰ See Epperson, *supra* note 30, at 149–50.

²⁴¹ See *id.* at 150.

²⁴² 347 U.S. 483 (1954).

²⁴³ Kathy L. Cerminara, *Remembering Arthur: Some Suggestions for Law School Academic Support Programs*, 21 T. MARSHALL L. REV. 249, 253–54 (1996).

Segregation in public schools “is at its highest point in more than three decades,”²⁴⁴ and the racial isolation in elementary and secondary schools results in fewer learning opportunities for “students of color.”²⁴⁵ The gross inequity in educational opportunities for low-income families has resulted in civil rights investigations in many states.²⁴⁶ Although the most significant predictor of academic success is the socioeconomic status of the student’s family,²⁴⁷ a strong correlation also exists between academic achievement and the poverty level of the student’s school and community.²⁴⁸ Students from low-income families who attended affluent schools performed with “the equivalent of having two more years of education than low-income students in schools with high concentrations of poverty.”²⁴⁹

The fact that individuals from underrepresented populations have defied these adverse conditions and are in a position to even apply to law school is indicative of an inner drive, passion, or commitment that propelled them to pursue higher education and a career in law. Unfortunately, many of these applicants will be denied access to higher education because admission practices do not consider these factors and instead, rely mainly on LSAT scores and UGPAs.

IV. THE U.S. NEWS & WORLD REPORT RANKINGS, ABA ACCREDITATION STANDARDS, AND ANTI-RACE-CONSCIOUS LEGAL CLIMATE OUGHT NOT PRECLUDE ACCESS

The foregoing discussion demonstrates why LSAT scores and UGPAs are unreliable measures of merit and less accurate predictors for the underrepresented. Law schools should not altogether eliminate the LSAT as a factor in admission decisions, but rather they should use it only for the

²⁴⁴ Epperson, *supra* note 30, at 149–50.

²⁴⁵ *Id.* at 149.

²⁴⁶ Arne Duncan, *supra* note 188. The Office for Civil Rights will be issuing a series of guidance letters to school districts and postsecondary institutions to address issues of fairness and equity, as well as instituting compliance reviews to ensure that all students have equal access to educational opportunities, including college preparation and advanced courses. *Id.*

²⁴⁷ Epperson, *supra* note 30, at 150. The economics of education will likely be felt even more in the current economic climate, where federal, state, and local deficits are resulting in greater cuts in an already overburdened and under resourced public educational institutions.

²⁴⁸ See McCaslin et al., *supra* note 235, at 3.

²⁴⁹ Epperson, *supra* note 30, at 150.

purpose for which it was intended, as one of several factors. In part, law schools continue to rely mainly on the numerical indicators to increase their rankings, to comply with overly-restrictive accreditation standards, and to protect themselves in the anti-race-conscious legal climate.

A. U.S. News & World Report Rankings

The *U.S. News & World Report* rankings²⁵⁰ undermine the fundamental mission of legal education to the detriment of the profession.²⁵¹ Law schools are frequently motivated to increase their rankings to increase their stature, increase their applicant pool, and help their graduates get more prestigious job placement with firms who consider these rankings.²⁵² On the one hand, law school deans object to these rankings because they distort the mission of legal education and compromise law school policy and pedagogy;²⁵³ but on the other hand, law school deans use the rankings

²⁵⁰ Prior to 1987, law schools did not provide information regarding a law school's median LSAT, bar passage rate, or employment rate to prospective students. Michael E. Solimine, *Status Seeking and the Allure and Limits of Law School Rankings*, 81 IND. L.J. 299, 300 (2006). *U.S. News & World Report* began ranking schools because education is extremely expensive, and it wanted to provide consumers with relevant information upon which to base their decision. *Frequently Asked Questions*, U.S. NEWS & WORLD REPORT, http://www.usnews.com/articles/education/best-colleges/2008/08/21/2009-frequently-asked-questions.html?loomia_ow=t0:s0:a41:g26:r12:c0.012800:b20174593&s_cid=loomia:about-the-rankingsmethodology#1 (last visited Sept. 30, 2011).

Within three years of the first rankings, the AALS, the LSAC, and the National Association of Law Placement (NALP) objected to the rankings because, rather than providing significant and meaningful information about the merits of the schools, these organizations argued that the magazine was more interested in boosting its sales. Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY'S L.J. 301, 319 (2003).

²⁵¹ MICHAEL SAUDER & WENDY ESPELAND, LAW SCH. ADMISSION COUNCIL, LSAC GRANTS REPORT 07-02, FEAR OF FALLING: THE EFFECTS OF U.S. NEWS & WORLD REPORT RANKINGS ON U.S. LAW SCHOOLS 34–35 (2007), available at <http://www.lsac.org/LSACResources/Research/GR/GR-07-02.pdf>.

²⁵² See *id.* at 32, 34–35.

²⁵³ See *id.* at 7. The majority of law school administrators indicated that the ranking were “more harmful than beneficial” to the individual school and legal education. *Id.* Since 1997, the “vast majority” of deans annually sign a letter “publically condemning the rankings.” *Id.*

in publications and reports sent to their constituencies.²⁵⁴ Deans across the country compete to rise in the ranks, and faculty, employers, and potential donors place a significant amount of weight on a law school's rank.²⁵⁵ Despite continued objections about the lack of validity of the rankings,²⁵⁶ the *U.S. News & World Report* rankings maintain their stronghold on the academy and the profession.²⁵⁷ The rankings distort the priorities for law schools by hindering the schools' ability to succeed,²⁵⁸ compromising their integrity,²⁵⁹ influencing resource allocation,²⁶⁰ impacting the law school's

²⁵⁴ Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 240 (2006). See also SAUDER & ESPELAND, *supra* note 251, at 10.

²⁵⁵ SAUDER & ESPELAND, *supra* note 251, at 27.

²⁵⁶ See, e.g., *id.* at 7–8.

²⁵⁷ See Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 LAW & SOC'Y REV. 105, 106 (2006). “[T]hose responsible for law school admissions and accreditation practices have created a de facto and racially discriminatory quota system that restricts African-American access to the legal profession.” Nussbaumer, *supra* note 69, at 167.

²⁵⁸ See Stake, *supra* note 254, at 254. The rankings create a cyclical “self-fulfilling prophec[y].” *Id.* Lower tiered schools are unable to recruit students with higher LSAT scores, donations, and faculty with more prestige. See *id.* Potential students, faculty, donors, and employers refuse the school because of its rank; thus, the school's rank remains low. See SAUDER & ESPELAND, *supra* note 251, at 25.

²⁵⁹ See SAUDER & ESPELAND, *supra* note 251, at 13. Some schools “game” the rankings by misrepresenting or manipulating their statistics. *Id.* One example of this occurred in 1995, where twenty-nine schools reported a higher LSAT median score to *U.S. News & World Report* than what they reported to the ABA. *Id.* Other examples are less clearly egregious. For example, some schools will avoid the question of LSAT scores by enrolling a smaller first year class and then adding transfer students, or enrolling students without LSAT scores, such as international students or L.L.M. students. See Johnson, *supra* note 8, at 312–13. In this way, the reported LSAT median score does not reflect the lower scores. *Id.* Other schools enrolled diverse students with lower entry indicators into conditional admissions or part-time programs to achieve diversity goals. Espeland & Sauder, *supra* note 29, at 602–03. These practices did not affect the schools' reported median LSAT score because, prior to 2009, the *U.S. News & World Rankings* did not factor transfer or part-time students in their calculations of selectivity. *Id.* at 602. Now that those students' indicators will count, several commentators fear this will further reduce diversity enrollment. See, e.g., *id.* at 603.

program,²⁶¹ harming the profession,²⁶² and influencing admission practices that result in adversely affected underrepresented applicants.²⁶³

1. U.S. News & World Report Rankings Adversely Impacts Admission for the Underrepresented

The *U.S. News & World Report* rankings contributed to increasing the floor of minimum LSAT scores for admission to law schools.²⁶⁴ It ranks

²⁶⁰ SAUDER & ESPELAND, *supra* note 251, at 10. For example, schools spend a “substantial” amount of resources on marketing expenditures on brochures and promotional materials to lure more prestigious students and faculty and to increase the school’s visibility in the hopes of gaining more points in the reputation section of the rankings. *Id.* The money spent on such marketing could instead be used to improve schools by hiring more faculty, supporting students, funding clinics and legal writing programs, or purchasing more library resources. *Id.* In addition to expenditures for marketing, law schools are spending increased resources for staffing, record keeping, and data gathering related to the rankings. *See id.* at 12. Law schools must realize that competition in the rankings is being funded largely by the students through increases in tuition, which can create economic barriers for some students. Yet, these expenditures that raise tuition may only indirectly benefit them, at best. Some argue that tuition increases are a by-product of the rankings. *See id.* Others cite the rise in inflation in the last twenty years, globalization and the rise in international law, pedagogical changes in the classroom, and technology. *See* James Vescovi, *Why Does Law School Cost So Much?*, COLUMBIA L. SCH., http://www.law.columbia.edu/law_school/communications/reports/summer06/lawschoolcost (last visited Sept. 30, 2011).

²⁶¹ *See generally* Ariens, *supra* note 250, at 353–55. To increase their rankings, schools have privileged scholarship over teaching. *See id.* Many schools expend a significant amount of resources to support faculty scholarship. *See id.* at 354 n.241. Some schools have not only “bought” star scholars, but have also given reduced teaching loads or designed class schedules around career faculties’ writing needs instead of around pedagogical principles. *See id.* at 353–55. Moreover, because the rankings use limited factors in their assessment, they do not reward or promote innovative curriculum or pedagogy, diversity, or ethics. *See* SAUDER & ESPELAND, *supra* note 251, at 7–8.

²⁶² As indicated, fewer underrepresented applicants are admitted into law schools, which results in fewer underrepresented becoming lawyers. The increase in resource expenditures to increase the rankings results in escalating the economic barriers to attend law school. *See id.* at 11–12. It also increases economic obstacles for graduates, who are burdened with extreme debt and may be less able to work in public service.

²⁶³ *See* Espeland & Saunder, *supra* note 29, at 588.

ABA-accredited law schools on quality (40%), selectivity (25%), placement rate (20%), and faculty resources (15%).²⁶⁵ The median LSAT comprises 50% of the selectivity score, or 12.5% of the total score.²⁶⁶ However, the LSAT scores actually have a greater weight “because variation in LSAT scores accounts for 90% of the variation in the overall ranks of the schools.”²⁶⁷ In addition, LSAT scores are the easiest factor in the rankings for schools to manipulate.²⁶⁸ Thus, one way law schools can easily raise their rankings is to raise the floor on the minimum LSAT score, which raises their median LSAT. Many schools are not only raising the minimum LSAT score,²⁶⁹ but some may also be raising the floor on UGPAs.

By overemphasizing LSAT scores in admission practices, the rankings implicitly result in fewer of the underrepresented gaining admission.²⁷⁰ Moreover, the rankings “discourage financial aid based on need and reduce incentives to increase the diversity of the profession.”²⁷¹ To increase their median scores, more schools increase merit scholarships and reduce need-based scholarships,²⁷² making it even more difficult for the economically disadvantaged to pursue a legal education even if they are accepted.

²⁶⁴ Currently the Society of American Law Teachers (SALT), an organization of law professors, has urged law schools to stop providing *U.S. News* with their incoming students’ LSAT scores on the theory that the immense pressure to snag incoming students with high scores is making it harder to admit diverse classes. Karen Sloan, *Law Scholars Propose to Starve ‘U.S. News’ of LSAT Data*, NAT’L L.J., May 25, 2010, <http://www.law.com/jsp/article.jsp?id=1202458731270>.

²⁶⁵ Robert Morse & Sam Flanigan, *Law School Rankings Methodology*, U.S. NEWS & WORLD REPORT (Mar. 14, 2011), <http://www.usnews.com/education/best-graduate-schools/articles/2011/03/14/law-school-rankings-methodology-2012>.

²⁶⁶ See Edwards, *supra* note 115, at 156.

²⁶⁷ SAUDER & ESPELAND, *supra* note 251, at 11.

²⁶⁸ See *id.*

²⁶⁹ See Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective*, 96 IOWA L. REV. 1549, 1574 (July 2011).

²⁷⁰ See Espeland & Sauder, *supra* note 29, at 599–601.

²⁷¹ Karen Sloan, *ABA Panel: U.S. News’ Rankings Bad, But What Are You Going to Do?*, NAT’L L.J., July 30, 2010, http://www.law.com/jsp/article.jsp?id=1202464043143&src=EMC-Email&et=editorial&bu=Law.com&pt=LAWCOM%20Newswire&cn=NW_20090730&kw=ABA%20Panel%3A%20%27U.S.%20News%27%20Rankings%20Bad%2C%20but%20What%20Are%20You%20Going%20to%20Do%3F.

²⁷² See SAUDER & ESPELAND, *supra* note 251, at 11–12.

a. *The U.S. News & World Report Rankings Ought Not Discourage Access Admission*

The rankings in *U.S. News & World Report* are not a sufficiently compelling justification for raising the floor on the minimum UGPA and LSAT scores because a lower floor does not mean a lower ranking.²⁷³ A commitment to access, which involves admitting students with lower scores, does not necessarily mean that the median score would change. The *U.S. News & World Report* rankings count the median LSAT score, not the mean or average.²⁷⁴ That means that while both extremely low and extremely high LSAT scores would affect the average score, they would not affect the middle or median score reported for the rankings. Therefore, a school could admit applicants with scores below its median score without hurting its ranking, as long as the scores in the middle remain the same.²⁷⁵ According to Robert Morse, Director of Data Research for *U.S. News & World Report*, “in most cases, except at some points in the 150–160 LSAT score area, one LSAT point upward will on average not change a school’s overall score by one point and therefore will not change its position in the rankings.”²⁷⁶

Schools can maintain their commitment to access without compromising their rankings. For example, 20% of students enrolled at University of California Hastings College of the Law (Hastings) enroll in the Legal Education Opportunity Program (LEOP).²⁷⁷ The median LSAT for LEOP students admitted in 2011 was 155 and the median UGPA was 3.51.²⁷⁸ The LSAT range for non-LEOP students is the twenty-fifth

²⁷³ *U.S. News & World Report* ranks law schools based upon the twenty-fifth to seventy-fifth percentile of LSAT scores of entering first year law students. U.S. NEWS & WORLD REPORT, *supra* note 11, at 69–70.

²⁷⁴ Morse & Flanigan, *supra* note 265.

²⁷⁵ See Espeland & Sauder, *supra* note 29, at 606.

²⁷⁶ Baynes, *supra* note 115, at 8. Baynes argues that in fact, it is those schools with the 150–160 LSAT score who feel the most pressure to increase their median LSAT score. *Id.*

²⁷⁷ *Legal Education Opportunity Program*, U. CAL. HASTINGS C. L., <http://www.uchastings.edu/academics/jd-program/leop/index.html> (last visited Oct. 29, 2011) (follow “Academics” hyperlink; then follow “Juris Doctor Program” hyperlink; then follow “Legal Education Opportunity” hyperlink).

²⁷⁸ *Legal Education Opportunity Program*, U. CAL. HASTINGS C. L., <http://www.uchastings.edu/prospective-students/jd/leop.html> (last visited Oct. 29, 2011) (follow “Prospective Students” hyperlink; then follow “J.D.” hyperlink; then follow “LEOP” hyperlink).

percentile at 157 and the seventy-fifth percentile at 165.²⁷⁹ Hastings maintains a high rank by *U.S. News & World Report*; it is a tier-one school and is ranked forty-second.²⁸⁰

Moreover, law schools that maintain a commitment to access in enrollment receive benefits related to the rankings because schools that improve access receive recognition for increasing racial diversity. The ARC at Seattle University has substantially increased the diversity of the student body. For example, between 2001 and 2005, one-third of non-white Seattle University law students were admitted through the ARC program.²⁸¹ Most ARC students—80.8%—are non-white.²⁸² In addition to citing the *U.S. News & World Report* rankings as a justification to set minimum floors on numerical criteria, many argue that setting minimum numerical criteria is necessary to comply with ABA accreditation standards.

B. *The ABA Accreditation Standards*

The most recent ABA Presidential Initiative Commission on Diversity Report and Recommendation acknowledged that notwithstanding prior efforts to improve diversity, “racial and ethnic groups, sexual and gender minorities, and lawyers with disabilities continue to be vastly underrepresented in the legal profession.”²⁸³ It stated further that increasing diversity is a high priority, as “a diverse legal profession is more just, productive, and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes.”²⁸⁴ The ABA created the ABA Presidential Advisory Council on Diversity in the Profession to promote pipeline initiatives to increase

²⁷⁹ *Application FAQs*, U. CAL. HASTINGS C. L., <http://www.uchastings.edu/prospective-students/apply/faqs.html> (last visited Oct. 29, 2011).

²⁸⁰ *Best Law Schools, Ranked in 2011*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings/page+2> (last visited Oct. 29, 2011).

²⁸¹ Lustbader, *supra* note 107, at 6.

²⁸² *Id.* Of the 431 non-whites students admitted between 2001–2005, 62.9% were general admission, while 37.1% were ARC admission. *Id.* Without the ARC admission program, 160 fewer non-white students would have been admitted to the School of Law between 2001 and 2005. *Id.*

²⁸³ AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *supra* note 33, at 5.

²⁸⁴ *Id.*

the number of students of color in the legal profession.²⁸⁵ In addition, the ABA has tried to require schools to show concrete action and a commitment to diversity through ABA Standard 211.²⁸⁶ In February 2006, the ABA proposed a revised version of Standard 211,²⁸⁷ and subsequently

²⁸⁵ Don Corbett, *Stunted Growth: Assessing the Stagnant Enrollment of African-American Students at the Nation's Law Schools*, 18 TEMP. POL. & CIV. RTS. L. REV. 177, 199–200 (2008).

²⁸⁶ Kenneth L. Marcus, *The Right Frontier for Civil Rights Reform*, 19 GEO. MASON. U. C.R. L.J. 77, 105 (2008).

²⁸⁷ Standard 211 states:

(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

Interpretation 211–1:

The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 211[.] A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 211 by means other than those prohibited by the applicable constitutional or statutory provisions.[.]

Interpretation 211–2:

Consistent with the U.S. Supreme Court's decision in *Grutter v. Bollinger*, 529 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes,

(continued)

adopted these revisions as Standard 212 in August 2006.²⁸⁸ The revisions to Standard 211 addressed the impact of *Grutter v. Bollinger*,²⁸⁹ the importance of diversity, and the ways the standards were structured to promote diversity of faculty, staff, and students.²⁹⁰ The adoption of these standards is stalled in the political mire of the U.S. Department of Education.²⁹¹ Finally, the ABA is working toward more outcome-based

and enables students to better understand persons of different races, ethnic groups and backgrounds.

Interpretation 211–3:

This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.

AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT TO THE HOUSE OF DELEGATES, *in* U.S. COMM'N ON CIVIL RIGHTS, BRIEFING REPORT: AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS app. 1 at 97–98 (2007), available at <http://www.usccr.gov/pubs/AALSreport.pdf>.

²⁸⁸ Marcus, *supra* note 286, at 106.

²⁸⁹ 529 U.S. 306 (2003).

²⁹⁰ AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 12, at 97–98, 103.

²⁹¹ Marcus, *supra* note 286, at 105. Shortly after the ABA proposed revisions to Standard 211, severe criticism ensued. *Id.* Critics wrote to the Department of Education claiming that Standard 211 violated the law because it did not satisfy *Grutter*, that a school has the right to determine whether diversity is part of its mission, and forced schools to comply with 211 even if it conflicted with an existing statute or constitutional provision prohibiting race-conscious policies. *See id.* As a result of the backlash, the ABA added a provision that law schools are required to use methods other than those prohibited by the constitution or other statute to adhere to the standard. AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 12.

standards in an effort to increase the effectiveness of law school pedagogy to better prepare students for practice.²⁹²

Notwithstanding these tangible indicia of the ABA's commitment to increasing diversity in the profession, some argue that the ABA's accreditation standards actually contribute to declining enrollment rates for the underrepresented.²⁹³ The ABA has legitimate concerns about law school practices that may admit potentially unqualified applicants with little chance to pass a bar exam, or worse, applicants who can pass the bar exam but are incompetent practitioners.²⁹⁴ "In the name of excluding those students who would inevitably fail, the philosophy of the Accreditation Committee also sacrifices those students who would succeed despite low

²⁹² James Podgers, *Self-Study Program: Ongoing Re-evaluation May Bring Change to Law School Accreditation Standards*, ABA JOURNAL, Nov. 2009, at 61.

ABA Standards for Approval of Law Schools is likely to move away from evaluating programs on the basis of criteria that measure 'input'—such . . . as faculty size, budget and physical operations Instead, the legal education section is planning to evaluate law schools more closely based on 'outcome' measures that focus on what students actually take away from their educational experience and how it translates into actual legal skills as they enter practice.

Id.

²⁹³ See, e.g., Corbett, *supra* note 258, at 209. Requirements for accreditation are mechanical and procedural and enforce "'a one-size-fits-all' model of legal education" because they restrict how schools pursue their mission. David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 RUTGERS L.J. 1127, 1134 n.14 (2008). Some requirements also unnecessarily increase costs and raise tuition. See George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 105 (2003).

This creates a larger barrier for the economically disadvantaged. For example, the requirement for such extensive and costly libraries creates economic barriers because it increases cost of tuition by \$4,000 per student. *Id.* Although the more hands-on, resource-intensive approach to legal education and competition among schools for higher rankings has reportedly impacted cost, the ABA requirements increase rankings by attracting new students and faculty increases overall cost because they affect per student expenditures, student-faculty ratio, library resources, and faculty salaries. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS app. I at 25 (2009).

²⁹⁴ See generally AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 12, at viii.

LSAT scores.”²⁹⁵ By adopting minimum bar passage standards and arguably de facto minimum LSAT score standards, the ABA established more barriers to access for the underrepresented. Moreover, these standards are easily misinterpreted, and they do not address the larger concern of promoting pedagogy and curriculum that ensure success and prepare students for practice.

In February 2008, the ABA adopted Interpretation 301-6, requiring law schools to meet and maintain a minimum bar pass rate to keep their accreditation.²⁹⁶ African-American and Hispanic bar takers are more often unsuccessful on the first bar attempt; therefore, this new standard may inhibit African-American and Hispanic enrollment.²⁹⁷

In addition to requiring minimum bar pass rates, the ABA, while not actually setting minimum LSAT scores, creates minimum floors in practice. In recent history, the ABA has denied accreditation to schools with average LSAT scores lower than 143.²⁹⁸ In fact, the ABA denies accreditation to schools that admit any applicant with an LSAT score of 140, regardless of how few students were admitted with that score.²⁹⁹ According to the most recent data published by LSAC, the average LSAT score for African-Americans in the 2008-2009 year was 142.25.³⁰⁰ This means that the ABA de-facto standard automatically disqualifies half of the African-Americans who take the LSAT.

To protect against exploitation of vulnerable high-risk applicants and to protect the integrity of the profession, the ABA ought to create pedagogy and curriculum standards that ensure success, rather than set a

²⁹⁵ Nussbaumer, *supra* note 69, at 179.

²⁹⁶ AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 12, at 18–19. Schools can show compliance by showing that at least 75% of its graduates passed the bar exam over the five most recent calendar years. *Id.* at 19. Schools may also comply by showing 75% passage rate in three of the most recent five calendar years or by showing that the schools' yearly first time bar pass rate is not more than fifteen points below the average rate for graduates at other ABA approved schools in the same jurisdiction during the same period. *Id.*

²⁹⁷ See Corbett, *supra* note 258, at 210.

²⁹⁸ See Shepherd, *supra* note 293, at 114.

²⁹⁹ *Id.*

³⁰⁰ SUSAN P. DALESSANDRO ET AL., LAW SCH. ADMISSION COUNCIL, LSAT TECHNICAL REPORT 10-03, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS, 2003–2004 THROUGH 2009–2010 TESTING YEARS 19 (2010), available at <http://www.lsac.org/LSACResources/Research/TR/TR-10-03.pdf>.

minimum bar passage rate and a de-facto minimum LSAT score. “[T]he credential bias assumes that past academic performance is a measure of immutable ability,” which determines future “achievement regardless of student effort or faculty instruction.”³⁰¹ In doing so, the ABA misguidedly assumes that law schools cannot teach students with lower LSAT scores to pass a bar exam or succeed in practice. Yet several schools are doing just that. New York Law School recently published results showing that its Comprehensive Curriculum Program has improved bar passage rates of students in the bottom quarter from 19.4% in 2003 to 83.5% in 2008.³⁰²

The ABA could easily adopt standards that promote inclusion while ensuring that law schools graduate students with the potential to pass the bar exam and competently represent clients.³⁰³ They could do this by requiring schools to incorporate an inclusive pedagogy, have comprehensive ASPs,³⁰⁴ and provide bar preparation programs.

Although the foregoing discussion exposes the potential problems with the ABA minimum bar passage requirement and de-facto minimum LSAT score, the majority of law schools can comply with the ABA standards and increase enrollment of the underrepresented without worrying about accreditation.

As the above discussion demonstrates, the *U.S. News & World Report* rankings and the ABA accreditation standards are not adequate justifications for law schools to rely on the numerical criteria of the UGPA and LSAT scores. This is especially true when such reliance disproportionately disqualifies otherwise meritorious candidates from underrepresented populations. The following discussion displays why

³⁰¹ B. Glesner Fines, *The Impact of Expectations on Teaching and Learning*, 38 GONZ. L. REV. 89, 91 (2002–2003).

³⁰² Donald H. Zeigler et al., *Curriculum Design and Bar Passage: New York Law School's Experience*, 59 J. LEGAL EDUC. 393, 393 (2010).

³⁰³ “When teachers and institutions expect students to perform well, it becomes a self-fulfilling prophecy for students, who are likely to exert more effort to meet expectations.” Maureen E. Wilson, *Teaching, Learning, and Millennial Students*, NEW DIRECTIONS FOR STUDENT SERVS., Summer 2004, at 59, 63 (2004).

³⁰⁴ Interpretation 501–3 says that among other indicia in assessing compliance, the ABA should consider “the effectiveness of the law school’s academic support program.” AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 12, at 37. However, to date, the ABA has not articulated clear standards for what constitutes an effective ASP.

concerns over the anti-race-conscious admission legal climate are not adequate justifications to abandon inclusive admission practices.

C. The Anti-Race-Conscious Legal Climate

*Grutter v. Bollinger*³⁰⁵ is the key United States Supreme Court decision on race-conscious admission practices in law schools.³⁰⁶ Decided in 2003, the United States Supreme Court upheld the race-conscious admission practice at the University of Michigan Law School.³⁰⁷ In a 5-4 decision, the Court found the law school's practice constitutional because it was narrowly tailored to address the compelling state interest of achieving a critical mass of underrepresented minority groups.³⁰⁸ Moreover, the admission practice was constitutional because it was not applied mechanistically, it was not aimed at achieving specific quotas, and it provided a full review for all candidates.³⁰⁹

Although the Court upheld University of Michigan's law school admission policy, it found the institution's undergraduate admission policy unconstitutional in *Gratz v. Bollinger*.³¹⁰ Under that policy, the admission process automatically distributed to every single "underrepresented minority" one-fifth of the points needed to guarantee admission.³¹¹ The Court determined this process was not narrowly tailored to achieve the University of Michigan's interest in educational diversity, so it was not constitutional.³¹²

Notwithstanding the decision in *Grutter*,³¹³ several scholars doubt that the Supreme Court will uphold race-conscious practices in the future.³¹⁴

³⁰⁵ 539 U.S. 306 (2003).

³⁰⁶ Artika Tyner, *Robust Exchange of Ideas and the Presence of the African-American Voice in the Law School Environment: A Review of Literature*, MOD. AM., Spring 2009, at 37, 40.

³⁰⁷ *Grutter*, 529 U.S. at 328.

³⁰⁸ *Id.* at 329–30, 343.

³⁰⁹ *Id.* at 334.

³¹⁰ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

³¹¹ *Id.* at 270.

³¹² *Id.*

³¹³ Current U.S. Supreme Court cases have not overruled *Grutter*. For example, in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), the Court determined that the Seattle School District's practice of using race as a tie-breaker in making school assignments was unconstitutional because the practice did not use an individualized review of each applicant. *Id.* at 722–23. In addition, the Supreme Court

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“In the wake of . . . recent decisions, it is difficult to predict how the newly constituted Court would rule on the diversity rationale in the higher education context, were they to revisit the issue.”³¹⁵ “Proponents of affirmative action . . . are losing in the courts and in the political process. The Court seems determined to eliminate the use of race as a criterion for decision making by state actors, notwithstanding the devastating impact that such action might have on citizens of color.”³¹⁶ California, Michigan,³¹⁷ Florida, Nebraska, Texas, and Washington have enacted anti-race conscious legislation that prohibits admission practices to use race as a factor.³¹⁸ Given the uncertainty of the direction of the United States Supreme Court and the trend toward anti-race conscious initiatives,³¹⁹ many institutions discarded access admission practices.³²⁰ In doing so, they expose themselves to potential litigation for employing discriminatory practices. In response to these concerns, institutions must develop race-neutral but non-discriminatory admission practices.

indicated that the districts failed to show that they considered alternative methods to accomplish their goal. *Id.* at 735. Quoting from *Grutter*, the Court pointed out that narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives.” *Id.* (quoting *Grutter*, 539 U.S. at 339).

³¹⁴ See, e.g., Guy-Uriel E. Charles, *Response: Do We Care Enough About Racial Inequality? Reflections on The River Runs Dry*, 158 U. PA. L. REV. PENNUMBRA 119, 119–20 (2009).

³¹⁵ Barbara A. Noah, *A Prescription for Racial Equality in Medicine*, 40 CONN. L. REV. 675, 696 (2008).

³¹⁶ Charles, *supra* note 318.

³¹⁷ Shortly after the victory in the Court, Michigan passed Proposal 2, Michigan Civil Right Initiative and banned race-conscious practices. Monica Rose, *Proposal 2 and the Ban on Affirmative Action: An Uncertain Future for the University of Michigan in Its Quest for Diversity*, 17 B.U. PUB. INT. L.J. 309, 309 (2008). On November 7, 2006, 58% of Michigan voters chose to bar the state from granting preferences to or discriminating against individuals or groups in government employment, contracting, and education. *Id.* at 319.

³¹⁸ See Scott Powers & Luis Zaragoza, *10 Years Later, Results Mixed at Universities*, ORLANDO SENTINEL, April 11, 2010, at A1.

³¹⁹ Although the University of Michigan School of Law prevailed in *Grutter*, Proposal 2, a subsequent state initiative, banned the use of affirmative action in 2006. See Rose, *supra* note 317, at 309–10.

³²⁰ See Scott Jaschik, *Is Affirmative Action in Decline or Out of Control?*, INSIDE HIGHER ED (Oct. 9, 2008), <http://www.insidehighered.com/news/2008/10/09/affirm>.

1. *Abandonment of Access Admission Practices*

Many colleges, universities, and graduate schools have abandoned their access admission program because they fear potential litigation.³²¹ In the year after *Grutter*, over a hundred educational institutions were warned that complaints would be filed with the Office for Civil Rights unless race-conscious practices were discontinued.³²² The Center for Equal Opportunity reported that after *Grutter*, over one hundred colleges and abandoned universities had “‘voluntarily’ abandoned their race-conscious” admission practices.³²³ “By 2003, only about one-third of private colleges nationally and of public institutions without legal prohibitions on affirmative action said that they considered race in admission”³²⁴ “[E]ven though colleges in most states [did not] face the direct [requirement] to do so . . . , risk-averse institutions may simply abandon . . . their affirmative action programs to avoid scrutiny” and potential legal liability.³²⁵ “The threat that groups like the American Civil Rights Institute and the Center for Equal Opportunity will lodge a complaint with the Office for Civil Rights has led colleges and universities to modify the structure, eligibility criteria and focus of their academic support and financial assistance programs.”³²⁶

2. *Overreliance on Numerical Indicia Creates Potential Discriminatory Admission Practices*

The fear of litigation can cut both ways. The failure to provide a fair and accurate admission process could result in potential misuse³²⁷ of the LSAT and discrimination litigation.³²⁸ Several commentators, including

³²¹ *Id.*

³²² Epperson, *supra* note 30, at 169.

³²³ *Id.* Among these colleges and universities are Carnegie-Mellon University, Harvard University, Indiana University, The Massachusetts Institute of Technology, Northwestern University, Princeton University, The University of Illinois at Urbana-Champaign, Williams College, and Yale University. *Id.*

³²⁴ Jaschik, *supra* note 320.

³²⁵ *Id.*

³²⁶ Epperson, *supra* note 30, at 170. In this current anti-race-conscious legal climate, an increasingly large number of colleges and universities are discontinuing access admission practices. *See id.*

³²⁷ Misuse in this context means using the LSAT score as primary basis for admissions instead of as part of a holistic process.

³²⁸ *See* Nussbaumer, *supra* note 69, at 175.

the past president of LSAC, have indicated that the current reliance on the LSAT could give rise to discrimination litigation by those groups who are being denied admission to law school.³²⁹ At the St. John's School of Law 2005 conference "The LSAT, *U.S. News & World Report*, and Minority Admission," then President of the LSAC Phil Shelton stated, "[T]he evidence is very clear that the test has a disparate impact based on race, and if the test is being used contrary to LSAC guidelines that could provide a valid basis for proving racial discrimination."³³⁰ The LSAT is not a race-neutral criterion. Thus, to avoid threats of litigation from either end, law schools should adopt practices that are non-race-conscious (including not relying on the LSAT), but rather should adopt practices that ensure the underrepresented access.

3. *Race-neutral and Non-discriminatory Practices*

Among the variety of attempts to design race-neutral admission practices, three types of these practices include: class-based preferences, "X-percent" programs, and direct measures programs.³³¹

Class-based admission practices give preferences to applicants based on lower socioeconomic status.³³² This practice addresses only part of the problem because class is not a proxy for race. It does not account for the degree of disadvantage applicants of color have experienced or overcome.³³³ Fewer African-Americans from low-income backgrounds apply to college than do whites.³³⁴ As a result, focusing on socioeconomic class does not increase enrollments for applicants of color.³³⁵ For example, after Proposition 209 passed in California (banning racial preferences), UCLA College of Law employed an admission plan based on economic need.³³⁶ Sadly, in 1997, when UCLA no longer considered race and only considered economic need, black enrollment dropped by 72% and Hispanic

³²⁹ *See id.*

³³⁰ *Id.* (alteration in original).

³³¹ Roithmayr, *supra* note 115, at 10–12.

³³² *Id.* at 11.

³³³ *Id.* at 11–12.

³³⁴ Rose, *supra* note 317, at 333. Rose uses the term "black" instead of African-American.

³³⁵ *Id.*

³³⁶ Roithmayr, *supra* note 115, at 11.

enrollment dropped by 26%.³³⁷ In 1999, only two out of 286 enrolled students at UCLA were black.³³⁸

The “X-percent” strategy enacts legislation that automatically admits, into state schools students who were in the top percent of their graduating high school class without regard to ACT or SAT scores.³³⁹ Although over time these X-percent programs may increase enrollment of students of color in state schools, it does nothing to increase enrollment in the more elite schools.³⁴⁰ Moreover, these plans eliminate the ability of the admission committee to exercise discretion in its decision making.³⁴¹

The direct measures program offers the most promise.³⁴² This approach requires a more holistic review of each applicant but it ensures that the criteria is focused on “the educational benefits that flow” from

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ See Rose, *supra* note 317, at 330. Texas admits students in the top 10%, California admits students in the top 4%, and Florida admits students in the top 20% of their high school class. *Id.* See also Roithmayr, *supra* note 115, at 12.

³⁴⁰ Rose, *supra* note 317, at 331–32.

³⁴¹ *Id.* at 332.

³⁴² See *id.* at 335. Prior to *Grutter*, Daria Roithmayr suggested the follow three criteria as a direct measures program:

1. Has the applicant or applicant’s family been subject to the effects of racial discrimination or race-related adversity, past or present, including but not limited to direct, institutional or societal discrimination on the basis of race?
 . . .
2. Will the applicant, based on the applicant’s life experiences or own ideas and thinking, contribute a perspective or viewpoint on issues of racial justice that is currently not well-represented in the student population?
 . . .
3. Is the applicant likely to provide services or resources to communities that are legally underserved or disproportionately excluded by legal institutions?

Roithmayr, *supra* note 115, at 8–9.

inclusion.³⁴³ A direct measures program would consider in what ways the applicant would contribute to the educational mission of the school.³⁴⁴ The applicant could be asked to “highlight their experience with diversity or their potential for contributing to a diverse campus climate.”³⁴⁵

Hastings’ thirty year-old LEOP is a good example of such a direct measures program.³⁴⁶ LEOP aims to provide “alternative means of evaluating an applicant’s potential” and to provide an ASP.³⁴⁷ Generally, students who have overcome significant obstacles submit an additional application for consideration for admission to the program.³⁴⁸ They are asked to identify and describe obstacles they overcame as well as efforts they made to overcome those obstacles.³⁴⁹

Wayne State University Law School adopted a plan to consider numerical indicators plus “such factors as the applicant’s capacity to overcome socioeconomic disadvantage, whether the applicant has a leadership and volunteering background, whether the applicant’s residence constitutes ‘geographic diversity,’ and if the applicant is the first in the applicant’s family to attend college or graduate school.”³⁵⁰ The applicant can also explain the applicant’s ability to overcome discrimination.³⁵¹

Any combination of these holistic direct measures would conform to the current legal standards as set out by the anti-race conscious legislation and by the United States Supreme Court. The focus of these direct measures should be to determine the reliability of the numerical indicators. Race should not be a dispositive factor in and of itself; rather, it should be one of numerous factors that have relevance to the reliability of the numerical indicators.

The foregoing discussion supports the notion that numerical indicators, specifically LSAT scores, do not accurately predict or fairly measure merit for these applicants. To rectify the disparity in enrollment rates, both

³⁴³ See George La Noue & Kenneth L. Marcus, “*Serious Consideration*” of Race-Neutral Alternatives in Higher Education, 57 CATH. U. L. REV. 991, 1019 (2008).

³⁴⁴ See Roithmayr, *supra* note 115, at 6.

³⁴⁵ Rose, *supra* note 317, at 335.

³⁴⁶ See *Legal Education Opportunity Program*, *supra* note 277.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ Rose, *supra* note 317, at 335–36.

³⁵¹ *Id.* at 336.

private³⁵² and public law schools must develop admission practices that are inclusive, fair, and just. This is especially important given the general mission of legal education to train stewards of justice, and it is especially true for schools with a social justice mission.

V. A PRESCRIPTION FOR EFFECTIVE, INCLUSIVE, FAIR, AND JUST ADMISSION PRACTICES

In an effort to increase proportional representation, organizations and individual law schools have made efforts either to promote systemic change or to provide individual opportunities through pipeline initiatives. For example, the Society of American Law Teachers (SALT) promotes a boycott of *U.S. News & World Report* rankings because among other issues, the use of LSAT scores negatively impacts diversity.³⁵³ SALT is also working on initiatives to change ABA Accreditation standards.³⁵⁴ Besides advocating for change, other law related organizations have focused on providing access through pre-law and pipeline programs.³⁵⁵ For example, in forty years of operation, the Pre-Law Summer Institute and The Council on Legal Education Opportunity each provided access for

³⁵² More private law schools than public schools provide access admission today because they are free from constraints of anti-race-conscious legislation; however, tuition in private schools is often much higher than in public schools, so it once again creates unnecessary hardship on the underrepresented if their only access is in private schools. *See generally* Haddon & Post, *supra* note 5, at 43–44 n.3. The authors there noted:

There are some who suggest that elite private schools have begun to perform the traditional role of public institutions in providing access to quality higher education to less privileged students while public institutions with scarce resources have substantially abandoned this role. With minority students, there may have been a net loss in resources available to needy students because pressure from the Department of Education and the Justice Department, at the instance of opponents of affirmative action, has forced public universities to redistribute some of these funds to majority students.

Id.

³⁵³ *See* SALT, *SALT Issues Statement to Diminish Influence of U.S News Law School Rankings*, SALT (Sept. 30, 2010), www.saltlaw.org/contents/view/321.

³⁵⁴ *See* Hadden & Post, *supra* note 5, at 47.

³⁵⁵ *See* AM. BAR ASS'N PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, *supra* note 33, at 17.

diversity applicants.³⁵⁶ Some law schools offer pipeline initiatives³⁵⁷ and conditional admission programs.³⁵⁸

³⁵⁶ The Pre-Law Summer Institute prepares American Indian and Alaska Native applicants for law studies. AM. BAR ASS'N PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, *supra* note 33, at 20. The Council on Legal Education Opportunity is focused on expanding opportunities for minorities, low-income, and disadvantaged groups. *Id.* at 23. *See also What is CLEO*, COUNCIL ON LEGAL EDUC. OPPORTUNITY, <http://www.cleoscholars.com/index.cfm?fuseaction=Page.viewPage&pageID=482> (last visited Sept. 30, 2011).

³⁵⁷ AM. BAR ASS'N PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, *supra* note 33, at 17. LSAC has funded pipeline initiatives. *Racial/Ethnic Minority Applicants*, L. SCH. ADMISSION COUNCIL, <http://www.lsac.org/jd/diversity/minorities-in-legal-education.asp> (last visited Oct. 1, 2011). For examples of other pipeline programs, see Charles R. Calleros, *Patching Leaks in the Diversity Pipeline to Law School and the Bar*, 43 CAL. W. L. REV. 131, 144–49 (2006). The City University of New York (CUNY) School of Law has a unique approach to pipeline. In 2006, Associate Dean Mary Lu Bilek assisted in creating the Pipeline for Justice Program. CITY UNIV. N.Y. SCH. OF LAW, THE PIPELINE TO JUSTICE: CUNY LAW ENHANCES ACCESS TO THE PROFESSION 8, *available at* <http://www.law.cuny.edu/clinics/JusticeInitiatives/pipeline/pipeline.pdf>. After the admissions process is complete, CUNY reaches out to rejected applicants who are dedicated to public service and have other achievements, but whose LSAT scores were too low to gain admission. *Id.* at 7. CUNY invites these applicants to enroll in an intense LSAT preparation course. *Id.* During the first part of the course, students take an intense LSAT preparation course and a minimum of fifteen practice LSAT exams. *Id.* at 9. During the second part of the course, students take an intensive course on critical reading and writing skills. *Id.* In addition, students receive coaching on test anxiety, self-efficacy, and study planning. *Id.* at 7. Successful students are then admitted into CUNY. *Id.* Pipeline students state that the program provided them with confidence and skills not only to conquer the LSAT but also to succeed in law school. *Id.* at 10.

³⁵⁸ *See 2010 Law School Conditional Admission Programs*, L. SCH. ADMISSION COUNCIL (April 21, 2010), <http://www.lsac.org/jd/PDFs/2010-Conditional-Admissions-Programs.pdf>. Approximately twenty-three law schools avoid the access admission numbers game by inviting students to participate in conditional admission programs (CAPs), where applicants participate in a summer course, and if they earn a requisite grade, they gain admission. *Id.* *See, e.g., Special Summer Program*, U. DETROIT MERCY SCH. L., <http://www.law.udmercy.edu/prospective/admission/ssp.php> (last visited Nov. 1, 2011). The problem is that many applicants may not be able to afford the cost of tuition or to move to the school without a guarantee of admission. *See, e.g., SSP Frequently Asked Questions*, U. DETROIT MERCY SCH. L., <http://www.lawschool.udmercy.edu/ssp/sspfaq.php> (last
(continued)

These are all laudable efforts to increase access to law school, but they are not enough. Law school organizations can work with the ABA³⁵⁹ to better clarify and create accreditation standards that ensure solid academic programming for students. Law school organizations can create a legal defense fund and a network of pro-bono lawyers to protect against potential legal challenges, which would encourage more risk-adverse law schools to adopt access admission practices. Finally, law schools themselves can provide inclusive admission practices, by expanding their pool, involving faculty in the admission process, establishing an application criterion that captures the underrepresented, formulating a system to evaluate the application, and providing an effective ASPs.

visited Oct. 1, 2011) (noting that no financial aid is available for the Special Summer Program and that students will learn whether they have passed two to three weeks after the program's conclusion).

³⁵⁹ One indication that the ABA would welcome ways to ensure more inclusive access in admissions is Interpretation 802–1 which:

permits the granting of a variance for an experimental program based on all of the following:

- (1) Good reason to believe that there is a likelihood of success;
- (2) High quality experimental design;
- (3) Clear and measurable criteria for assessing the success of the experimental program;
- (4) Strong reason to believe that the benefits of the experiment will be greater than its risks; and
- (5) Adequately informed participation by students involved in the experiment.

The Accreditation Committee, in assessing the application for a variance, will consider (among other things) whether the program in question is one that might, with further evidence from experience, be found to be in compliance with Standard 503 and Interpretation 503–1. It is also important to keep in mind that under Standard 802 and Interpretation 802–5, variances are school-specific and based on the circumstances existing at the law school filing the request.

AM. BAR. ASS'N, CONSULTANT'S MEMO #1—REVISION 1, STANDARD 503 2 (2009), *available at* http://www.americanbar.org/groups/legal_education/resources/accreditation/consultants_memos.html.

A. *Expand the Pool*

Merely recruiting applicants from underrepresented populations with higher scores is an option that schools may exercise; however, this will not achieve the goal of increasing representation in schools and the profession because it merely moves those with higher numerical indicators to other schools. All schools should be working to expand the pool rather than to merely compete for the same students. To increase the overall pool all schools should, in combination with factors that suggest the numerical indicators are not an accurate measure, admit 10% of their students from either the bottom quartile of their pool or with LSAT scores that are within one standard deviation of their median LSAT score. Expanding the pool would not only provide access, but it would also ensure enrollment of a critical mass of the underrepresented in the higher-tier schools. As discussed earlier, expanding the pool by one standard deviation below the median LSAT score does not compromise the ranking, because once the median LSAT is set, the lower numbers do not count.³⁶⁰

B. *Engage Faculty*

Engaging the faculty in the admission process will better serve schools' missions and create a better classroom environment. Unfortunately, as part of the general trend to reduce faculty governance and increase faculty scholarship, faculty involvement in other activities including the admission process has decreased.³⁶¹ However, excluding faculty from the admission process has far reaching and negative implications. The successful applicants become students, who become alumni, and alumni become the emissaries of the school's mission.³⁶²

³⁶⁰ See Espeland & Sauder, *supra* note 29, at 606.

³⁶¹ See generally Melissa J. Marlow, *It Takes a Village to Solve the Problems in Legal Education: Every Faculty Member's Role in Academic Support*, 30 U. ARK. LITTLE ROCK L. REV. 489, 493 (2008). The statistical indicators used in *U.S. News & World Report* rankings for law school fall into two categories: inputs, or measures of the qualities that students and faculty bring to the educational experience, and outputs, or measures of graduates' achievements linked to their degrees. See generally Robert Morse & Sam Flanigan, *How U.S. News Calculated the 2012 Graduate Schools Rankings*, U.S. NEWS & WORLD REPORT (Mar. 14, 2011), <http://www.usnews.com/education/best-graduate-schools/articles/2011/03/14/how-us-news-calculated-the-2012-graduate-school-rankings>.

³⁶² See, e.g., *Alumni*, W. MICH. U. C. HEALTH & HUMAN SERVS., <http://www.wmich.edu/hhs/alumni.html> (last visited Oct. 1, 2011) (describing alumni as "our partners, emissaries and supporters").

Faculty must determine who they want to reflect the values and mission of their school. By increasing their involvement, faculty can help shape the complexion of the entering class and know more about their students. Even if they do not remember individual students by name, faculty who know about the backgrounds of the majority of the student body are more likely to treat students as whole people and not faces among the masses.³⁶³ This familiarity could help create a more humane learning environment that could ultimately benefit the students by enhancing their learning and ultimately making them better lawyers. Moreover, faculty governance directly impacts the students' experience in law school.³⁶⁴ Thus, faculty members need to realize how their decisions impact the students. To fully understand those impacts, faculty need to understand their students, what motivates them, and what has shaped them. Most faculty members' life opportunities and experiences vastly differ from their students.³⁶⁵ Having faculty involved in reviewing applications will enable them to promote institutional values and missions and provide governance that truly serves the students and, ultimately, the profession.

C. Establish Admission Criteria

Schools should develop a set of direct measures that give an idea of how the candidate may encapsulate the school's mission. A committee comprised of admission personnel, faculty, administrators, students, and alumni should develop the criteria for admission and design the application form.³⁶⁶ This application should be the only one provided; there should not

³⁶³ See *Applying to Graduate School*, U. TENN. HEALTH SCI. CTR., <http://www.uthsc.edu/allied/asp/undergraduate/applyingtogradschool.php> (last visited Oct. 1, 2011) (informing students that professors who know a student's abilities and potential will be the professors who know that student as an individual and not merely a "face in the crowd").

³⁶⁴ See, e.g., Eve Gerber, *Harvard's \$200,000 Question*, SLATE MAGAZINE (July 8, 1999), http://www.slate.com/articles/briefing/articles/1999/07/harvards_200000_question.html (discussing a Harvard plan to have a consulting firm review, among other things, faculty governance to explain why students were "unhappy").

³⁶⁵ See Tracy Jan, *Colleges Lagging on Faculty Diversity*, BOSTON GLOBE, Feb. 16, 2010, http://www.boston.com/news/education/higher/articles/2010/02/16/boston_area_short_on_black_hispanic_professors/ ("At [Boston University], like the other schools, the percentage of minority faculty lags far behind the demographics of its student body.").

³⁶⁶ Admission practices should "consider test scores in context and evaluate other factors," including questions in the application that will give more information about the

(continued)

be a separate application for access admission to avoid concerns of discriminatory practices. The application is an opportunity to set the tone and communicate the mission of the school, and the admission questions should be used to convey that message.

In addition to numerical indicators, personal statements, undergraduate transcripts, LSAT writing samples, resumes, and references, the application would include a section to evaluate direct measures. These direct measures could help: (1) evaluate the reliability and accuracy of the numerical indicators; (2) determine how the applicant will add benefit to the mission and educational experience of the school; and (3) determine how the applicant will contribute to the profession.

Because the numerical indicators are less reliable with some populations, the application could include a section that asks applicants to directly discuss whether they think their UGPA or LSAT score accurately reflects their merits and abilities. There could be a series of questions, such as the following:

- Did you take an LSAT Prep Course?
- How many times did you take the LSAT?
- If you took practice tests, what was your average score?
- Do you have a history of under-performing on standardized tests?
 - What was your SAT or ACT?
 - Did your SAT or ACT score fairly predict your UGPA?
- Is English your second language?
 - If you have a TOEFL Score, what is it?
 - How long have you lived in an English-speaking country?
- Do you wish to disclose any disabilities, including learning disabilities that may have impacted your ability to perform on the LSAT?
 - Do you wish to disclose if you had testing accommodations?
 - If you disclose, please provide documentation.

applicant, individually review each applicant, and “aim for diversity of experience.” BINGHAM MCCUTCHEN LLP ET AL., PRESERVING DIVERSITY IN HIGHER EDUCATION: A MANUAL ON ADMISSIONS POLICIES AND PROCEDURES AFTER THE UNIVERSITY OF MICHIGAN DECISIONS 66, 67 (2004), *available at* [http://www.equaljusticesociety.org/compliance manual/](http://www.equaljusticesociety.org/compliance_manual/).

- Have you been out of a formal educational environment for more than six years?
- Did you work when you were in undergraduate school?
 - How many hours per week?
- Did you have care-taking responsibilities to family members while in undergraduate school?
- Have you done additional academic work since undergraduate school?
- What is your race/ethnicity/nationality?
- Are you the first in your family to go to college?
- What are/were your parents' occupations?
- What is your socioeconomic background?
- Other: Do you wish to disclose any other factor that may have compromised your ability to perform on the LSAT or that would suggest your UGPA is not an accurate measure of your academic ability?

Direct measures can also be used to determine how the applicant can further the mission of an educational experience in the school. The applicant could be asked a few short questions, such as:

- Do you have experience with diversity or discrimination?
- How have you overcome adversity?
- How have your life experiences shaped your values and perspectives?
- What do you expect to learn in law school?
- What do you expect to contribute to the law school environment?
- In what ways do you plan to serve the underserved in the legal profession?

Additionally, direct measures can help to determine how the applicant can contribute to the profession. The applicant could be asked:

- In what ways do you think you will use your law degree?
- What is your main motivation for attending law school?
- How has your idea of the legal profession been shaped?
- Describe one of your role models and explain in what ways you want to emulate your role model.
- As a lawyer, in what ways do you think you can contribute to the profession, society, or your local community?

D. Formulate a Rubric to Evaluate the Application

As the admission committee reviews applications, members need to know what they are looking for and how to best evaluate what information

they can glean from different parts of the application. In addition to the relative weight of the quality of the undergraduate school and the numerical indicators—along with the factors to determine the relative reliability and accuracy of those indicators, and the contribution to the law school and the profession short answers—the application will also contain a personal statement, the undergraduate transcript, LSAT writing sample, and prior experiences and references.

1. The Personal Statement

Although the personal statement can be an indicator of how well the applicant organizes ideas and writes, focus should be on the content of the statement. Beyond providing information about writing skills, personal statements indicate obstacles that the applicant overcame and what motivated the applicant to want to become a lawyer.³⁶⁷ The fact that an applicant overcame significant obstacles is not only an indication of merit, but also an indication that the applicant has the discipline and focus necessary to persevere. Similarly, the more the applicants can articulate their motivation for wanting to become a lawyer, the more likely it is that the applicants will remain engaged in the educational process.³⁶⁸ Whether they want to do public interest or civil rights work because they were victims or witnesses of injustice, or whether they want to practice on Wall Street because they suffered from poverty, applicants with strong motivation have a clear purpose and passion for succeeding in law school. This passion increases their chances of staying motivated through tough times.³⁶⁹ Motivation and perseverance are two essential characteristics, not only in law school, but also in the practice of law,³⁷⁰ and the personal

³⁶⁷ *Personal Statement*, ALMA C., http://www.alma.edu/academics/departments/pre-professional/law/personal_statement (last visited Oct. 1, 2011).

³⁶⁸ *See id.* (“Most pre-law advisors and law school admission committee members agree that the best personal statements . . . allow readers to draw positive conclusions about the applicants’ chances for success in law school.”).

³⁶⁹ *See Message from the Dean of Admission*, CHARLESTON SCH. L., <http://www.charlestonlaw.edu/v.php?pg=10204> (last visited Oct. 2, 2011) (“I want to see some passion. The passion, the fire, should come through in the personal statement.”). This motivation is so essential that it is a component of the summer program at Seattle University. ARC students write their reasons for being in law school and share their reasons with each other.

³⁷⁰ *See Personal Statement*, *supra* note 367 (“Perseverance, determination, motivation, [and] self-discipline . . . are good [themes] on which to base stories about your life that underline traits useful for law school and [a legal] career.”).

statement can be an excellent proxy of these characteristics. Personal statements that appear undeveloped³⁷¹ may not necessarily reflect inadequacy; rather, they may simply reflect that the applicant did not have anyone to guide them through the application process. Therefore, when reading personal statements, the admission committee should remain flexible and refrain from making sweeping conclusions and assumptions. Before rejecting an applicant based on a thin or inadequate personal statement, the admission committee should ask the applicant to provide a supplement to the personal statement.

2. *UGPA and LSAT*

Personal statements are not the only traditional area of an application that can provide insight into an applicant's character. UGPA can also provide valuable information, but the UGPA may not be sufficient by itself. Parsing through a transcript can show whether the applicant can perform academically. Erratic patterns in grades may indicate that the applicant had some traumatic experience in college or was guided into the wrong major. In addition, upward trends in grades may indicate the applicant was under-prepared for college. In addition, the transcript can show what courses the students did well in and what courses they did not do well in. For example, if they did really well in American History or Philosophy, where they had to write a lot of papers and read heavy texts, but they did poorly in Chemistry, they may be a good candidate for law school even though they may have a slightly lower overall UGPA.³⁷² Thus, looking beyond the simple three-digit number can be very informative.

The LSAT score is relevant in the sense that the lowest LSAT score should be within a one standard deviation of the median LSAT score for the school. Although an applicant with a lower LSAT score could succeed, it is easier to justify admission and not compromise the *U.S. News & World Report* rankings if the scores remain within this range. More

³⁷¹ For example, on the surface, grammatical errors and writing issues may be troubling because the applicants presumably had the chance to edit their statement and likely had access to an editor. Thus, the presence of these errors may indicate a carelessness and lack of precision that will not bode well in law school.

³⁷² Studies show a student's particular field of study in undergraduate studies affects performance gains and types of reasoning learned later in graduate programs. See Mark Graham & Bryan Adamson, *Law Students' Undergraduate Major: Implications for Law School Academic Support Programs (ASPs)*, 69 UMKC L. REV. 533, 547-48 (2001).

important than the actual LSAT score is whether the applicant took a preparation course, whether the applicant had a disability but did not receive accommodations, and whether the applicant took the LSAT more than once, which would indicate motivation and perseverance.

An often-overlooked piece of the LSAT is the writing sample.³⁷³ Unlike the personal statement, which may have been edited, the writing sample may provide a good example of how well the applicants write, and whether they can think logically and develop their thoughts. A superficial, one-sided, and basic response to the writing prompt on the LSAT may indicate that the applicant would have difficulty with legal analysis and writing.

3. *Prior Experiences and References*

Finally, an applicant's prior experiences provide invaluable insight. An applicant who has had relevant legal experience has a context for law studies. Other experiences, such as leadership activities, competitive athletics, and volunteer work demonstrate the vision, motivation, drive, and the discipline to succeed. Such experiences also signal the contribution these applicants can make in the law school and legal community.

Consider some of the prior experience of many of the ARC students that signaled their ability to succeed.³⁷⁴ Some had successful careers in corporate settings such as Microsoft, Boeing, and the National Football League. Others owned and operated a business. Some worked in a variety of political arenas, as interns at the White House and Congress, as campaign organizers, or as elected officials. Many had extensive travel experiences and exposure to different cultures through organizations such as AmeriCorps or the Peace Corps. Others had significant athletic achievements, and one student had even run with the bulls in Spain, which signaled his appetite for adventure and willingness to take risks. These experiences also enriched their ability to contribute to the law school, the learning environment, and to the profession.

³⁷³ As previously discussed, law schools heavily rely on an applicant's LSAT score, and the writing sample component of the LSAT is not included in this score. See Andrea A. Curcio et al., *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271, 283 n.67 (2008).

³⁷⁴ See *supra* note 109.

Furthermore, experience can generate better references.³⁷⁵ References provide useful information about an applicant,³⁷⁶ especially for underrepresented populations. Many people are more reticent about sharing their accomplishments because their culture regards such boasting as rude, impolite, or arrogant.³⁷⁷ Unlike academic and employment references, personal references may be discounted in admission circles; however, in the context of underrepresented applicants, personal references from family friends, pastors, ministers, or community leaders may be more informative because they will shed light on achievements that the applicant may not. Moreover, the absence or superficiality of an academic reference does not necessarily mean that the applicant did not do well in any course; it may simply mean that the applicant did not develop a personal relationship with any professor. Again, many people from underrepresented populations do not know how to navigate the academic world or how to cultivate connections they will later need.³⁷⁸

Once the law school has effectively expanded the pool, engaged faculty, established relevant admission criteria, and formulated an application evaluation rubric, it will likely have increased the proportion of underrepresented in their entering class. With providing access, law schools need to also provide mechanisms to ensure that these students succeed and excel.

E. Provide Effective Academic Support

Although full discussion of effective ASPs is beyond the scope of this article,³⁷⁹ it is important to realize how critical an ASP is to the mission of

³⁷⁵ See Douglas E. Ray & Heather S. Karns, *Job Search Skills for the New Economy*, 40 U. TOL. L. REV. 403, 405 (2009).

³⁷⁶ See Parker B. Potter, Jr., *The Rhetorical Power of Law Clerks*, 40 SW. L. REV. 473, 476 (2011).

³⁷⁷ See, e.g., Alexandre Ardichvili et al., *Cultural Influences on Knowledge Sharing Through Online Communities of Practice*, 10 J. KNOWLEDGE MGMT. 94, 101 (2006) (“[I]n Chinese culture, it is not acceptable to speak a lot in public and to stand out.”).

³⁷⁸ See GLADWELL, *supra* note 184, at 101–08. The Seattle University ARC program also stresses the importance of networking with members of the practicing bar by providing opportunities for students to interact with practitioners at receptions, special events, and even mock interviews. *Summer Program*, SEATTLE U. SCH. L., http://www.law.seattleu.edu/Academics/Academic_Resource_Center/Program_Overview/Summer_Program.xml (last visited Sept. 24, 2011).

³⁷⁹ See Lustbader, *supra* note 15; Lustbader, *supra* note 10.

inclusion. An effective ASP empowers students³⁸⁰ when it creates a critical mass, addresses stigma³⁸¹ and backlash issues, values the contribution the students make, helps students develop learning communities, fosters their integration into the school³⁸² and the profession, and provides academic and non-academic support.³⁸³ For example, at Hastings, LEOP students develop a sense of community that begins at the LEOP orientation.³⁸⁴ That sense of community extends throughout law school because the students attend small workshops and small group sessions through which the students begin to rely on each other for support and perspective.³⁸⁵ Similarly, at Seattle University School of Law, ARC starts with an intensive summer-entry program, creates a community, and provides ongoing support.³⁸⁶

³⁸⁰ Such an ASP can help keep students engaged and validated. *See* Lustbader, *supra* note 15, at 842. Underrepresented students are more likely to feel a disconnect between their own values and the institution's values. Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 546 (2007). This disconnect can lead to the student withdrawing and underperforming. *See id.* (arguing that people of color and women are more likely to experience a disconnect from their values and withdraw).

³⁸¹ ASPs can cause harm by placing additional work on students participating in a given program, the dependence that such a program may create, or the stigma students may feel from such a program. *See* Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 781–83 (1996). “[ASPs] must avoid or eliminate stigma. Those who participate in ASPs are often stigmatized. Such stigma stems from arguments made against the existence of special admissions program.” Cerminara, *supra* note 243, at 256.

³⁸² “By narrowly focusing on increasing the number of minority students admitted and enrolled into a particular institution, contemporary concepts of affirmative action succeed in opening the doors for minority students . . . [but] fail to fully integrate minority students into an institution's community once they have walked through those doors.” Nelson, *supra* note 20, at 31.

³⁸³ *See* Lustbader, *supra* note 15, at 842–43.

³⁸⁴ *A Sense of Community*, U. CAL. HASTINGS C. L., http://web.archive.org/web/20040604001140/http://www.uchastings.edu/leop_01/community.htm (last visited Sept. 29, 2011).

³⁸⁵ *What Does LEOP Offer?*, U. CAL. HASTINGS C. L., http://web.archive.org/web/20040604020220/http://www.uchastings.edu/leop_01/whatdoesleopoffer.htm (last visited Sept. 29, 2011).

³⁸⁶ *See Academic Resource Center Program Overview*, *supra* note 107.

Many schools claim that inclusive and holistic admission practices are too time consuming and expensive.³⁸⁷ As a result, these schools are willing to exclude potentially great applicants for the sake of efficiency.³⁸⁸ Certainly, inclusive admissions require a resource-intensive admission process, a resource-intensive faculty development program, and a resource-intensive ASP. The benefits of ensuring inclusion far outweigh those costs because such inclusion enhances the law school and the profession.

VI. THE COST/BENEFIT ANALYSIS OF ENSURING INCLUSION

Although the cost may be high, the benefits of an inclusive, fair, and just direct measures admission process outweigh those costs. The cost of such a process includes the time-intensive nature of full review,³⁸⁹ the training of admission personnel and faculty committee members,³⁹⁰ the implementation of an ASP,³⁹¹ the adoption of faculty development programs for pedagogy, and the commitment of the institution to ensure student success.³⁹²

A clear direct measures application and criteria, as recommended above, can ameliorate some of the time and costs associated with holistic reviews. Focused application questions and an evaluation rubric help establish clarity. The school must affirmatively and explicitly determine admission criteria in addition to the numerical indicators that are important to achieve the educational mission of the school. Having such clarity of purpose in the admission process communicates to all students what factors are valued.

The cost to train admission personnel and faculty committee members can result in a more efficient and effective review process. Once the application reviewers know what they are looking for and why, reading

³⁸⁷ See Hadden & Post, *supra* note 5, at 72.

³⁸⁸ See *id.* at 71. Law firms make this same trade-off. See S.S. Samuelson, *The Organizational Structure of Law Firms: Lessons from Management Theory*, 51 OHIO ST. L.J. 645, 655 n.86 (1990). They may consider only applicants who were in the top 10% of their class because they assume those applicants will be strong candidates. *Id.* Sadly, in only looking at the top 10%, of the class, these firms are overlooking other applicants who may have a broader range of skills that will make them more effective lawyers.

³⁸⁹ Hadden & Post, *supra* note 5, at 72.

³⁹⁰ *Id.*

³⁹¹ See Cerminara, *supra* note 243, at 268.

³⁹² See generally *id.* at 254–55.

through files can go relatively quickly. Further, reviewers benefit by gaining a sense of satisfaction that the process is fair and reliable.

The cost of adding an ASP can be offset by more satisfied and successful students.³⁹³ It is not sufficient to provide access; the majority of these students will still need a special support program.³⁹⁴ Such a program would have, at a minimum, a full-time director. The remaining staffing needs would depend on the size of the student body and the type of program that the school decides to create.

The cost of training faculty in pedagogy will be offset by the benefit of more effective teachers.³⁹⁵ Faculty will benefit from cross-cultural competency and sensitivity training. They also will benefit by learning about pedagogical practices that enhance learning and ensure success for their students. Faculty committed to inclusive and effective pedagogy employ ASP pedagogies in their classes. Such pedagogy is more consistent with the recommendations in the Carnegie Report³⁹⁶ and Best Practices.³⁹⁷

The cost of an institutional commitment to students can be outweighed by the reality that the admission process has helped the school manifest its educational mission. By having a more inclusive admission process, more of the underrepresented will be enrolled in the school and prepared to represent clients from all walks of life.

Funding for these expenditures can be considered an investment in the future of the law school and the profession. When students feel the school is invested in their success, these students become alumni who feel invested in the school. For example, Seattle University ARC alumni, when

³⁹³ One example is the University of Michigan Law School Peer Support Services. *Peer Support Services*, U. MICH. L. SCH., http://www.law.umich.edu/currentstudents/student_services/Pages/peersupportsvcs.aspx (last visited Sept. 26, 2011).

³⁹⁴ See Cerminara, *supra* note 243, at 253–54.

³⁹⁵ See Lustbader, *supra* note 15, at 844. Such faculty development is necessary regardless of the presence or absence of access admission. Legal education pedagogy must respond to the learning styles of incoming students and prepare them for the society and legal system they will enter, not the one that existed when the Langdellian method was established. See generally Paula Lustbader, *You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly over the Rainbow*, 47 WASHBURN L.J. 327 (2008).

³⁹⁶ CARNEGIE REPORT, *supra* note 22, 5–10. First year law school classes are dedicated to well-honed skills of legal analysis; however, they should be matched by an emphasis on skills to serve clients and a solid ethical grounding. *Id.* at 4.

³⁹⁷ BEST PRACTICES, *supra* note 22.

compared to their counterparts, are more connected to the law school, and disproportionately participate in alumni functions and law school activities, such as coaching and judging mock trials.³⁹⁸ Moreover, ARC alumni donate disproportionately to the school when compared to their non-ARC counterparts.³⁹⁹

Programs like the ARC also provide a strong basis for fund raising. Law firms that express a commitment to diversity are likely targets for funding. In addition, some benefactors who believe in the mission of access and see a record of success are likely to provide funding.⁴⁰⁰ For example, at Seattle University, after acquiring a twelve year track record of success, an anonymous benefactor created an endowment for scholarships for the ARC students.⁴⁰¹ The benefactor has contributed to that endowment almost annually since then and the endowment now exceeds eight million dollars.⁴⁰²

Consider these ARC alumni and the contributions they made as discussed earlier in this article. Over half of these ARC alumni were denied admission into any other law school.⁴⁰³ Without the ARC program, these individuals would not be lawyers. Without such access, the law school and the profession would not have benefitted from their many contributions. Can law schools and the profession really afford not to have these lawyers in the community? In the end, the cost of not providing access is far more than providing access. The marginal cost to ensure access is far outweighed by the benefits of inclusion.

³⁹⁸ See Lustbader, *supra* note 108.

³⁹⁹ See Kenneth Shook, Seattle Univ. Sch. of Law, ARC Alumni Donor Report (April 14, 2010) (unpublished report) (on file with author). According to Kenneth Shook, Seattle University School of Law Associate Director of Development, of the alumni who graduated between 1990 and 2009 and that participated in giving to the school, ARC alumni constituted greater than 10% of the total number of alumni between the fiscal years of 2007–09. *Id.* ARC alumni comprised less than 10% of these alumni. *Id.*

⁴⁰⁰ See James M. Hodge, *Gifts of Significance*, THE CTR. ON PHILANTHROPY IND. U., http://www.philanthropy.iupui.edu/TheFundRaisingSchool/PrecourseReadings/precourse_giftsofsignificancehodge.aspx (last visited Oct. 2, 2011) (“Gifts of significance are given to organizations that earn the trust and confidence of benefactors. . . . Major gifts generally come from those donors who already believe the institution’s mission . . .”).

⁴⁰¹ Lustbader, *supra* note 108.

⁴⁰² *Id.*

⁴⁰³ See *id.*

Finally, if schools are truly concerned about costs, they should consider what they spend in the rankings race. Given the price law schools pay to achieve a higher ranking, the collateral cost to the integrity of legal education, the access to the profession, the compromise of many law schools' missions, and the erosion of the academic programs, surely, the cost of establishing fair and just admission practices and the academic support to ensure meaningful opportunity is a small price to pay.⁴⁰⁴

VII. CONCLUSION

Law schools over-rely on numerical criteria and abandoned access admission practices in an effort to increase their rankings by *U.S. News & World Report*, to comply with ABA accreditation standards, in response to anti-race-conscious practices legislation and court rulings, and in an attempt to save costs. However, numerical criteria are an unreliable measurement of merit and an inaccurate predictor of potential for success for underrepresented populations. The factors that lead to the achievement gap are deeply rooted in society. Even if law schools commit to adequate, effective, and strident major educational reforms and pipeline initiatives, it will take more than a generation for those efforts to close the achievement gap for applicants to colleges and graduate school. The justice system cannot afford to wait that long.

Law schools can ensure inclusive, fair, and just admission without compromising their integrity. They can adopt admission policies that increase enrollment of the underrepresented without compromising their rankings, that satisfy the ABA accreditation standards, and that conform to the current legal climate. To do so, instead of abandoning access admission, law schools need to abandon their over-reliance on numerical

⁴⁰⁴ Ensuring access to traditional higher education is also important in the rise of higher education for-profit. These for-profit schools often do not offer accredited programs and leave students in high amounts of debt. See Mary Beth Marklein, *As For-Profit Colleges Rise, Students Question Value*, USA TODAY, Sept. 29, 2010, at A1. For many students, particularly those from underrepresented communities, their only option for higher education is to enroll in for-profit schools. See generally LAURA H. GILBERT, BACK TO SCH. FOR GROWNUPS LLC, FOR-PROFIT HIGHER EDUCATION UNDER SCRUTINY: ISSUES AND CHALLENGES 7 (2011), available at <http://backtoschoolforgrownups.com/wp-content/uploads/2011/06/For-Profit-Higher-Education-Under-Scrutiny.pdf>. If access is not granted at traditional schools, underrepresented students will be relegated to for-profit schools and placed at even more of a disadvantage.

indicators and shift from a race-conscious admission paradigm to a holistic direct measures admission practice.⁴⁰⁵

As I write this article, I am also reading approximately 400 applications for the ARC program. In file after file, I am made aware of the privileges bestowed upon me just by accident of birth. These applicants have amazing life stories, fortitude, gifts, and passion. I am grateful that my law school has not wavered in its commitment to access. I am also heavy hearted because we can only enroll a small percentage of these applicants, and I am acutely aware that for the majority of them, their dream of becoming a lawyer will end.

The applicants accepted will make their unique contributions to the law school, the profession, and the clients they serve. Consider the responses of alumni when asked about why they are proud to be lawyers:

- “There are no words to explain how great it feels when you witness a victim of domestic violence turn the corner from ‘victim’ to ‘survivor.’”⁴⁰⁶
- “My client walked up to me after a hearing and said, ‘Thank you for giving me my child.’ I know I made a direct difference in that child’s life.”⁴⁰⁷
- “I am proud of being part of our land use and environmental practice team and doing projects like the Port of Seattle Third Runway, the Qwest Field, and Exhibition Center. On a more personal level, pro bono projects really stick with you.”⁴⁰⁸
- “When I worked for the State’s Medicaid agency, I got a call from a member of the public thanking me for being the sole reason why she was receiving effective medical care. She wept while she thanked me; it brought tears to my eyes.”⁴⁰⁹
- “I write contracts for the Army, generally for humanitarian assistance projects and disaster relief in Central America. Recently, I was reviewing potential sites for the Army to drill water wells for the local people. I remember thinking that helping people this way was an absolutely wonderful way to

⁴⁰⁵ In a statement on the LSAT, SALT called for admission reforms, including the adoption of a more “whole file” review process. See Hadden & Post, *supra* note 5, at 103.

⁴⁰⁶ Paula Lustbader, *My Reflections on ARC’s 20th Anniversary*, SEATTLE U. SCH. L., <http://www.law.seattleu.edu/x1528.xml> (last visited Oct. 2, 2011).

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

make a living and make a difference in people's lives. I really feel great about that. God bless you for helping me be able to do that."⁴¹⁰

- "Gotta go with the helping people thing . . . love it . . . and I make a great living."⁴¹¹

These remarks demonstrate the caliber of alumni who would have been denied access in most schools. Let these remarks serve as a reminder of the potential that current admission practices leave at the door. An inclusive, fair, and just admission process ensures access for applicants with profiles similar to these alumni. The profession needs them. Their future clients are waiting for them.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*