Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admissions To Ensure Full Representation in the Profession

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I: Introduction

African-American\textsuperscript{1} and Mexican-American enrollment in law schools has declined sharply since 1993.\textsuperscript{2} Disconcertingly, this decline occurred during a time when both groups applied at a relatively constant rate and saw their numerical entry indicators increase, and the number of seats in law schools grew by over 3,000.\textsuperscript{3} This decrease in enrollment occurred because law schools place an unwarranted premium on numerical criteria\textsuperscript{4} to predict success in law school and increase minimum levels for qualification to improve school rankings.\textsuperscript{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.\textsuperscript{6} By the same token, law schools, the initial gatekeepers of who enters the profession\textsuperscript{7} and the educators of future lawyers, have a similar

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\textsuperscript{1} Because articles that address race and ethnicity issues use varying terminology within their own research, I will use the term that each original source used.

\textsuperscript{2} The representation of both groups has declined since 1993. The proportion of African-Americans in the 2008 class decreased 7.5% as compared with the 1993 class. The proportion of Mexican-Americans in the 2008 class decreased 11.7% as compared with the proportion entering law school 15 years ago. \textit{See A Disturbing Trend in Law School Diversity}, SOC’Y OF AM. L. TCHR., http://blogs.law.columbia.edu/salt/ (last visited Aug. 15, 2010).


\textsuperscript{4} Undergraduate Grade Point Averages (UGPA) and Law School Achievement Test (LSAT) scores.

\textsuperscript{5} Most law schools use a formula to compute an admission index; they weigh the LSAT between 55 and 65% in the formula. \textit{See} Michael A. Olivas, \textit{Higher Education Admission and the Search for One Important Thing}, 21 U. ARK. LITTLE ROCK L. REV. 993, 1003 n.32 (1999). 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 admission process. LSAT scores are a large component of the law school rankings; thus, they have a great impact on law school admissions decisions. \textit{See} Jennifer Jolly-Ryan, \textit{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, (2007–2008).

\textsuperscript{6} 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. \textit{See} Akshat Tewary, \textit{Legal Ethics as a Means to Address the Problem of Elite Law Firm Non-Diversity}, 12 ASIAN L.J. 1, 32–33 (2005).

\textsuperscript{7} Eighteen states require a J.D. or L.L.B. in order to take the Bar exam. \textit{See Comprehensive Guide to Bar Admission Requirements}, NAT’L CONF. OF BAR EXAM’RS & A.B.A. SECTION ON LEGAL EDUC. & ADMISSIONS TO
duty to ensure that they employ inclusive, fair, and just admissions practices. Unfortunately, the majority of law schools are failing to meet that charge.

Law schools have abandoned access admissions practices and view their heavy reliance on numerical indicators as necessary to increase their rankings in the U.S. News and World Report. In addition, schools misinterpret the compliance requirements for ABA Accreditation. Citing concerns about the current anti-race-conscious legal climate, many law schools also believe that they cannot provide access—even with the proliferation of Law School

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The Association of American Law Schools Handbook/Membership Requirements: BYLAWS AND EXECUTIVE COMMITTEE REGULATIONS PERTAINING TO THE REQUIREMENTS OF MEMBERSHIP, The AALS requires that member schools have faculty “who are devoted to fostering justice and public service in the legal community.” http://www.aals.org/about_handbook_requirements.php, § 6-1(b) (i). In addition, it requires 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.” http://www.aals.org/about_handbook_requirements.php, § 6-1(b) (v). Finally, it requires member schools to engage in non-discriminatory practices. http://www.aals.org/about_handbook_requirements.php, § 6-3.

See also About Us, A.B.A. CTR. for Racial & Ethnic Diversity, http://new.abanet.org/centers/diversity/Pages/Information.aspx (last visited June 17, 2010). The same can be said of law firm hiring practices. As stewards of justice, the legal profession, more than any other profession, must employ just practices. See Alex M. Johnson, Jr., Representing Race: The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist’s Perspective, 95 Mich. L. Rev. 1005, 1011 (1997).


Access admissions practices are those that enable a law school to consider criteria beyond numerical indicia in order to increase enrollment of the underrepresented.


Actually, the ABA may have created an unintended conflict. Standard 501-2 requires that admissions practices be consistent with standards 211 and 212, which address diversity, 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, 2009-2010 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 39 (2009–2010), http://www.abanet.org/legaled/standards/2009-2010 StandardsWebContent/Chapter5.pdf. These standards suggest that law schools that over rely on the numerical indicators could actually be in noncompliance. But standard 501(b) requires law schools to “not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar.” Id. at 38. When combined with standard 301–306, 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 admissions practices. Id. at 19–20, http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf.
Academic Support Programs\textsuperscript{13} and professionals with specialized expertise to ensure students’ success.

By relying primarily on numerical criteria\textsuperscript{14} and adopting less comprehensive admissions practices, law schools disregard the fact that numerical criteria are poor measures of merit and predictors of success in school\textsuperscript{15} and in practice.\textsuperscript{16} Moreover, they disregard the importance of

\textsuperscript{13}The abandonment of ASPs and the fear of potential litigation over race-conscious practices deterred many ASPs from explicitly addressing issues of underrepresentation. Instead, most of these programs serve the bottom quartile or identified at-risk student populations. Many of these students happen to also be from underrepresented populations. 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.

\textsuperscript{14}Admissions practices vary between law schools. Some schools calculate an index score that combines an applicant’s UGPA and LSAT score. Different schools place different weights on these two factors, for example, some place 40% of the index score on UGPA and 60% on the LSAT. Other schools create presumptive admissions for the 75th percentile and presumptive denials for the bottom 25th percentile. Regardless of the exact admissions practices used, the reliance on numerical indicators is at an all-time high. \textsuperscript{See} Stephen P. Klein & Laura Hamilton, The Validity of the U.S. News and World Reports of ABA Law Schools (1998), available at http://www.aals.org/reports/validity.html.

\textsuperscript{15}Nor do numerical criteria predict how well an applicant might do when given the right kind of pedagogy and support. Academic Support Programs demonstrate that with the right kind of intervention and pedagogy, students can outperform their predictors. Specifically, students learn best when teachers provide both copious feedback and frequent exams on small amounts of material. \textsuperscript{See generally} Paula Lustbader, From Dreams to Reality: The Emerging Role of Law School Academic Support Programs, 31 U.S.F. L. REV. 839 (1997); Paula Lustbader, Walk the Talk: Creating Learning Communities to Promote a Pedagogy of Justice, 4 SEATTLE J. FOR SOC. JUST. 613 (Spring/Summer 2006); Paula Lustbader, One Size Does Not Fit All: Designing an Academic Support Program that Fits Your School, Part I: Factors to Ensure Success, LAW SCH. ACAD. SUCCESS PROJECT (2008), http://breeze.unc.edu/p31482522/; Paula Lustbader, One Size Does Not Fit All: Designing an Academic Support Program that Fits Your School, Part II: Components of Successful ASPs, LAW SCH. ACAD. SUCCESS PROJECT (2008), http://breeze.unc.edu/p78957269/; Paula Lustbader, One Size Does Not Fit All: Designing an Academic Support Program that Fits Your School, Part VI: Staffing, LAW SCH. ACAD. SUCCESS PROJECT (2008), http://breeze.unc.edu/p67061813; Paula Lustbader, Hanging Ten (Mar. 3, 2011) (unpublished manuscript) (on file with author).

\textsuperscript{16}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, the main concept of success in law school is tied directly to bar passage. 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. \textsuperscript{See} Jesse Rothstein & Albert Yoon, Affirmative Action in Law School Admissions: What do Racial Preferences Do?, 75 U. CHI. L. REV. 649, 713 (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. \textsuperscript{See generally} Lisa Anthony Stilwell et al., Analysis of Differential Prediction of Law School Performance by Racial/Ethnic Subgroups Based on the 1996–1998 Entering Law School Classes, LAW SCH. ADMISSION COUNCIL, LSAT TECHNICAL REP. 98–02 (1998).
students’ experiences prior to law school. Such 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 professional skills and ethical values. Thus, by relying solely on numerical criteria, law schools disproportionately disqualify otherwise meritorious candidates from underrepresented populations 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” admissions decisions, not by abandoning access. 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.” Instead, the goal of law school admissions 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. Third, law schools need to broaden their pedagogy and expand their curriculum to be responsive to a more diverse student body and to better serve the profession and public.
In section II, this article articulates the benefits of inclusion of the underrepresented. Section III postulates that overreliance on numerical criteria cause barriers to access, demonstrates that numerical criteria do not correlate to success in practice, explain why such criteria are less accurate indica of merit or potential for success for underrepresented applicants, and shows 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 admissions practices. Section V provides a prescription for inclusive admissions practices that ensure access and suggests that the benefits of inclusion outweigh its costs.

II: The Benefits of Inclusion

A. An Broad Definition of Diversity

An inclusive definition of diversity ensures greater representation of all segments of society. Students of color, race, ethnicity, political race, formal or cultural race, and low socioeconomic status, as well as minorities, are all terms that label segments of the population that are underrepresented in status positions in our society, and such terms are both over- and under-inclusive. Race matters, as does socioeconomic disadvantage. Race cannot provide a proxy for class, and class cannot serve as a proxy for race. If the legal profession’s goal is to provide

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22 “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 (2002).


24 Programs that focus exclusively on race ignore the discrimination and disadvantage faced by those in the lower socioeconomic classes.

25 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 Daria Roithmayr,
true diversity of perspective, representation, and values, then diversity must be discussed in the largest sense: That of the underrepresented segments in the professions. In this context, the term underrepresented includes persons with diverse ethnic and racial compositions, 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.

B. The Value of Inclusion

Full and meaningful participation by all segments of society is vital in a democracy. While early affirmative action policies and rhetoric invoked a rationale of reparations for past discrimination, such 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. 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.

27 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.” See Espeland & Sauder, supra note 42, at 606.
28 Because “underrepresented populations” is the most inclusive term, that will be the term of choice in this article; but when referring to specific data or studies, terms will be used that refer to the particular segments of the population addressed by the source.
28 See Nelson, supra note 19, at 580.
29 See Epperson, supra note 27. Epperson notes the over 300 amicus briefs supporting diversity were filed in Grutter.
Increasing diversity promotes greater trust and participation in the American political, economic, and legal systems. A democracy must reflect the values and perspectives of all of its citizens. Lawyers play a significant and powerful role in governing this country. Counting Barack Obama, 59% of U.S. presidents have been lawyers. Law is the most dominant profession of both houses of the U.S. Congress; 59% of U.S. senators and 40% of house representatives are lawyers. 24% of U.S. governors are lawyers. Lawyers also serve vital roles in private industry. Even if they are not in leadership positions, often lawyers 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 our society. Increasing diversity in the legal profession also promotes and provides access to justice as a vehicle to political power and also as a vehicle to the administration of justice. 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 better

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31 The democracy rationale argues that lawyers and judges have a unique responsibility for sustaining a political system with broad participation for all its citizens. A diverse bar and bench create greater trust in the mechanisms of government and the rule of law. See Am. Bar Ass’n, supra note 25.

32 A prime example is that Barack Obama’s presidential candidacy increased minority participation in the election process. In 2008, about 65% of Blacks went to the polls, nearly matching the 66% voting rate for whites. Black women had the highest rate of participation among all voters, at 69%. Blacks had the sharpest increase in voter participation in more than a decade, with 15.9 million casting ballots to make up 12.1% of the electorate. Blacks Match Whites in Voting Rates in 2008, USA Today (Apr. 30, 2009), http://www.usatoday.com/news/nation/2009-04-30-black-vote_N.htm.

33 Brief for the American Bar Association, supra note 27, X.

34 Lawyers 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 craft better legislation and lead legislative activity. See Chris Smith, From Courtrooms to Capitols, Am. Ass’n for Just. Trial 3 (Nov. 2008).


38 Nat’l Governors Ass’n, www.nga.org (last visited June 18, 2010).

results that more accurately reflect clients’ values. The profession and future clients benefit by having practitioners with rich, diverse life experiences, because those practitioners will bring their perspective to the practice.

Moreover, increasing diversity promotes justice as a vehicle of upward economic mobility and as a vehicle to enhance legal services for the underrepresented. The ability to practice law enables members of underrepresented communities to increase their economic upward mobility as they enter a profession with greater earning potential. In turn, these members can then use their increased economic status to ensure more access to justice by providing both economic and pro-bono services to their communities. Practitioners from underrepresented populations often promote and provide access to justice for underserved communities. For example, one study found that University of Michigan Law School minority alumni 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.”

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

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41 Clients and large corporations recognize the value of diversity. For example, both Shell and Wal-Mart recently fired firms that did not have adequate numbers of diversity attorneys. See Derede McAlpin, More Law Firms Face the Consequences of Poor Diversity Performance, 27 OF COUNSEL 1, 1 (2008).


43 See 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.

In addition to the value diversity brings to the legal profession, increasing diversity enriches the educational experience for all students.\textsuperscript{45} The U.S. Supreme Court acknowledged that all students benefit from racially inclusive systems of public education.\textsuperscript{46} These benefits include a better cross-racial understanding, a better prepared citizenry, and more effective economic and national security systems.\textsuperscript{47}

Racial isolation\textsuperscript{48} and segregation in public education harm both minority and white students.\textsuperscript{49} 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.”\textsuperscript{50} Before college, the average white student attends schools that are 80% white;\textsuperscript{51} thus, increasing diversity in the educational institution helps all students learn different perspectives and different points of view.\textsuperscript{52} Having diverse peers in the classroom also helps to educate future lawyers, who will represent an increasingly multicultural clientele.\textsuperscript{53}

Notwithstanding the myriad ways in which diversity benefits society, especially in our legal and educational systems, the underrepresented are disproportionately excluded from the legal profession and law schools.

Despite the overwhelming benefits of increased inclusiveness and the professed mission of the American Bar Association, the Association of American Law Schools, the Law School

\textsuperscript{45} See Rothstein & Yoon, supra note 16, at 656 (citing Randall Kennedy, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 Harv. L. Rev. 1327, X(1986)).

\textsuperscript{46} Grutter X

\textsuperscript{47} See Epperson, supra note 27, at 166 (citing Grutter [need full cite to Grutter]).

\textsuperscript{48} 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).

\textsuperscript{49} See Epperson, supra note 27, at 150–51.

\textsuperscript{50} Id. at 151.

\textsuperscript{51} Id. at 150.

\textsuperscript{52} Students who interact with diverse students in classrooms and in the broad campus environment are more motivated and better able to participate in a heterogeneous and complex society. See Patricia Gurin et al., Diversity in Higher Education: Theory and Impact of Educational Outcomes, 72 Harv. Educ. Rev. 330, 330 (2002).

Admissions Council, and numerous other public and private law-related agencies to improve diversity, the underrepresented are disproportionately excluded from the legal profession and law schools. The majority of agencies who study data on hiring and retention narrowly define diversity only in terms of racial minorities. These studies reveal that although minorities comprise roughly 25%–30% of the population, they comprise less than 16.4% of the profession. In fact, the legal profession has a lower representation of minorities than any other profession. There is also a similar trend in legal education for African-American and Mexican-American applicants. The lack of diversity in the profession and in the schools is, in part, the result of law firms making “by the numbers” hiring decisions and law schools making “by the numbers” admissions decisions.

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55 AM. BAR ASS’N, HOUSEHOLD DATA ANNUAL AVERAGES 210, http://new.abanet.org/marketresearch/PublicDocuments/cpsaat11.pdf (last modified Dec. 15, 2009). Within the legal profession, 19.67% of associates in law firms are of color, and less than 6% of minority attorneys are partners. Press Release, The Nat’l Ass’n for Law Placement (Oct. 21, 2009), http://www.nalp.org/oct09lawfirmdiversity. 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 percentage dipped to 13.4% in 2009. Even if this decrease is attributable to the general downsizing of firms, more minorities than Caucasians lost their jobs. While 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. Observers fear that findings from annual Diversity Scorecard survey of attorneys of color may signal the start of a new downward trend. Emily Barker, One Step Back: For the First Time in Years, the Population of Minority Lawyers at Big Firms is Shrinking, Am. Lawyer 71, 71 (Mar. 2010).

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57 “[F]rom 2003 to 2008, 61% of black applicants and 46% of Mexican-American applicants were denied acceptance at all of the law schools to which they applied, compared with 34% of white applicants.” Of the 46,500 matriculants in law schools during 2008, only 7.3% were African-American and only 1.4% were Mexican-Americans. See Tamar Lewin, Law School Admissions Lag Among Minorities, N.Y. TIMES, Jan. 6, 2010, available at http://www.nytimes.com/2010/01/07/education/07law.html?adxnnlt=1&adxnnlx=1276776423-U4aZsmcJoy/Gq0lTgZhwg. Professor Conrad Johnson has asserted that enrollment of African-Americans and Mexican-Americans decreased from 1993 to 2008. Id. But the LSAC argues that his 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), available at http://www.saltlaw.org/userfiles/1-14-10LSACResponse.pdf. LSAC claims that diversity among law school 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).

58 Firms that have increased diversity share common characteristics: They focus on strong initiative and execution in areas of recruiting, hiring, mentoring, promoting, and retaining diverse attorneys. See WASH. STATE MINORITY BAR ASS’N, 2009-2010 LAW FIRM DIVERSITY REPORT 23 (on file with author). But firms with lower success in increasing diversity place greater emphasis on law school grades and law review membership. These criteria often negate other indicators of success, such as recommendations from professors, course work, and community service. See Tewary, supra note 6, at 11.

59 In looking at law school application data from 1991, Professors Jesse Rothstein and Albert H. Yoon contend that black enrollment would decline by 90% 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.
III: Overreliance on Numerical Indicators Causes Underrepresentation:

Some studies suggest that 70%–80% of law school admissions’ decisions are based solely upon UGPA and LSAT scores. By their overreliance on numerical indicators in their admissions’ practices, law schools limit opportunities for large segments of the underrepresented. Numerical indicators are the least reliable predictors for the historically underrepresented in higher education and in the professions. In basing admission decisions on numbers alone, these institutions disregard the value of experience, character development, and determination. In so doing, 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 and World Report Rankings, to comply with the demands of American Bar Association Accreditation Standards, and to avoid potential litigation in the current anti-race-conscious legal climate.

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. 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. Because access admission

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60 Phoebe Hadden & Deborah Post, Misuse and Abuse of the LSAT, 80 St. John’s L. Rev. 41, 96 (2006).
62 As stated by LSAC President Phil Shelton, “The 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 61, at 175.
63 In addition to these concerns, many schools claim that admissions based on numerical criteria is more cost-effective than conducting holistic reviews or offering academic support programs to ensure success of the underrepresented with lower numerical indicators.
students are “mismatched” to their school, he postulates they do not perform as well as they would if they were in a lower tiered school.64

However, the mismatch theory has weak statistical support. “[H]alf or more of the black and 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.”65 Without access admission, black enrollment at selective schools would decline by 90%, leaving the few black students who remain in selective schools without a critical mass or academic support.66

In addition, the “mismatch” theory ignores the studies that show minority students’ academic performance is enhanced when they are in more challenging and integrated learning environments.67 Another problem with the “mismatch” theory is that it erroneously presupposes that academic performance correlates with professional performance.68 Many exceptional practitioners did not do well academically, and some even failed the bar their first time.69 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.

Numerical indicia are not capable of quantifying other attributes, such as character, discipline, personal skills, and motivation that are equally important in assessing who has “earned” a right to participate and who brings value to the school, the profession, and the community. Moreover, when admissions personnel treat merit as an objective truth, they neglect to take into account that

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65 See Rothstein & Yoon, supra note 16, at 652.
66 Id.
67 Id. at 660–663.
68 Because law schools focus less on practical training, students who are struggling academically in law school may not necessarily struggle in practice. See Alex M. Johnson Jr., Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice, 64 S. CAL. REV. 1231, 1245 n.59 (1991).
69 In addition, even those who do not sit for a bar exam or pass one may use their law degree in other ways and have very successful careers. Thus, failure on a bar exam does not equate with failure in life. Rothstein & Yoon, supra note 16, at 663.
we are all products of our environment; as a result, “merit” based on the numbers often reflects a person’s relative privilege and opportunity. 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. Moreover, the LSAT and the UGPA less accurately predicts potential for success in law school for the underrepresented. Finally, such reliance on numerical indicators discounts the predictive value of non-numerical factors.

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.71

[The LSAT] does not measure motivation, perseverance, character, interpersonal skills, problem-solving skills, oral communication, empathy for clients, commitments 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.72

Professors Marjorie M. Shultz and Sheldon Zedeck are designing an alternative to the LSAT test that would measure potential to succeed in practice.73 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.”74 They found that the Shultz/Zedeck test was “no better” than the LSAT in predicting law school performance.75 However, they also found that the LSAT was not “particularly useful in predicting lawyer effectiveness.”76 But unlike the LSAT, the

71 See Hadden & Post, supra note 61, at 97.
72 Id.
73 LSAC helped fund the research to develop this test. X
75 Id.
76 Id.
Shultz/Zedeck test did not produce different results based on race.\textsuperscript{77} Given the disconnect, law schools might consider using both the Shultz/Zedeck test and the LSAT in conjunction with other indicators to help achieve less discriminatory admissions practices.\textsuperscript{78}

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. Researchers studied alumni who graduated between 1970–1996.\textsuperscript{79} They found a “statistically significant relationship between UGPA and LSAT scores and law school grades,\textsuperscript{80} but no “significant relationship” between those indicia and success in the practice of law.\textsuperscript{81} The study reported that 97.2\% of the minority alumni passed at least one bar exam. Although it is unknown whether the remaining 2.8\% had attempted and failed to pass a Bar exam or whether 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.\textsuperscript{82} 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, satisfaction, and service.\textsuperscript{83}

\textsuperscript{77} Id.
\textsuperscript{78} 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. If the Shultz and 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.


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 SULLIVAN ET AL., supra note 21, at 6.

\textsuperscript{79} Id.
\textsuperscript{80} David L. Chambers et al., Doing Well & Doing Good, 42 LAW QUADRANGLE NOTES 60, 70 (1999).
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 63.
\textsuperscript{83} Id. at 62.
The Seattle University ARC\textsuperscript{84} alumni’s success\textsuperscript{85} also demonstrates that UGPA and LSAT scores do not correlate with success in practice. ARC alumni make a difference and thrive professionally. 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 assistance attorney generals; public interest lawyers; policy advisors for governors, state and federal legislators, corporations, and not-for-profit organizations; educators;\textsuperscript{86} corporate counsel in large corporations; and judges.\textsuperscript{87} One works as the general counsel for a Native Alaskan Corporation.\textsuperscript{88} 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.\textsuperscript{89} Another alumna works as a policy analyst and director of a nonprofit organization that focuses on issues of immigrant rights, health, and domestic violence.\textsuperscript{90} 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.\textsuperscript{91}

Many alumni broke barriers. One alumnus was the first African-American on the Pierce County Superior Court.\textsuperscript{92} One was the first African-American woman and another was the first woman elected prosecutor in their respective counties.\textsuperscript{93} ARC alumni assume leadership roles in the

\textsuperscript{84} The Academic Resource Center 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. Its pedagogy centers around acculturating and empowering those who may or do feel disenfranchised by the law school experience. Students admitted under the Access Admission Program typically have an average LSAT score 10 points lower than the presumptive admit scores. 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. http://www.law.seattleu.edu/Academics/Academic_Resource_Center/Program_Overview.xml


\textsuperscript{86} One was a law professor, two are currently working as academic support professionals in law schools, others teach or are administrators at undergraduate and community colleges, and one is dean of the school of education at a prestigious university, and another is president of a community college.

\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
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” necessary for success in law school. Although a “modest” correlation exists between LSAT scores and first-year law school grades, it was never intended to trump other factors in admission decisions. In fact, the Law School Admissions Council 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

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94 Id.
95 Id.
96 Id.
97 Id.
98 Id.
100 See Johnson, Jr., supra note 8.
101 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.
102 The Law School Admissions Council (LSAC) is the designer and administrator of the LSAT.
making admissions decisions.\textsuperscript{103} The LSAC guidelines specifically state that law schools 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 greater adverse impact upon applicants from minority groups than upon the general applicant population.”\textsuperscript{104}

Despite the LSAC’s efforts, and the lack of correlation between LSAT scores and success in practice, law schools continue to over rely LSAT scores. In so doing they significantly reduce enrollment of the underrepresented.\textsuperscript{105} All applicants of color except for Asian-Americans have significantly lower mean LSAT scores than white applicants.\textsuperscript{106} A low LSAT score creates a


In its efforts to dissuade law schools and other organizations, such as the U.S. News and 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., Predictive Validity of Accommodated LSAT Scores, LAW SCH. ADMISSION COUNCIL (2001), http://www.lsac.org/pdfs/LSAT-Score-Predictors-of-Performance.pdf. It also has supported efforts to design an alternative test that measures necessary skills for success in the legal profession. See Hadden & Post, supra note 61, at 86, and tried to provide law schools with models for admissions that place less emphasis on the LSAT, such as in 2000, the LSAC created the “Initiative to Advance Education on the LSAT.” It devoted ten million dollars to this five-year project. Its purpose was to promote greater diversity by providing law schools admission models that place less emphasis on the LSAT. See 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).

LSAC also has experimented with its reporting methods such as reporting score-bands instead of individual scores. See Hadden & Post, supra note 61, at 88. Despite these efforts, most law schools sacrifice accuracy and fairness for efficiency. Part of the pressure for law school to base admission decisions on numerical criteria may come from applicants who want a quick response, and the increase in online applications has only made matters more urgent. In their effort to compete for the best applicants, schools engage in a race to admit first. Schools often 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, he or she must sometimes give an answer before hearing from A, and thereby abandon holistic reviews. Numerous scholars argue that because of the LSAT’s disparate impact and limited predictive value, law schools should reduce or eliminate their reliance on it. Daria Roithmayr, Direct Measures: An Alternative Form of Affirmative Action, 7 MICH. J. RACE & L. 1, 10 (2001-2002).


\textsuperscript{105} Johnson, Jr., supra note 8, at 334. 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 48, at 419. Significant achievement gaps exist between English language learners and native English speakers. See John W. Young et al., Validity and Fairness of State Standards-Based Assessments for English Language Learners, 13 EDUC. ASSESSMENT, 170, 172 (2008).


The model-minority myth presumes all Asian ethnic groups are similarly represented in higher education. 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. Students from Southeast Asia and the Pacific Islands
barrier for applicants in three ways: it reduces their chances of getting accepted into law schools of their choice, reduces their chances of getting accepted into any law school at all, and reduces their chances of receiving merit scholarships. While lower LSAT scores restrict opportunities for the underrepresented, they do not accurately predict a student's ability and potential.

First, the LSAT inaccurately predicts student potential because there is bias in the test. Second, the LSAT less accurately predicts potential for applicants who underperform on the LSAT because of stereotype threat or psychological stress. 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 other indicia of success, after the first-

are still significantly underrepresented. Marty B. Lorenzo, Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest, 2 MICH. J. RACE & L. 361, 412–13 (1997); 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 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.”).

107 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. 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. He found that 82% of the schools raised their 25th percentile LSAT scores, and that 62% of those schools decreased their African-American enrollment by 19%. Nussbaumer, supra note 61, at 170–71. See also Lead Education Statistics: Total Minority J.D. Enrollment 1987–2009, A.B.A., http://www.abanet.org/legaled/statistics/charts/stats%20-%2010.pdf (last visited June 27, 2010).


108 X cite


110 See Steele et al., supra note 149, at 4–28.
year.\textsuperscript{111} And fourth, the LSAT under-predicts potential for success where schools provide appropriate interventions such Academic Support Programs.\textsuperscript{112}

First, the LSAT under-predicts potential because of racial and ethnic bias inherent in the test. This bias is demonstrated by a consistent achievement gap between minority students and white students. While urging law schools to use the LSAT for the limited purpose for which it was intended, as only one factor in admission decisions, 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. He also defends the test by noting that new questions on the LSAT are tested three times to ensure that there is equality in performance among subgroups and that the test validly, albeit “imprecisely,”\textsuperscript{113} predicts first-year law school grades.\textsuperscript{114}

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. Dr. Roy Freedle, retired from the Educational Testing Service, asserts that the LSAT is biased because “it leads to mean racial differences” and “it probably contains significant individual item bias.”\textsuperscript{115} First, he argues that no racial disparity exists on standardized verbal intelligence test scores, but racial disparity exists on LSAT scores; thus, he argues that the LSAT is an inherently biased test.\textsuperscript{116} Second, the LSAT is constructed in a way that perpetuates bias.\textsuperscript{117} In order to maintain the reliability of the test, new test questions are constructed from a sample of potential questions included in a previous testing cycle.\textsuperscript{118}

\textsuperscript{111} Jolly-Ryan, \textit{supra} note 4, at 62. The type of reading required to complete all of the questions in 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 the realities of how lawyers and law students need to read.

\textit{Id.}

\textsuperscript{112} See Lustbader, \textit{supra} note 79.

\textsuperscript{113} See Johnson, Jr., \textit{supra} note 8, at 347.

\textsuperscript{114} \textit{Id.} at 338–42.

\textsuperscript{115} See Freedle, \textit{supra} note 136, at 214.

\textsuperscript{116} \textit{Id.} at 183–84.

\textsuperscript{117} \textit{Id.} at 192–95.

\textsuperscript{118} \textit{Id.} at X
potential questions that receive the highest number of correct responses are included in a future test.\textsuperscript{119} Because inherent bias exists in the test to begin with, the test questions that receive the highest number of correct responses come disproportionately from white test-takers; thus, future questions will continue to bias in favor of white test-takers.\textsuperscript{120} As a result, the LSAT does not accurately measure the intelligence or aptitude of the underrepresented because it has inherent bias.

Second, the LSAT inaccurately predicts potential for these populations because it does not factor in stereotype vulnerability. The fear of perpetuating a negative stereotype of a stigmatized group for which the test taker is a member impairs ability to performance. Studies demonstrate that on standardized tests, stereotype threat impairs performance of African-Americans, Latinos, Latinas, athletes, white men, gay men, and women taking math tests.\textsuperscript{121} This same stereotype vulnerability applies to the socioeconomically disadvantaged.\textsuperscript{122} In one study, researchers gave high school students enrolled in honors math an exam consisting of GRE math questions. Researchers told the girls that they wanted to measure the girls’ mathematical abilities. The girls performed significantly lower than the boys. The concern of perpetuating the negative stereotype that girls do not do well in math had an extra psychological barrier for the girls to work through while they were taking the test. Next, researchers gave a similar group the same test, but researchers told this group that they were testing the validity of the questions, not whether the students understood the math. In that group, the girls performed at a rate similar to the boys.\textsuperscript{123}

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. Asian-Americans are stereotyped as successfully assimilated into American society because they are “hardworking, intelligent, and successful,” especially when they are compared to other

\textsuperscript{119} Id. at X

\textsuperscript{120} Id. at 215.

\textsuperscript{121} Spencer & Castano, supra note 48. One interesting study revealed the impact of both positive and negative stereotyping. Asian women, when prompted to think of their ethnicity, performed better than the control group on math tests, which reinforced the stereotype that Asians have superior mathematical abilities; however, they performed worse than the control when they were prompted to think of their gender. Id. at 422.

\textsuperscript{122} Id. at 428.

\textsuperscript{123} See Steele et al., supra note 149, at 6 (citing Steele & Aronson (1995)).
people of color. These “positive” stigmas of Asian-Americans surround math, science, and technical competencies. The flip 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. Fear of confirming this negative aspect of the stereotype impairs their academic performance.

As stereotype vulnerability studies show, the psychological burden on test-takers can be paralyzing and results in lower performance on standardized tests. The presence of stereotype vulnerability, coupled with expectations of under-achievement and negative educational experiences can combine to create “dispositional test anxiety.” 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. More significantly, second-time bar takers with such anxiety showed a stronger predictor of failure than first-year law school GPA.

To overcome test anxiety and do well on these tests, students must have confidence in their own abilities. That confidence can quickly erode if they went through an educational process where they were expected to underachieve. It can also erode when they are only one in a tiny percentage of peers who have made it this far. It erodes when few role models exist to show how it can be done. Finally, confidence erodes when students had inadequate educational intervention the first time they performed poorly on a standardized test. 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.

126 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. at 216.
127 Id.
128 TOUGH, supra note 112. 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. Id.
Third, LSAT scores inaccurately predicts success in grades beyond the first year,\textsuperscript{129} and in other indicia of success. While 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.\textsuperscript{130} 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. 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.\textsuperscript{131} Denying admission based on a correlation with first-year grades is unfair because students can and do learn those skills necessary for success in law school.

Moreover, the LSAT does not predict other indicia of success such as networking, relationship building, leadership, and interpersonal success, which are so vital to success in law school and beyond. For example, as previously mentioned, 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 comprise about ten percent 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.\textsuperscript{132} The LSAT does not provide an accurate picture of applicants’ strengths and potential to contribute to the educational environment.

Fourth, the LSAT does not accurately predict success for underrepresented students who are supported with the right type of mentoring,\textsuperscript{133} academic support, or educational environment. Consider the psychological distress many underrepresented students experience that may create dispositional exam anxiety. This anxiety impairs learning, studying, exam taking, and bar

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\item \textsuperscript{129} See Hadden & Post, supra note 61, at 70–71.
\item \textsuperscript{130} See Freedle, supra note 136, at 216.
\item \textsuperscript{131} Id. at 219.
\item \textsuperscript{132} See Lustbader, supra note 79.
\item \textsuperscript{133} Id. at 220.
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Any university counseling center can provide effective interventions to help students overcome such anxiety. For example, students in the Academic Excellence Program (AEP) at the University of Dayton School of Law outperformed their predictors. The majority of black students participated in the AEP where they received academic support. Over the seven-year program, only eleven students were dismissed. 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.

A recent study of ARC students mirrors the success at Dayton. 92.5% of the ARC students admitted between 2001 and 2005 graduated from law school. Approximately 71% of the ARC Students outperformed their predictors and graduated above the bottom 10%, 11% graduated in the top 50% of their class, and one was ranked 10th in his class at graduation. 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. These successes are occurring throughout law schools with access admissions and strong ASPs to serve those students.

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. Minorities typically have lower UGPAs than Caucasians.

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134 Kaufman, et al., supra note 161, at 216.
135 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.
137 During this five year period, the mean LSAT score of the general population was 156. The mean score for ARC students was 147; 9 points lower. With a standard deviation of 4.759, that makes the average ARC LSAT score within 1.89 standard deviations from the mean LSAT score. (report on file with author).
138 Academic Resource Center, supra note 86.
UGPAs do not necessarily accurately reflect an applicant’s intellectual ability. Opportunity to develop that intellect is an essential factor that creates success. The achievement gap between the underrepresented and the privileged starts in elementary school, and the difference in achievement tests grows each year thereafter.

Most of the underrepresented succeeded despite inadequate academic preparation or encouragement, which may result in GPAs 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 can create significant barriers to students’ access to such opportunities. The problems created by inadequate educational opportunities snowball, as the lack in pre-school creates a less prepared student in elementary school, which creates a less prepared student in middle school. In turn, this situation creates an academically underprepared student in high school, which leads to lower high school grades. Academically underprepared college students may or may not have access to the resources necessary to strengthen their study skills and fill gaps in their prior educational experience, thus causing lower grades in college.

Because of the limited or non-existent educational opportunities available to underrepresented applicants, which may have lead to academic under-preparedness in college, law school admissions need to consider UGPA in context of these applicants’ lives. In so doing, law

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140 See GLADWELL, supra note 84, at 256.

141 Studies show that programs to fight poverty and close the education gap for the poor, while inspiring, have only produced incremental gains. But some programs, such as the Harlem Children’s Zone, have produced significant results. The typical student entering the charter middle school at a 6th grade level would, on average, score in the 39th percentile in math. By the 8th grade, that student would score in the 74th percentile. See David Brooks, The Harlem Miracle, N. Y. TIMES, May 7, 2009, http://www.nytimes.com/2009/05/08/opinion/08brooks.html?_r=1.

142 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, whereas the non-privileged children are in less stimulating and structured programs. GLADWELL, supra note 84, at 256–60. It is also linked directly to the socioeconomic status of the family. 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). PAUL TOUGH, WHATEVER IT TAKES, GEOFFREY CANADA’S QUEST TO CHANGE HARLEM AND AMERICA 42 (2009).

143 One focus of the upcoming civil rights investigation will be the lack of access to college prep programs offered to students of color and the achievement and opportunity gap. CROSSING THE NEXT BRIDGE, supra note 89.

144 An admissions preference based on applicants’ abilities to achieve academically while overcoming economic and social disadvantages is the central theme of class-based affirmative action. Inherent in this theme is a
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 his or her cumulative UGPA.

Law school admission practices already consider factors that influence UGPA, such as rigor of the undergraduate school, so it is not unreasonable for them to consider additional factors, such as the obstacles that particular applicants overcame. 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 school is a strong indicator that 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. Therefore, assessing the character traits that enable applicants to overcome challenges should be part of the basis for admissions decisions. The significance is not that holistic, individualized approach to analyzing and making admissions decisions. See Nelson, supra note 19, at 38–39.


146 In support of affirmative action in undergraduate admissions, Professor Mari Matsuda argues that a minority applicant who worked during school to help her 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., 29 (June/July 1999).

147 Many of the access admission students who have come through the Academic Resource Center Program at Seattle University’s law school overcame substantial obstacles. Some were homeless at one point in their lives. One was emancipated, homeless, and a 7th 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 were survivors of and witnesses to violence, discrimination, and injustice. Many were the first in their immediate, if
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 their 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. Although she had the advantage of attending a private Catholic school, she scored lower on the SAT and LSAT than other applicants at both Princeton and Yale Law School. Without affirmative action, she would not have attended those schools, where she excelled. She graduated from Princeton Summa Cum Laude and was a member of Phi Beta Kappa. She graduated from Yale Law School with honors and was on Law Review. Had she attended less elite schools, she might not have enjoyed the opportunities to rise in the profession and make her impressive contributions. Her background and experience informed her decisions as a trial judge, prosecutor, corporate litigator, lecturer, and adjunct professor. And now she sits on the highest court of the land.

There are many others who have benefitted from some form of affirmative action or holistic admissions review and proceeded to make significant contributions to the legal field. 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.


As a result of her background, Judge Sotomayor brings compassion and understanding to the courtroom. For example, in civil cases, she would speak Spanish to Spanish-speaking parties so that they would understand what was happening in their case.


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.” In so doing, they developed character traits that propel them to succeed and to make a contribution. Typically, these individuals overcame expectations to underachieve, lack of financial resources, and lack of opportunities.

Teachers’ expectation of students is a critical factor in promoting student learning, motivation, and achievement. 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; conversely, when others expect students to fail, they fail. Our educational institutions have flagrantly maintained low expectations of African-American and Latino/a students, and these institutions have tolerated abysmal failure rates for Native American students. More than 50% of all “African-American, Latino, and Native American” high school students will not graduate. Blacks constitute 16.1% of elementary and secondary school students, 14.1% of high school graduates, 10.3% of entering college students, and 6.2% of college graduates. Only a small percentage of those graduates apply to law school. Our educational institutions have failed these students and society. If schools were instead businesses producing a product with this rate of failure, they would be out of business.

Our educational institutions have also failed the socioeconomically disadvantaged because teachers have lower expectations of these students. Teachers’ perception of students’ academic

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153 Most of the underrepresented are not expected by society to achieve or have not had adequate opportunities to do so. For example, approximately half of the students in the Academic Resource Center Access Admissions 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 79.


156 See ROBERT A. SCOTT & DOROTHY ECHOLS TOBE, THE SEVEN PRINCIPLES IN ACTION: EFFECTIVE UNDERGRADUATE EDUCATION COMMUNICATES HIGH EXPECTATIONS 79 (Anker Pub’g 1995).

157 See Epperson, supra note 27, at 151.

158 See Epperson, supra note 27, at 151.

159 See Rothstein & Yoon supra note 16, at 665.
abilities and life skills are influenced by class and reflect bias. 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. 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, while 13.2% of American households in 2005 had annual incomes of less than $20,000.

The majority of underrepresented have succeeded 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. Many students must spend time researching and applying for financial aid and scholarships. Most do not have disposable income to go out and socialize with their peers, 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, and transportation may eat into what little time they have to study. In addition, many must work while they are going to school. Some hold more than one job to support themselves, to help support their families, and to pay for tuition.

Most of the underrepresented have succeeded despite having inadequate time or resources to enhance their analytic skills. Many have care-giving responsibilities for family members because their families cannot afford child or in-home care. Others spend time helping their immigrant families navigate through an English-speaking society. Think about the educational experience of children who are in public or private high schools in privileged areas versus those

160 See Spencer & Castano, supra note 48, at 420.
161 Id.
162 The U.S. Census is taken every ten years. The 2000 U.S. Census found that 15.8% of U.S. households had an income less than $15,000, and an additional 12.8% of households had an income between $15,000 and $24,999. U.S. Census Bureau, Profile of Selected Economic Characteristics 3 (2000) http://censtats.census.gov/data/US/01000.pdf.
163 These resources are vital for admission into law school. Almost no one studies for the LSAT on their own. 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.
who are in large public or inner-city high schools. Children in the private or privileged high schools are expected to attend college. They attend schools with smaller teacher-student ratios, broader course offerings, more honors-level instruction, better teachers, greater resources to support teachers, greater parent involvement,164 special instruction for students with learning challenges, more enrichment programs, and more ability to provide feedback. 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.165 Most receive tutoring or take a preparation course for standardized tests.166 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.167 Many hire professionals to help with the college application process. The majority have family and financial support.

In contrast, underrepresented students do not have such opportunities.168 The majority of these students are not preparing for college. Despite the passage of time since Brown v. Board of Education and its progeny, minority students continue to attend poorly subsidized public school districts that do poor jobs of educating students.169 Segregation in public schools “is at its highest point in more than three decades,”170 and the racial isolation in elementary and secondary

164 The lack of parental involvement is not because these parents do not care. Most public schools continue to operate as if all students come from two-parent households, with one parent staying at home. 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.

165 See Heidi Legg Burross, Change and Continuity in Grades 3-5: Effects of Poverty and Grade on Standardized Test Scores, 110 TEACHER C. REC. 2464, 2465 (2008).

166 While some schools provide test prep through career services, most students take private prep courses. The market for prep courses and tutoring has skyrocketed, with an average cost for test prep of between $1,500 and $2,500. This four billion dollar industry has become cheaper and more accessible with the use of online courses; but prep courses still create a financial barrier for many perspective students. 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.

167 See MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS 69–73, 91–101 (2008), 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 he claims that where someone comes from is more important than innate natural abilities when it comes to success.

168 See Epperson, supra note 27, at 149–150.


170 Epperson, supra note 27, at 150.
schools results in fewer learning opportunities for “students of color.” The gross inequity in educational opportunities for low-income families has resulted in civil rights investigations in thirty states. Although the most significant predictor of academic success is the socioeconomic status of the student’s family, a strong correlation also exists between academic achievement and the poverty level of the student's school and community. Students from low income families who attended affluent schools perform with “the equivalent of having two more years of education than low income students in schools with high concentrations of poverty.”

That anyone from underrepresented populations has defied these adverse conditions and is 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 admissions practices don’t consider these factors and instead, rely mainly on LSAT scores and UGPAs.

IV. The U.S. News and World 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 eliminate
the LSAT as a factor in admission decision altogether, but they should use it only for the 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. World and News Report Rankings

The U.S. News and World Report Rankings\(^{177}\) undermine the fundamental mission of legal education to the detriment of the profession.\(^{178}\) Law schools are motivated to increase their rankings in order to increase their stature, increase their applicant pool, and help their graduates get more prestigious job placement with firms who consider rankings. 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;\(^{179}\) but on the other hand, law school deans use the rankings in publications and reports sent to their constituencies.\(^{180}\) 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.\(^{181}\) Despite continued objections about the lack of validity of the rankings,\(^{182}\) the U.S. News and World Report Rankings maintains its stronghold

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Within three years of the first rankings, the Association of American Law Schools, the Law School Admission Council, and the National Association of Law Placement objected to the rankings because, rather than provide significant and meaningful information about the merits of the schools, these organization argued that the magazine was more interested in boosting its sales. See Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 St. Mary’s L.J. 301, 319 (2003).


\(^{179}\) The majority of law school administrators indicated that the ranking were “more harmful than beneficial” to the individual school and legal education. Since 1997, the “vast majority” of deans annually sign a letter “publicly condemning the rankings.” See Saunter & Espeland, supra note 194, at 7.


\(^{181}\) Id. at 302.

\(^{182}\) Id. at 320–21.
on the academy and the profession.\textsuperscript{183} The rankings distort the priorities for law schools by hindering schools’ ability to succeed,\textsuperscript{184} compromising their integrity,\textsuperscript{185} influencing resource allocation,\textsuperscript{186} impacting the law school’s program,\textsuperscript{187} harming the profession,\textsuperscript{188} and influencing admissions’ practices that result in adversely affected underrepresented applicants.\textsuperscript{189}

1. U.S. News and World Report Rankings Adversely Impacts Admissions for the Underrepresented

\textsuperscript{183} Those 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. See Nussbaumer, supra note 61, at 167.

\textsuperscript{184} The rankings hinder a school’s ability to succeed. The rankings create a cyclical self-fulfilling prophecy. Lower tiered schools are unable to recruit students with higher LSAT scores, donations, and faculty with more prestige. Potential students, faculty, donors, and employers refuse the school because of its rank; thus, the school’s rank remains low.

\textsuperscript{185} Some schools “game” the rankings by misrepresenting or manipulating their statistics. One example of this occurred in 1995, where 29 schools reported a higher LSAT median score to U.S. News and World Report than what they reported to the ABA. See Espeland & Sauder, supra note 42, at 602–603. 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, Jr., supra note 8, at 312. In this way, the reported LSAT median score doesn’t reflect the lower scores. Other schools enrolled diverse students with lower entry indicators into conditional admissions or part-time programs to achieve diversity goals. These practices did not affect the schools’ reported median LSAT score because, prior to 2009, the U.S. News and World Rankings did not factor transfer or part-time students in their calculations of selectivity. See Espeland & Sauder, supra note 42, at 602–603. Now that those students’ indicators will count, several commentators fear this will further reduce diversity enrollment.

\textsuperscript{186} 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. 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. See Sauder & Espeland, supra note 190, at p.10 In addition to expenditures for marketing, law schools are spending increased resources for staffing, record keeping, and data gathering related to the rankings. 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. And yet, these expenditures that raise tuition only indirectly benefit them, at best. Some argue that tuition increases are a by-product of the rankings. Id. at 12. Others cite the rise in inflation in the last 20 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?, COLUM. L. SCH., http://www.law.columbia.edu/law_school/communications/reports/summer06/lawschoolcost (last visited Aug. 21, 2010).

\textsuperscript{187} In order to increase their rankings, schools have privileged scholarship over teaching. Many schools expend a significant amount of resources to support faculty scholarship. Some schools have not only “bought” star scholars, but given reduced teaching loads or designed class schedules around career faculties’ writing needs instead of around pedagogical principles. Moreover, because the rankings use limited factors in their assessment, they do not reward or promote innovative curriculum or pedagogy, diversity, or ethics.

\textsuperscript{188} As indicted, 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. It also increases economic obstacles for graduates, who are burdened with extreme debt and may be less able to work in public service.

\textsuperscript{189} See Espeland & Sauder, supra note 38, at 588.
The U.S. News and World Report Rankings contributed to increasing the floor of minimum LSAT scores for admission to law schools. It ranks ABA-accredited law schools on quality (40%), selectivity (25%), placement rate (20%), and faculty resources (15%). The median LSAT comprises 50% of the selectivity score, or 12.5% of the totally score. The LSAT scores actually have a greater weight, however, “because variation in LSAT scores accounts for 90% of the variation in the overall ranks for the schools.” In addition, LSAT scores are the easiest factor in the rankings for schools to manipulate. In some cases, a difference of one point in the median LSAT can result in a school being placed in the top tier or in the third tier. 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, but some may also be raising the floor on UGPAs.

By over-emphasize LSAT scores in admissions’ practices, the rankings implicitly result in fewer underrepresented gaining admission. Moreover, the rankings “discourage financial aid based on need and reduce incentives to increase diversity of the profession.” In order to increase their median scores, more schools increased merit scholarships and reduced need-based scholarships, making it even more difficult for the economically disadvantaged to pursue a legal education even if they get accepted.

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190 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_, LAW.COM (May 25, 2010), http://www.law.com/jsp/article.jsp?id=1202458731270.

191 See Edwards, _supra_ note 123, at 155.


193 _Id._ at 11


196 See Sauder & Espeland, _supra_ note 194, at 11.
2. The U.S. News and World Report Rankings Ought not Discourage Access Admissions

The rankings in U.S. News and 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. 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 and World Rankings counts the median LSAT score, not the mean or average. 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 that median score without hurting its ranking, as long as the scores in the middle remain the same. According to Robert Morse, Director of Data Research for U.S. News and 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 the school’s overall score by one point and therefore will not change its position in the rankings.”

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). The LSAT range for admitted LEOP students is 152–156 and the median UGPA is 3.2–3.4. The LSAT range for non-LEOP students is the 25th percentile at 161 and the 75th percentile at 165. Hastings maintains a high rank by U.S. News and World Report; it is a tier-one school and is ranked 39.

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198 See Espeland & Sauder, supra note 42, at 606.
199 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. See Baynes, supra note 40, at 8.
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 U.S. News and World Report has a separate ranking for diversity of the student body,\textsuperscript{203} where the Seattle University School of Law was ranked 21st in 2009. 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. Most ARC students—80.8%—are non-white.\textsuperscript{204}

In addition to citing the U.S. News and 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 American Bar Association (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 are still vastly underrepresented in the legal profession.”\textsuperscript{205} It further stated 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.”\textsuperscript{206}

The ABA created the ABA Presidential Advisory Council on Diversity in the Profession to increase the number of students of color in the profession by promoting pipeline initiatives. In

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\textsuperscript{203} The U.S. News bases its diversity index “on the total proportion of minority students—not including international students—and the mix of racial and ethnic groups on campus.” They use:

[D]emographic data reflecting each law school's student body, and includes both full- and part-time students. The groups that form the basis of the calculations are African-Americans, Asian-Americans, Hispanics, American Indians, and non-Hispanic whites. The formula produces a diversity index that ranges from 0.0 to 1.0. The closer a school's number is to 1.0, the more diverse is the student population. Law schools that enroll a large proportion of students from one ethnic group, even if it is a minority group, do not score high in this index.


\textsuperscript{204} Of the 431 non-whites students admitted between 2001–2005, 62.9% were general admission, while 37.1% were ARC admission. Without the ARC admission program, 160 fewer non-white students would have been admitted to the School of Law between 2001 and 2005. (report on file with author).

\textsuperscript{205} See AM. BAR ASS’N, *supra* note 25, at 5.

\textsuperscript{206} Id.
addition, the ABA has tried to require schools to show concrete action and a commitment to diversity. In 2006, the ABA revised sections on Legal Education and Admissions to the Bar standard 211, and subsequently standard 212. These revisions addressed the impact of *Grutter v. Bollinger* (*Grutter*), the importance of diversity, and the ways the standards were structured to promote diversity of faculty, staff, and students. The adoption of these standards is stalled in the political mire of the U.S. Department of Education. Finally, in an effort to increase the

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207 The ABA states that increasing diversity is a high priority. In fact, the ABA created the ABA Presidential Advisory Council on diversity in the profession. The purpose of this council is to increase the number of students of color in the profession by promoting pipeline initiatives. In addition, in 2006, the ABA section on Legal Education and Admissions to the Bar adopted standard 211, which required schools to show concrete action and their commitment to diversity. 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, and enables students to better understand persons of different races, ethnic groups and backgrounds.

Interpretation 211-3: The Standard does not specific 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.


208 Shortly after the ABA proposed revisions to standard 211, severe criticism ensued. 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. 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
effectiveness of law school pedagogy to better prepare students for practice, the ABA is working toward more outcome-based standards.\textsuperscript{209}

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.\textsuperscript{210} 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 exam but are incompetent practitioners. In the name of protecting those students who might inevitably fail, the Accreditation Committee also sacrifices those students who would succeed despite low LSAT scores.\textsuperscript{211} By adopting minimum bar passage and arguably de facto minimum LSAT score standards, the ABA established more barriers to access for the underrepresented. Moreover, these standards are easily misinterpreted, but 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.\textsuperscript{212} African-American and Hispanic

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\textsuperscript{209} 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 on the basis of “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. See James Podgers, Self-Study Program: Ongoing Re-evaluation May Bring Change to Law School Accreditation Standards, 95 A.B.A. J. 61, 61 (2009).

\textsuperscript{210} 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.” Second, some requirements unnecessarily increase costs and raise tuition. See 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). 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/student. Although the more hands-on, resource-intensive approach to legal education and competition among schools for higher rankings, 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, REPORT TO CONGRESSIONAL COMMITTEE ON HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 11, 25 (2009).

\textsuperscript{211} See Nussbaumer, supra note 61, at 179.

\textsuperscript{212} Schools can show compliance by showing that at least 75% of its graduates passed the bar exam over the five most recent calendar years. 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 15 points below the average rate for graduates at other ABA approved schools in the same jurisdiction during the same period.
bar takers more frequently are unsuccessful on the first bar attempt; therefore, this new standard may inhibit African-American and Hispanic enrollment.\textsuperscript{213}

In addition to requiring minimum bar pass rates, while not actually setting minimum LSAT scores, the ABA creates minimum floors in practice. In recent history, the ABA has denied accreditation to schools who admitted students with LSAT scores lower than 143.\textsuperscript{214} In fact, the ABA denies accreditation to schools who admit any applicant with an LSAT score of 140, regardless of how few had been admitted with that LSAT. According to the most recent data published by LSAC, the average LSAT score for African-Americans in the fall of 2008 was 143.5.\textsuperscript{215} This means that the ABA de-facto standard automatically disqualifies half of the African-Americans who take the LSAT.

Rather than set a minimum bar passage rate and a de-facto minimum 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. The credential bias assumes that past academic performance is a measure of immutable ability, which determines future achievement regardless of student effort or faculty instruction.\textsuperscript{216} 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. For example, in 2008, Phoenix Law School had a 97\% Bar Passage Rate for its students who had average LSAT scores of 148-151.\textsuperscript{217} Although the LSAT low of 148 was above the de-facto minimum, this passage rate demonstrates that students with lower indicators can outperform the predictors with the right type of pedagogy and support; thus, the LSAT should not be used as a barrier. In addition, New

\begin{itemize}
\item See Corbett, supra note 216, at 209–10.
\item The ABA denies accreditation to schools with an average LSAT scores below 143 and to any school who admits an applicant with an LSAT score of 140, regardless of how few had been admitted with that LSAT. See Shepherd, supra note 218, at 115.
\item LSAC Volume Summary, Average UGPA, Average LSAT and Counts by Ethnic Group- Fall 2004 to Fall 2008
\item Dennis Shields, Outcome Measures and Student Achievement How to Improve Bar Passage Rates Within a Broader Set of Outcome Measures, BAR EXAM PASSAGE CONFERENCE, Oct. 17, 2008.
\end{itemize}
York Law School recently published results showing that their Comprehensive Curriculum Program has improved bar passage rates of students in the bottom quarter from 19.4% in 2003 to 83.5% in 2008.  

Therefore, by requiring schools to incorporate an inclusive pedagogy, have comprehensive Academic Support Programs, and provide bar preparation programs, 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.

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 are not impacted by these standards because their bar passage rates and average LSAT scores are solidly within ABA ranges. Therefore, 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 and World Report Rankings and the ABA accreditation standards are not adequate justifications for law schools to rely on numerical criteria of the UGPA and LSAT scores, especially when such reliance disproportionately disqualifies otherwise meritorious candidates from underrepresented populations. The following discussion will show why concerns over the anti-race-conscious admissions legal climate are not adequate justifications to abandon inclusive admissions practices.

C. The Anti-Race-Conscious Legal Climate

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

219 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, 2009-2010 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 38 (2009-2010), available at http://www.abanet.org/legaled/standards/2009-2010 StandardsWebContent/Chapter5.pdf. However, to date, the ABA has not articulated clear standards for what constitutes and effective ASP.

220 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. See Maureen E. Wilson, Teaching, Learning, and Millennial Students, NEW DIRECTIONS FOR STUDENT SERVS., 63 (2004).
Grutter is the key U.S. Supreme Court decision on race-conscious admissions practices in law schools. Decided in 2003, the U.S. Supreme Court upheld the race-conscious admissions practice at the University of Michigan Law School. In a 5-4 decision, the Court found that the law school’s practice constitutional because it was narrowly tailored to address a compelling state interest to achieve a critical mass of underrepresented minority groups. Moreover, the admissions practice was constitutional because it was not applied mechanistically, was not aimed at achieving specific quotas, and provided a full review for all candidates. While the Court upheld University of Michigan’s law school admissions policy, it found the institution’s undergraduate admissions policy was unconstitutional in Gratz v. Bollinger. Under that policy, the admission process automatically distributed to every single “underrepresented minority” one-fifth of the points needed to guarantee admission. 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.221

Notwithstanding the decision in Grutter,222 several scholars doubt that the Supreme Court will uphold race-conscious practices in the future. “[I]n 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.”223 “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.”224 California, Michigan,225

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221 Id. at 270.
222 Current U.S. Supreme Court cases have not overruled Grutter. For example, in Parents Involved in Community Schools v. Seattle Dist. I the Court held that “avoiding isolation” of minority students based on race is a compelling interest in public elementary and secondary schools, but it 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. In addition, the Supreme Court indicated that the districts failed to show that they considered alternative methods to accomplish their goal. Quoting from Grutter, the Court pointed out that narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives.” Parents Involved in Community Schools v. Seattle Dist. I 551 U.S. 701, 735 (2007).
225 Shortly after the victory in the Court, Michigan passed Proposal 2, Michigan Civil Right Initiative, and banned race-conscious practices. 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
Florida, Nebraska, Texas, and Washington\textsuperscript{226} have enacted anti-race conscious legislation that prohibits admissions’ practices to use race as a factor. Given the uncertainty of the direction of the U.S. Supreme Court and the trend toward anti-race conscious initiatives,\textsuperscript{227} many institutions discarded access admissions practices. In so doing, they expose themselves to potential litigation for employing discriminatory practices. In response to these concerns, institutions must develop race-neutral but non-discriminatory admissions practices.

1. **Abandonment of Access Admissions Practices**

Many colleges, universities, and graduate schools have abandoned their access admissions program because they fear potential litigation.\textsuperscript{228} 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.\textsuperscript{229} The Center for Equal Opportunity reported that after *Grutter*, over one hundred colleges and universities have “voluntarily” abandoned their race-conscious admissions practices.\textsuperscript{230} By 2003, only about one third of private colleges and public institutions without legal prohibitions on affirmative action said they considered race in admissions.\textsuperscript{231} Even 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.\textsuperscript{232} “The threat that groups like the American Civil Rights Institute and the Center for Equal Opportunity will lodge a complaint

\begin{footnotesize}
\begin{enumerate}
\item 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 236.
\item See Epperson, * supra* note 27, at 169.
\item 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, Yale University, and “dozens of others.” *Id.*
\item Jaschik, * supra* note 241.
\item *Id.*
\end{enumerate}
\end{footnotesize}

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.”

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

The fear of litigation can cut both ways. The failure to provide a fair and accurate admissions process could result in potential misuse\(^{234}\) of the LSAT and discrimination litigation. Several commentators, including the past president of LSAC, have indicated that the current reliance on the LSAT could give rise to class-action law suits by those groups who are being denied admission to law school. At the St. Johns Symposium on the Misuse of the LSAT in 2005, then President of the LSAC, Phil Shelton stated that, “[T]he evidence is very clear that the test has a disparate impact based on race, and if the test is used contrary to LSAC guidelines that could provide a valid basis for proving racial discrimination.”\(^{235}\) 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 that ensure the underrepresented access.

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

Among the variety of attempts to design race-neutral admissions practices, the three most common are class-based preferences, “X-percent” programs, and direct measures programs.

Class-based admissions practices give preferences to applicants based on lower socioeconomic status. 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.\(^{236}\) Fewer African-Americans from low income backgrounds apply to college than do

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\(^{233}\) In this current anti-race-conscious legal climate, an increasingly large number of colleges and universities are discontinuing access admissions practices. *See* Epperson note 27 at 170.

\(^{234}\) Misuse in this context means using the LSAT score as primary basis for admissions instead of as part of a holistic process.

\(^{235}\) *See* Roithmayr, *supra* at 126, at 11.

\(^{236}\) *See* Roithmayr, *supra* at 126, at 11.
whites. As a result, focusing on socioeconomic class does not increase enrollments for applicants of color. For example, after Proposition 209 banning racial preferences was passed in California, UCLA College of Law employed an admission plan based on economic need. Sadly, in 1997, when UCLA no longer considered race and only considered economic need, Black enrollment dropped by 72% and Latino/a enrollment dropped by 26%. In 1999, only two out of 286 enrolled students at UCLA were Black.

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. 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. Moreover, these plans eliminate the ability of the admissions committee to exercise discretion in its decision making.

The direct measures program offers the most promise. 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 inclusion. A direct measures program would consider in what ways the applicant will contribute to the educational mission of the school. The applicants could be asked

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237 Rose, supra note 236, at 333 (Rose uses the term “Black” instead of African-American).
238 Roithmayr, supra note 126, at 11.
239 See Rose, supra note 236, 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. See also Roithmayr, supra note 126, at 11.
240 Rose, supra note 236, at 332.
241 Id. at 332.
242 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 her life experiences or her 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 at 126, at 8–9.
to “highlight their experience with diversity or their potential for contributing to a diverse campus climate.”

UC Hastings’ 30 year-old Legal Education Opportunity Program (LEOP) is a good example of such a direct measures program. LEOP’s goals are to provide alternative means of evaluating an applicants’ potential and to provide an academic support program. Generally, students who have overcome significant obstacles submit an additional application for consideration for admission to the program. They are asked to identify and describe obstacles they overcame as well as efforts they made to overcome those obstacles.

Wayne State University Law School has adopted a plan to consider numerical indicators plus “factors such 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 his family to attend college or graduate school.” The applicant can also explain his ability to overcome discrimination.

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 U.S. Supreme Court. The focus of these direct measures is to determine the reliability of the numerical indicators. As such, race is not a dispositive factor in and of itself; rather, it is 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. In order to rectify the disparity in enrollment rates, both private and public law schools must develop admissions

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244 Rose, supra note 236, at 335.
246 Only students who are interested in the program submit an application to LEOP. Interested students must identify and describe any obstacle which they have had to overcome as well as efforts they have made to overcome those obstacles. U.C. HASTINGS C. L., Legal Education Opportunity Program, supra note 206.
247 See Rose, supra note 236, at 336.
248 Id. at 336.
249 More private law schools than public schools provide access admissions today because they are free from constraints of anti-race-conscious legislation; however, tuition in private schools is often much higher than in
practices that are inclusive, fair, and just. Admissions practices must be inclusive, fair, and just especially given the general mission of legal education to train stewards of justice, and is specifically true for schools with a social justice mission.

V: A Prescription for Effective, Inclusive, Fair, and Just Admissions 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) advocates changing the rankings criteria to include diversity as a primary criteria and not a separate ranking. SALT also is working on initiatives to change ABA Accreditation standards.\(^{250}\) Besides advocating for change, others law related organizations have focused on providing access through prelaw and pipeline programs. For example, in 40 years of operation, the Pre-Law Summer Institute and The Council on Legal Education Opportunity each provided access for approximately 900 diversity applicants.\(^{251}\) Some law schools offer prelaw programs, pipeline initiatives,\(^{252}\) and conditional admission programs.\(^{253}\)

public schools, so it once again creates unnecessary hardship on the underrepresented if their only access is in private schools.

\(^{250}\) See Hadden & Post, supra note 61, at 103.

\(^{251}\) The Pre-Law Summer Institute prepares American Indian and Alaska Native applicants for law studies. See AM. BAR ASS’N, supra note 25, at 20; The Council on Legal Education Opportunity is focused on expanding opportunities for minorities, low-income and disadvantaged groups. Id. at 23; (((ABA Diversity in the Legal Profession, at p. 23,))))). See also COUNCIL ON LEGAL EDUC. OPPORTUNITY, http://www.cleoscholars.com (last visited June 22, 2010).

\(^{252}\) One way to provide access is through pre-law programs, where law schools make a commitment to admit students upon their successful completion of the pre-law program at the undergraduate campus. For example, the University of Michigan developed the Wolverine Scholars Program last year. [cite] Through this program, undergraduate students who maintained a full course load for three years and UGPA of 3.8 may apply to the law school without an LSAT score. [cite, most likely id.] The admissions committee considers the student’s willingness to accept challenge, determination, discipline, academic progress, cultural and social economic background, work experience, travel experience, and any other challenges the student has had to overcome. [cite most likely id.]

\(^{253}\) LSAC has funded pipeline initiatives. Information for Racial/Ethnic Minority Applicants, LAW SCH. ADMISSION COUNCIL, http://www.lsac.org/specialinterests/minorities-in-legal-education.asp (last visited June 22, 2010). 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 (2006). CUNY has a unique approach to pipeline. In 2006, Associate Dean Mary Lu Bilek created the Pipeline for Justice Program. 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. CUNY invites these applicants to enroll in an intense LSAT prep course. During the first part of the course, students take an intense LSAT preparation course and take a minimum of 15 practice LSAT exams. During the second part of the course, students take an intensive course on critical reading and writing skills. In addition, students receive coaching on test anxiety, self-efficacy, and study planning. Successful students are then admitted into CUNY. Pipeline students state that the program provided them
These are all laudable efforts to increase access to law school, but they are not enough. Law school organizations can work with the ABA\textsuperscript{255} 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 encourages more risk-adverse law schools to adopt access admissions practices. Finally, law schools themselves can provide inclusive admissions practices, by expanding their pool, involving faculty in the admissions process, establishing an application criterion that captures the underrepresented, formulating a system to evaluate the application, and providing an effective Academic Support Programs.

\textbf{A. Expand the Pool}

Merely recruiting applicants from underrepresented populations with higher scores is an option that many schools exercise; however, this will not achieve the goal of increasing representation in our schools and 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 with confidence and skills not only to conquer the LSAT, but to succeed in law school. \textit{Pipeline to Justice Program, City Univ. N.Y. Sch. of L.}, http://www.law.cuny.edu/clinics/JusticeInitiatives/pipeline.html (last visited June 22, 2010).

\textsuperscript{254} Approximately twenty law schools avoid the access admissions 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. 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.

\textsuperscript{255} One indication that the ABA would welcome ways to ensure more inclusive access in admissions is Interpretation 802-1 that:

\begin{itemize}
  \item permits the granting of a variance for an experimental program based on all of the following:
  \item (1) Good reason to believe that there is a likelihood of success;
  \item (2) High quality experimental design;
  \item (3) Clear and measurable criteria for assessing the success of the experimental program;
  \item (4) Strong reason to believe that the benefits of the experiment will be greater than its risks; and
  \item (5) Adequately informed participation by students involved in the experiment.
\end{itemize}

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.

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 either from 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 pointed out 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.256

B. Engage Faculty

Engaging the faculty in the admissions 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, many schools disbanded faculty admissions committees.257 Faculty, however, must participate in the admissions process. The students become alums and alums become the emissaries of the school’s mission. Faculty need to 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. This familiarity could help create a more humane learning environment258 that will ultimately benefit the students, enhance their learning, and make them better lawyers. Moreover, faculty governance directly impacts students’ experience in law school. Thus, faculty members need to realize how their decisions impact the students, and in order to fully understand those impacts, faculty need to understand their students, what

256 Section VI.A.2.
258 See generally note 15
motivates them, and what has shaped them. Most faculties’ life opportunities and experiences vastly differ from their students. Having faculty involved in reviewing applications will thus 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 admissions personnel, faculty, administrators, students, and alums should develop the criteria for admission and design the application form.259 This application should be the only one provided; there should not be a separate application for access admissions in order to avoid concerns of discriminatory practices. The application is an opportunity to set the tone and communicate the mission of the school, and the admissions 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. The three goals of direct measures are to 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 we know that the numerical indicators are less reliable with some populations, the application could include a section that asks applicants to directly discuss whether or not they think their UGPA or LSAT score accurately reflects their merits and abilities. There could be a series of check-the-box answers like 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?

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259 Admissions practice should “consider test scores in context and evaluate other factors,” include questions in the application that will give more information about the applicant, individually review each applicant, and “aim for diversity of experience.”
• Do you have a history of under-performing on standardized tests?
  o What was your SAT or ACT?
  o Did your SAT or ACT score fairly predict your UGPA?
• Is English your second language?
  o If you have a TOFEL Score, what is it?
  o 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?
  o Do you wish to disclose if you had testing accommodations?
  o If you disclose, please provide documentation.
• Have you been out of a formal educational environment for more than 6 years?
• Did you work when you were in undergraduate school?
  o 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 and 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 has your life’s 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 him or her. 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 admissions 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, 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 contain a personal statement, the undergraduate transcript and 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. 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 an applicant can articulate his or her motivation for wanting to become a lawyer, the more likely that applicant will remain engaged in the educational process. Applicants with strong motivation, 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, have a clear purpose and passion for succeeding in law school. This passion increases their chances of staying motivated through tough times. Motivation and perseverance are two essential characteristics, not only in law school, but in the practice of law, and the personal statement can be an excellent proxy of these characteristics. Personal statements that appear undeveloped may not necessarily reflect inadequacy; rather, they may simple reflect that the applicant did not have anyone to guide them through the application process. Therefore, when reading personal statements, the admissions committee should remain flexible and refrain from

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260 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.

261 For example, on the surface, grammatical errors and writing issues may be troubling because the applicant presumably had the chance to edit his or her 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.
making sweeping conclusions and assumptions. Before rejecting an applicant on the basis of a thin or inadequate personal statement, ask the applicant to provide a supplement to their 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. 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.262 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 admissions and not compromise the U.S. News and World Rankings, if the scores remain within this range. But more 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. Unlike the personal statement, which may have been edited, the writing sample provides a good example of how well the

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applicant writes, and whether he or she can think logically and develop his or her 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. Some had successful careers in corporate settings like 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 like 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 and learning environment and to the profession.263

Furthermore, experience can generate better references. References provide useful information about an applicant, especially for underrepresented populations. Many people are more reticent about sharing their accomplishments because their culture regards such boasting as rude, impolite, or arrogant. Unlike academic and employment references, personal references are usually discounted in admissions 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

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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 need later.264

Once the law school has effectively expanded the pool, engaged faculty, established relevant admissions criteria, formulated an application evaluation rubric, it will likely have increased the proportion of underrepresented in their entering class. With providing access, law school 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,265 it is important to realize how critical an ASP is to the mission of inclusion. An effective ASP empowers students266 when it creates a critical mass, addresses stigma267 and backlash issues, values the contribution the students make, helps students develop learning communities, fosters their integration into the school268 and the profession, and provides academic and non-academic support. For example, at UC Hastings, Legal Education Opportunity Program (LEOP) students

264 See GLADWELL, supra note 84, 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.

265 See Paula Lustbader, From Dreams to Reality; Hanging Ten (unpublished manuscript) (on file with author).

266 Such an ASP can help keep students engaged and validated. Underrepresented students are more likely to feel a disconnect between their own values and the institution’s values. This disconnect can lead to the student withdrawing and underperforming. See 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) (arguing that people of color and women are more likely to experience a disconnect from their values and withdraw.).

267 “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 often participate in academic support programs are often stigmatized. Such stigma stems from arguments made against the existence of special admissions program. See Cerminara, supra note 101, at 256.

268 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 doors for minority students. Such concepts however, fail to fully integrate minority students into an institution’s community once they have walked through those doors. See Nelson, supra note 19, at 31.
develop a sense of community that begins at the LEOP orientation. \textsuperscript{269} 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. \textsuperscript{270} Similarly, at Seattle University School of Law, ARC starts with an intensive summer-entry program, creates community, and provides ongoing support. \textsuperscript{271}

Many schools claim that inclusive and holistic admissions practices are too time consuming and expensive. \textsuperscript{272} As a result, these schools are willing to exclude potentially great applicants for the sake of efficiency. \textsuperscript{273} Certainly, inclusive admissions require a resource-intensive admissions 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.

**VII: The Cost/Benefit Analysis of Ensuring Inclusion**

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

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

\textsuperscript{269} U.C. HASTINGS C. L., Legal Education Opportunity Program, supra note 206.
\textsuperscript{270} Id.
\textsuperscript{271} See Lustbader,
\textsuperscript{272} See Hadden & Post, supra note 61, at 72.
\textsuperscript{273} Law firms make this same trade-off. They consider only applicants who were in the top 10\% of their class because they assume those applicants will be strong candidates. 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.
educational mission of the school. Having such clarity of purpose in the admissions process communicates to all students what factors are valued.

The cost to train admissions personnel and faculty committee members can result in more efficient and effective review processes. Once the application reviewers know what they are looking for and why reading 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 academic support program can be offset by more satisfied and successful students. It is not sufficient to provide access; the majority of these students will still need a special support program. Such a program would have at a minimum, a full-time director. The remaining staffing 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. 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 Report and Best Practices.

The cost of institutional commitment to students can be outweighed by the reality that the admissions process has helped the school manifesting its educational mission. By having a more

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274 One example is the University of Michigan Law School Peer Support Services, http://www.law.umich.edu/currentstudents/studentservices/Pages/peersupportsvcs.aspx (last visited June 17, 2010).
275 See Cerminara, supra note 101, at 254.
276 Such faculty development is necessary regardless of the presence or absence of access admissions. 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, 47 WASHBURN L.J. 327 (2008).
277 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. See generally SULLIVAN ET. AL., supra note 23.
278 See Stuckey, supra note 23.
inclusive admissions 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 achieving success, these students become alumni who feel invested in the school. For example, Seattle University ARC alums, when 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. Moreover, ARC alumni donate disproportionately to the school.\(^{279}\)

In addition, programs like the ARC provide a strong basis for fund raising. Law firms who 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. 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. He has contributed to that endowment almost annually since then and the endowment now exceeds 8 million dollars.\(^{280}\)

Consider these ARC alumni—who would have been denied access without ARC—and their contributions they made in 2009. Five out of the current twelve Washington State Bar Association Leadership Institute Fellows are ARC alums. Two are members of the Washington State Bar Association Board of Governors. Several are on the boards of various Bar committees. The current president of the Latino/a Bar Association of Washington is ARC alum. One received the 2009 Champion of Justice Award from the Washington Association of Criminal Defense Lawyers for his work as the president of the Seattle King County NAACP. One received the Washington State Bar Association’s 2009 Courageous Award and is the president-elect of the Young Lawyers Division in his county. And one received the King County Bar Association Presidents’ Award.

\(^{279}\) According to Kenneth Shook, Seattle University School of Law Associate Director of Development, between the fiscal years of 2007-2009, 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. ARC alumni comprised less than 10% of these alumni. (email on file with author).

\(^{280}\) Lustbader su website
Over half of these ARC’s alums were denied admission into any other law school. Without the ARC program, they 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 our 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.

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 and the collateral cost to the integrity of legal education, the access to the profession, the compromise of many law school’s missions, and the erosion of the academic programs, surely, the cost of establishing fair and just admissions practices and the academic support to ensure meaningful opportunity is a small price to pay.\textsuperscript{281}

\section*{VII: Conclusion}

Law schools over-rely on numerical criteria and abandoned access admissions practices in an effort to increase their rankings by U.S. News and World Report, in order 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 inaccurate predictor of potential for success for underrepresented populations. The factors that lead to the achievement gap are deeply rooted in our society. Even if we commit to adequate, effective, and strident major educational reforms and pipeline initiatives, it will take at more than a generation for those efforts to close the achievement gap for applicants to colleges and graduate school. Our justice system cannot afford to wait that long.

\footnote{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. For many students, particularly those from underrepresented communities, their only option for higher education is to enroll in for-profit schools. 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. \textit{See generally} Tamar Lewin, \textit{Inquiry is Sought Into Practices of For-Profit Colleges}, N. Y. \textsc{times}, June 21, 2010, http://www.nytimes.com/2010/06/22/education/22education.html.}
Law schools can ensure inclusive, fair, and just admissions without compromising their integrity. They can adopt admissions 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 admissions, law schools need to abandon their overreliance on numerical indicators and shift from a race-conscious admissions paradigm to a holistic direct measures admissions practice.\textsuperscript{282}

As I write this article, I am also reading approximately 400 applications for the ARC program. In file after file, I am made ever 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. But 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.

I know that the ones we accept 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.’"\textsuperscript{283}

"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."\textsuperscript{284}

"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."

"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."

\textsuperscript{282} In a December 2003 statement on the LSAT, SALT called for admission reforms, including the adoption of a more “whole file” review process. See Hadden & Post, supra note 61, at 103.
\textsuperscript{283} Paula Lustbader, My Reflections of ARC’s 20\textsuperscript{th} Anniversary, http://www.law.seattleu.edu/x1528.xml.
\textsuperscript{284} Lustbader supra note 280.
“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. Although I was working 12 hours per day, and was dog tired when I flopped into bed, I remember thinking that helping people this way (helping them get water in their villages) was an absolutely wonderful way to 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.”

“Gotta go with the helping people thing . . . love it . . . and I make a great living.”

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 admissions process ensures access for applicants with profiles similar to these alumni. The profession needs them. Their future clients are waiting for them.

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285 Lustbader supra note 280.