

THE RONALD H. BROWN CENTER FOR CIVIL RIGHTS AND  
ECONOMIC DEVELOPMENT  
SYMPOSIUM

**MISUSE AND ABUSE OF THE LSAT:  
MAKING THE CASE FOR ALTERNATIVE  
EVALUATIVE EFFORTS AND A  
REDEFINITION OF MERIT**

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INTRODUCTION

Recent studies of social inequality—the widening gap between rich and poor and the lack of social mobility in the United States—all concur in one respect: it is easier to move up the economic ladder if you have college and graduate degrees.<sup>1</sup>

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The content of this Article represents the individual views of Phoebe A. Haddon and Deborah W. Post and do not represent the views of the ABA, LSAC, Temple Law School, or Touro Law School.

<sup>1</sup> Studies that appeared in professional journals have now percolated down into media outlets that have a much wider audience. See, e.g., *Survey—America: Middle of the Class*, *ECONOMIST*, July 16, 2005, at 81 (discussing a University of Michigan study of social mobility by Gary Solon); David Wessel, *As Rich-Poor Gap Widens in*

However one chooses to characterize the transformation of the economy in the United States—post industrial, post capitalist, information age, or knowledge-based—it is an economy in which credentials matter. Credentials, like a J.D. degree, symbolize human capital in the form of valuable intellectual and professional skills that the credentialed person can be presumed to have. Understandably, access to education has become the site of significant controversy in the current political economy in the United States, including debate over the cost of higher education,<sup>2</sup> access to federal grants or loans,<sup>3</sup> and admissions

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*the U.S., Class Mobility Stalls*, WALL ST. J., May 13, 2005, at A1 (citing a study by Solon and Miles Corak, a Canadian economist and editor of a book on mobility in Europe and North America).

<sup>2</sup> The issue of college costs has been covered extensively in the media for some time. See, e.g., Daniel S. Cheever, Jr., *Is College Worth the Money?*, BOSTON GLOBE, June 3, 2005, at A19 (stating that tuition rise over the past ten years was 51% at public schools and 36% at private institutions); Ralph R. Reiland, *Colleges Must Stop Giving Students Less for More*, CHRISTIAN SCIENCE MONITOR, Sept. 6, 1996, at 18 (discussing the dual perils of abandoning traditional course requirements and the alarming rise in tuition costs: the tuition increase between 1980–93 was 211% for public colleges and 242% at private colleges); see also Ron Grossman & Charles Leroux, *Tuition Has Gone Ballistic*, CHI. TRIB., June 29, 1997, § 2 (Perspective), at 1 (Rand Corp. subsidiary, Commission on National Investment in Higher Education, made up of university presidents and corporate executives, warned that by 2017, “a college degree will be beyond the reach of as many as half the students who want and are qualified to seek one”); Michael Grunwald, *Kerry Says Tax Break Should Include Tuition Control*, BOSTON GLOBE, Nov. 1, 1996, at B12 (future presidential candidate supports Clinton tax credit for college education but worries about “spiral of educational inflation”).

In retrospect, the increase in tuition in the nineties was moderate. The College Board reported a 5% rise at public colleges and a 6% rise at private institutions in 1996. See Tom Vanden Brook, *College Tuition Rises 5%: Officials Blame Increase in Average on Salaries, High-Technology Tools*, MILWAUKEE J. SENTINEL, Sept. 26, 1996, at 9. For further evidence of recent increases in tuition, compare the 14.1% increase at public schools in 2003 reported by the College Board, THE COLL. BD., TRENDS IN COLLEGE PRICING 2003 2 (2003), available at [http://www.collegeboard.com/prod\\_downloads/press/cost03/cb\\_trends\\_pricing\\_2003.pdf](http://www.collegeboard.com/prod_downloads/press/cost03/cb_trends_pricing_2003.pdf), with the 10.5% increase in public schools costs in 2004, THE COLL. BD., TRENDS IN COLLEGE PRICING 2004 3 (2004), available at [http://www.collegeboard.com/prod\\_downloads/press/cost04/041264TrendsPricing2004\\_FINAL.pdf](http://www.collegeboard.com/prod_downloads/press/cost04/041264TrendsPricing2004_FINAL.pdf). In September 2003, The U.S. Committee on Education and the Workforce and the U.S. House Subcommittee on 21st Century Competitiveness issued a report. See JOHN A. BOEHNER & HOWARD P. MCKEON, 108TH CONG., THE COLLEGE COST CRISIS (2003), <http://edworkforce.house.gov/issues/108th/education/highereducation/CollegeCostCrisisReport.pdf#search='The%20College%20Cost%20Crisis%202003'>. One of the report's key findings was that college costs were “exploding,” increasing at a rate higher than inflation. *Id.* at 2. While the report does not recommend solutions, it cites to a 1997 report of The National Commission on the Cost of Higher Education, which suggested that public concern with the rising costs of education might cause “policymakers at the Federal

and state levels [to] intervene and take up the task” of reducing the costs of higher education. *Id.* at 5

The Democratic members of the House committee do not agree with Republicans about the cause or cure for rising tuition. In May 2005, the Democrats introduced a bill, the College Affordability and Accountability Act, which would require states to maintain funding for public higher education while colleges and universities would have to report on cost containment strategies. It was referred to the House Committee on Education and the Workforce. See H.R. 2739, 109th Cong. §§ 4–5 (2005); John F. Tierney, *Making College Affordable*, BOSTON GLOBE, July 22, 2005, at A19.

<sup>3</sup> Reduction in public funding is often cited as the principal reason for tuition increases. It probably is not a coincidence that tuition increases follow immediately in the wake of cuts in funding for public colleges and universities. When the State of Wisconsin cut \$250 million from the budget for the University of Wisconsin system, tuition was increased, classes and entire departments were eliminated, class size was increased, and salaries were frozen. For some, this is equivalent to a reduction in quality accompanied by a rise in price. See Mary Beth Marklein, *Colleges Brace for Bigger Classes and Less Bang for More Bucks*, USA TODAY, Aug. 27, 2003, at 1A. Others see it as a form of market discipline—increasing “productivity” in the academy. See, e.g., William C. Symonds, *Colleges in Crisis*, BUS. WK., Apr. 28, 2003, at 72 (asserting that American higher education is suffering because it has not “restructured” by cutting costs and adopting “radical new strategies” like other industries).

Decrease in government support for public institutions is well documented. So is the decrease in funding for students in the form of grants. While the amount allocated to Pell Grants has increased, the major criticism of the reauthorization of the Pell program in 2005 was the impact on working and middle-class families no longer eligible to receive lower grants. See Olivia Winslow, *Pell Grant Gives Students Less*, NEWSDAY, Apr. 28, 2005, at A34 (citing a Government Accountability Office study that reported that 81,000 students nationwide would no longer be eligible for Pell Grants and 1.9 million would receive less money). The decline in educational opportunity for low and moderate income students has been documented by the Advisory Committee on Student Financial Assistance, a congressionally chartered, non-partisan source of advice and counsel to the United States Congress and the Secretary of Education. See ADVISORY COMM. ON STUDENT FIN. ASSISTANCE, ACCESS DENIED: RESTORING THE NATION’S COMMITMENT TO EQUAL EDUCATIONAL OPPORTUNITY, at v (2001), available at [http://www.ed.gov/about/bdscomm/list/acsfa/access\\_denied.pdf](http://www.ed.gov/about/bdscomm/list/acsfa/access_denied.pdf); ADVISORY COMM. ON STUDENT FIN. ASSISTANCE, EMPTY PROMISES: THE MYTH OF COLLEGE ACCESS IN AMERICA, at v (2002), available at <http://www.ed.gov/about/bdscomm/list/acsfa/emptypromises.pdf>; ADVISORY COMM. ON STUDENT FIN. ASSISTANCE, ABOUT ACSFA, <http://www.ed.gov/about/bdscomm/list/acsfa/edlite-about.html> (last visited Feb. 15, 2006); see also Brian K. Fitzgerald, *Missed Opportunities: Has College Opportunity Fallen Victim to Policy Drift?*, CHANGE, July 1, 2004, at 10. Brian Fitzgerald, the author of *Missed Opportunities*, is the staff director of the Advisory Committee. The question of access is particularly troublesome when universities and colleges switch financial aid from needs based scholarships to merit scholarships in order to recruit highly competitive students and when student loans have become more costly. See National Association of Student Financial Aid Administrators, S1932, The Deficit Reduction Act of 2005: Highlights of Student Aid Provisions, available at <http://www.nasfaa.org/publications/2006/greconciliationsummary020206.html>.

The reaction at some elite schools has been to increase scholarship money

criteria, including affirmative action policies.<sup>4</sup>

If we apply a strict free-market model to education, and

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available on the basis of need and to cap the tuition paid based on the amount of family income. See William Symond, *Online Extra: The Thinking at Harvard, West Point, and Smith*, BUSINESS WEEK ONLINE, FEB. 27, 2006 (describing admissions programs at these schools designed to recruit low income students); see also Ross Douthat, *Does Meritocracy Work? Not if Society and Colleges Keep Failing to Distinguish Between Wealth and Merit*, ATLANTIC MONTHLY, Nov. 1, 2005, at 120. There are some who suggest that elite private schools have begun to perform the traditional role of public institutions in providing access to quality higher education to less privileged students while public institutions with scarce resources have substantially abandoned this role. In the case of minority students, there may have been a net loss in resources available to needy students because pressure from the Department of Education and the Justice Department, at the instance of opponents of affirmative action, has forced public universities to redistribute some of these funds to majority students. According to an official of the American Association of State Colleges and Universities, perhaps as many as half of four year college college minority scholarship programs have been reviewed or modified to make them available to white students. See Jonathan D. Glater, *Colleges Open Minority Aid to All Comers*, N.Y. TIMES, Mar. 14, 2006.

<sup>4</sup> The number of articles published in newspapers, magazines, and law reviews analyzing the most significant court decisions on affirmative action in higher education such as *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), is staggering. The controversy over affirmative action is emotionally charged. Whites believe that they are being deprived of opportunities to which they are entitled and minorities believe that there must be some acknowledgment of and remedy for past and continuing discrimination in the form of exclusionary practices. In its worst and most cynical manifestation, this struggle pits white working-class single mothers (both Barbara Grutter and Cheryl Hopwood fit this description) against a very small number of minority students whose numbers in majority white institutions only recently reached a "critical mass." After *Grutter*, the attacks did not abate. The most recent justification for reducing the number of minority students in law schools is found in the scholarship of UCLA law professor Richard Sander, who has theorized a "cascade" effect in minority admissions to law schools. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004); see discussion *infra* notes 82–86.

The assertion that scores under-predict the potential for success of minorities is now being made for low-income applicants for college. One study of undergraduate admissions showed the difference in admissions rates for the same SAT score. Athletes were admitted at a rate of 77%, minorities at 66%, alumnae and legacy applicants at 51%, and low-income applicants at 37%. Low-income applicants "may not look as good on paper," one advocate for class conscious admissions argued, but his data showed "they have great academic potential." Justin Ewers, *Class Conscious*, U.S. NEWS & WORLD REP., May 2, 2005, at 42 (quoting William Bowen, former president of Princeton and head of the Andrew W. Mellon Foundation, author of *EQUITY AND EXCELLENCE IN HIGHER EDUCATION* (2005)); see also Eugene M. Tobin, Andrew Mellon Foundation, *Reconciling Opportunity and Privilege in American Higher Education*, Presentation at Smith College (Jan. 26, 2006) (arguing that both minority and low-income students should be the target of outreach efforts) (on file with Phoebe Haddon).

there are advocates for precisely this kind of reform, only those who could afford to pay the price would get an education. In the debate about access to higher education, that possibility is seldom seriously considered. Rather, it is the competitive advantages that arise from wealth and the costs of class-based exclusion that have become the focus of educators. It appears that there is still substantial support for the ideal of equal opportunity, a belief in individual potential without regard to wealth or class position, and the importance of merit. There is, at the same time, substantial disagreement about the manner in which educational resources should be distributed: who has merit, who deserves an education, and who is qualified to attend the most prestigious schools in the United States.

At the center of the storm over admissions criteria for college and law school is an important and powerful social institution in contemporary society: the standardized test, the testing industry, and the people who create, administer, and score it. The development of standardized tests has a contested history. The promoters of standardized tests are sometimes lauded as reformers of a decentralized admissions process that invited cronyism, nepotism, and irrational exclusionary prejudices. At others times they are reviled as the architects of quasi-scientific justifications for racist notions of intellectual inferiority and superiority. A half century after its creation, experience with the LSAT has revealed abuses that the creators and early critics of standardized tests might not have anticipated. While tests of "aptitude" or predictive tests, continue to be controversial and extremely problematic when used to decide who should have access to legal education, slightly different but related problems are created by the mass production and administration of tests in the name of efficiency. The sheer volume of tests administered, as well as the increase in the number of students applying to law schools, threaten to make assessment of individual merit so mechanical and superficial as to be virtually meaningless.

Law school administrators and law faculty are responsible for policies that determine who will attend law school. The subject of admissions standards or criteria is vitally important to the legal community and the decisions faculty and administrators make about admissions criteria have important consequences for a much wider community. Over the past several years, particularly since the creation of a ranking system

for law schools by *U.S. News & World Report*, the LSAT has become a symbol deployed by law schools in the competition for prestige, status, and applications. There has also been growing dissatisfaction with the LSAT and with the way it is used. At law schools across the country, on law professor listservs, in newsletters and alumnae magazines, in hallways and admissions offices, there is heightened interest in the use of the LSAT in law school rankings and the effect of this use on the quality of legal education.

Conferences have been sponsored on rankings, with attention paid to the effect of LSAT scores on those rankings<sup>5</sup> and on the LSAT examination and its effect on minority admissions.<sup>6</sup> The LSAT is utilized to support proposals that would send minority students "cascading" out of elite schools down to "lower-tier" schools.<sup>7</sup> Meanwhile, shocked by the decline in the number of African American students applying to and enrolled in law schools, especially African American males and other underrepresented groups, advocates for affirmative action presented proposed changes in standards of accreditation that would deter the use of the LSAT in a way that reduces or eliminates minority enrollment in law schools to the Council on Legal Education and Admission to the Bar ("Council") of the American Bar Association ("ABA").<sup>8</sup> Allegations that cultural

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<sup>5</sup> Indiana University School of Law: *Next Generation of Law School Rankings Symposium*, Indianapolis, Indiana, April 15, 2005. Schedule and abstracts of papers are available at [http://www.Law.Indiana.edu/front/special/2005\\_rankings\\_nextgen/abstract.shtml](http://www.Law.Indiana.edu/front/special/2005_rankings_nextgen/abstract.shtml) (last visited Jan. 28, 2006); see also Paul L. Caron & Rafael Gely, *Dead Poets and Academic Progenitors: The Next Generation of Law School Rankings*, 81 IND. L.J. 1 (2006).

<sup>6</sup> LAW SCH. ADMISSION COUNCIL, *Dreamkeeping: Empowering Minority Faculty—A Dialogue*, Seattle, Washington, Oct. 31, 2003 (encouraging minority faculty to get involved in the admissions process.). See generally *Symposium: The LSAT, U.S. News & World Report and Minority Admissions*, 80 ST. JOHN'S L. REV. 1 (2006).

<sup>7</sup> See Sander, *supra* note 4, at 416–17.

<sup>8</sup> The decline in minority enrollment is documented in MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION, Commission on Racial and Ethnic Diversity in the Profession, American Bar Association (2005) (third edition of volume publishing nationwide data on minorities in the legal profession which reported that number of minorities in law school declined two years in a row and the number of African American applicants declined 6% and 8% respectively in the two years). A group called the Coalition for Racial and Ethnic Diversity in Law School and the Legal Profession spearheaded by Vernellia Randall of the University of Dayton Law School and clinician Gary Palm, formerly of the University of Chicago School of Law, proposed revisions to the ABA standards that would address some of the reasons for

the decline. The Coalition also includes organizations such as the Society of American Law Teachers and the Clinical Legal Education Association. See COAL. FOR RACIAL & ETHNIC DIVERSITY IN LAW SCH. & THE LEGAL PROFESSION, REPORT ON SECTION OF LEGAL EDUCATION COUNCIL MEETING, *available at* <http://quickplace.uydayton.edu/coalition> (site includes proposals, identity of members of the Coalition, and reports of actions on the proposals) (last visited Mar. 18, 2006).

The Coalition submitted recommendations with respect to several of the Accreditation Standards but Standard 211, Equal Opportunity and Diversity, and Standard 503, Admissions, were the most significant. The Council rejected the Coalition draft of Standard 211, which would have required law schools to achieve “results” in recruiting a critical mass of minority students. The Council chose instead to include language requiring evidence of “a commitment demonstrable by concrete action.” John Sebert, *Memorandum on Revisions of Standards 210-212 and Associated Interpretations Approved by the Council at its Meeting of February 11, 2006*, Feb. 16, 2006, *available at* [http://www.abanet.org/legaled/standards/adoptedstandards2006/standards210\\_212.pdf](http://www.abanet.org/legaled/standards/adoptedstandards2006/standards210_212.pdf) (last visited Mar. 21, 2006).

With respect to the use of the LSAT in the admissions process, the ABA Standards Review Committee has proposed changes to Chapter Five, including language in Standard 503 that states: “in making admission decisions, a law school shall use the test results in a manner that is consistent with current guidelines regarding proper use of the test results provided by the agency that developed the test.” STANDARDS FOR APPROVAL OF LAW SCH. & INTERPRETATIONS, Chapter 5, *available at* <http://www.abanet.org/legaled/standards/chapter5.html> (last visited Mar. 21, 2006). The Coalition, in contrast, proposed a “disparate impact” approach reasoning that “[t]he disparate impact model is an essential tool in all the modern civil rights statutes. If U.S. employers are able to operate effectively under the disparate impact standard, there is no reason why U.S. law schools should be unable to do so.” Stop Crisis in Legal Education, <http://lawlib.lclark.edu/boleyblogs/?p=714> (follow “Coalition for Racial and Ethnic Diversity in Law School and the Legal Profession” hyperlink) (last visited Mar. 21, 2006). The language the Coalition proposes for Standard 501-2 is:

A law schools admission policies shall be consistent with Standards 210 and 211. In particular, schools shall not use an admission policy or practice that has the effect of discriminating on the basis of race, color, religion, national origin, sex, or sexual orientation unless that policy or practice has been proven by objective evidence to be valid and reliable in assessing an applicant’s capability to satisfactorily complete the school’s educational program. Policies and practices adopted to increase the number of traditionally discriminated against minorities do not violate this interpretation.

*Id.* In addition, the Coalition agreed with the Council that law schools must comply with the use guidelines of the Law School Admissions Council. See John A Sebert, Consultant on Legal Education, *Recommendations Concerning Revision of Portions of Chapters 2, 5 and 8 of the Standards*, Dec. 19, 2005, [hereinafter Sebert, *Recommendations*] <http://www.abanet.org/legaled/standards/commentsstandards2006/standardsmMarkup2,5,8.pdf>.

The compromise positions adopted by the Council have provoked a response from anti-affirmative action groups like the Center for Equal Opportunity, The Center for Individual Rights, and the National Association of Scholars, which has asked the U.S. Department of Education to revoke the ABA’s accrediting authority. Katherine S. Mangan, *Foes of Affirmative Action See Revocation of ABA’s Accrediting Power*, THE CHRONICLE OF HIGHER EDUCATION, Mar. 17, 2006.

bias in the examination explains the differential group performance on the examination seem to have diminished even as theory and empirical research on multiple intelligences and the culturally specific relationship between IQ tests have gained a foothold in cognitive psychology. More research is needed on the application of these theories in the design and content of the LSAT and for the use of complementary assessment instruments.<sup>9</sup>

The authors are members of the Society of American Law Teachers ("SALT"). We were asked by the Board of Governors of SALT to research and draft a statement on the impact of the LSAT on law school admissions. SALT believes that all law professors can and should participate in a meaningful way in a public discussion of criteria of admission for law school, including the use and possible misuse of the LSAT test. The SALT Statement on the LSAT is appended to this Article. This Article presents a longer and thorough discussion of the many issues raised by the use of the LSAT, GPA, or combination of both as the primary criterion in the admissions process. After exploring the evidence of over reliance and misuse of the LSAT in law school admissions and the institutional constraints that promote these practices, we conclude with a list of alternatives, which we believe might ameliorate the worst abuses. Most of these proposals for reform of the admissions process were previously issued in a more abbreviated form as the "SALT Statement on the LSAT" included as an appendix to this Article.<sup>10</sup>

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<sup>9</sup> There are intriguing discussions of IQ and success that reveal how culturally self-referential both concepts may be. See, e.g., Elena L. Grigorenko & Robert J. Sternberg, *Analytical, Creative, and Practical Intelligence as Predictors of Self-Reported Adaptive Functioning: A Case Study in Russia*, 29 INTELLIGENCE 57 (2001); Robert J. Sternberg, *Implicit Theories of Intelligence As Exemplar Stories of Success: Why Intelligence Test Validity Is in the Eye of the Beholder*, 6 PSYCHOL. PUB. POL'Y & L. 159 (2000); see also, MARJORIE M. SHULTZ & SHELDON ZEDECK (PRINCIPLE INVESTIGATORS), PHASE 1 FINAL REPORT: IDENTIFICATION AND DEVELOPMENT OF PREDICTORS FOR SUCCESSFUL LAWYERING (report on research initially funded by LSAC) (on file with authors); Linley Erin Hall, *What Makes Good Lawyering*, BOALT HALL TRANSCRIPT 22, VOL. 38, NO.2 (SUMMER 2005); Marjorie M. Shultz, *Expanding the Definition of Merit*, BOALT HALL TRANSCRIPT 25, VOL. 38, NO. 2 (SUMMER 2005) (reporting on research and methodologies for predicting successful lawyers).

<sup>10</sup> SOC'Y OF AM. LAW TEACHERS, SALT ON THE LSAT 1 (2003), <http://www.saltlaw.org/StatementLSATBrochure.pdf>.

## I. THE MISUSE OF THE LSAT IN ADMISSIONS—ONE TEST DOES NOT FIT ALL

Law schools have access to a host of relevant information about candidates for admission, including undergraduate and sometimes graduate transcripts and GPA, letters of recommendation, personal statements, descriptions of work and public service experience, extracurricular and civic activities, occasionally personal interviews with admissions professionals or faculty, and LSAT scores and related information assembled for member schools of the Law School Admissions Council ("LSAC").<sup>11</sup> Notably, the LSAT or a similar quantitative test score is required for all admissions candidates under the ABA standards for accreditation.<sup>12</sup> The requirement of a quantitative

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<sup>11</sup> A service provided to member law schools by LSAC is the Law School Data Assembly Service ("LSDAS"). See generally LAW SCH. ADMISSION COUNCIL, LAW SCHOOL ADMISSION REFERENCE MANUAL 2005–2006 16 (2005). LSDAS provides law schools with a report that summarizes undergraduate academic records in a uniform fashion. LSAC claims that "LSAC makes no attempt to assess the value of grades earned at different colleges." *Id.* at 21. The report does include, however, a chart showing the distribution of grades of graduates who have registered with LSDAS and the median LSAT score for students from that school who took that same test. *Id.* at 23–24. If the reader already has a sense of the relative rank of undergraduate schools and if her belief is confirmed because of the comparatively higher median LSAT score for a particular college, she is free in her own evaluation of a file to weight the GPA accordingly. The LSAC also produces an index calculation on the LSDAS report to the law school based on the LSAT score and undergraduate grade point average as specified by the law school and offers a validity study annually providing a formula for the combination of the two predictors. *Id.* at 56–58. But see Patrick J. Borchers, *Report on the Predictive Validity of the LSAT*, Oct. 10, 2001 (suggesting on the basis of a study of the performance of Creighton students, that use of a "normalized" GPA would enhance the predictive validity of the LSDAS index created for each school) (on file with Deborah Post).

<sup>12</sup> In August 2003, the Council of the Section on Legal Education and Admission to the Bar adopted changes to Standard 503 of the Standards for the Approval of Law Schools, the Interpretations of those standards, and the Rules of Procedure for the Approval of Law Schools. Revised Standard 503 still requires that all applicants to law schools take an admissions test but does not require that they take the LSAT. Section 503 requires a test "to assist the school in assessing the applicant's capability of satisfactorily completing the school's educational program." The standard is satisfied if a law school requires that students take a standardized test that is "valid and reliable," terms of art from the field of psychometrics. The burden is on the law school to prove that if it uses a test other than the LSAT, the standards have been satisfied. See STANDARDS FOR APPROVAL OF LAW SCH. & Interpretations, *supra* note 8, at ch. 5. The Council has proposed to add Interpretations 503-4 stating: "the cautionary policies concerning LSAT scores and related services" published by the LSAC is an example of the testing agency guidelines referred to in Standards 503." *Id.*; see also discussion *infra* notes 20–21 and accompanying text.

measure for use in law school admissions decisions was justified in the past by the profession's interest in protecting the public from unqualified lawyers.<sup>13</sup> A current justification for requiring some kind of examination is that a test ensures fair treatment of students while it helps admitting institutions to identify students for whom law school would be an unreasonable risk. Test scores are supposed to offer some assurance both to the student and the law school that the applicant has the capacity to succeed in law school.<sup>14</sup> It is assumed that standardized tests prevent the unfair exploitation of students. Making the use of a standardized test an accreditation requirement deters greedy schools more concerned about increasing their revenues than the welfare of students. The standard protects students who may be uninformed or irrational in their willingness to incur significant debt, gambling against the odds that they will succeed in law school.<sup>15</sup>

This ABA standard requiring a reliable validated test should not be read in isolation, without reference to the Standards which

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<sup>13</sup> Standardized examinations that were introduced into the admissions process for law schools as early as the mid-1920s included the Stoddard-Ferson test and an aptitude test developed at Yale University. See William P. LaPiana, *Merit and Diversity: The Origins of the Law School Admissions Test*, 48 ST. LOUIS U. L.J. 955, 956 (2004). LaPiana claims that the discriminatory use of standardized exams would have been unnecessary because no justification for discrimination had to be offered at that time. The broader issue, however, would be the relationship between the ideology of "professionalizing and standard-raising" and xenophobia and racism. *Id.* at 961. A much-quoted example of bias is the statement by John Henry Wigmore that the bar was being overrun by "the spawning mass of promiscuous semi-intelligence." RICHARD L. ABEL, *AMERICAN LAWYERS* 47 (1989).

<sup>14</sup> Another historical account of standardized testing suggests that the promoters of standardized examinations were interested in selecting the intellectual elite for higher education. This was to be a "natural aristocracy" as opposed to the moneyed aristocracy—an ideology that was both democratic and elitist. See generally NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 5–6 (1999); Eva L. Baker, *Testing and Assessment: A Progress Report*, EDUC. ASSESSMENT 7(1), 1, 4.; cf LaPiana, *supra* note 13, at 960 ("The goal [of law school testing] was not identifying the best and the brightest to whom the bountiful opportunities of a legal career would be opened, but rather to be able to tell the least talented that attendance at law school would be a waste of time and money.").

<sup>15</sup> Standard 501(b) states that "[a] law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar." Interpretation 501-1 explains, "A law school may face a conflict of interest whenever the exercise of sound judgment in the application of admission policies or academic standards and retention policies might reduce enrollment below the level necessary to support the program." STANDARDS FOR APPROVAL OF LAW SCH. & INTERPRETATIONS, *supra* note 8 (under the new ABA proposal this interpretation will become 501-4); see also LaPiana, *supra* note 13, at 960.

acknowledge the supportive role law schools can play in the lives of applicants who are striving for upward mobility; seeking in law school the training and credentials that will qualify them for positions of political and social power. Acknowledging the political nature of admissions policies instead of focusing on the threat of exploitation would promote what Professor Lani Guinier has called the “democratic ideals of participation, fairness and equal opportunity.”<sup>16</sup>

There are law schools that admit large numbers of “non-traditional students,” many from groups underrepresented in the profession. Most law schools now offer support programs that work to ensure the success of these students.<sup>17</sup> The ABA does not ignore the existence of such programs, but it accords them less deference than it does “entering credentials” and bar passage rate. Schools working to expand access to legal education, indeed, law schools with carefully developed academic support programs and strategies to help students with low predictors to succeed, may be frustrated by the accreditation standards set by the ABA or the membership criteria of the AALS. The median test scores of their students are treated skeptically by one or both institutions because of concern with first time bar passage rate. The result is that schools seeking accreditation and acceptance in the community of law schools—including those whose mission it is to attract non-traditional students with information in their files that suggest they will be good lawyers—feel pressured to accept students with “competitive” scores.<sup>18</sup>

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<sup>16</sup> Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 135 (2003).

<sup>17</sup> In a recent survey of law schools, 137 of 151 schools responding to a survey reported that they had some form of academic support program. See Richard Cabrera & Stephanie Zeman, *Law School Academic Support Programs—A Survey of Available Academic Support Programs for the New Century*, 26 WM. MITCHELL L. REV. 205, 208 (2000).

<sup>18</sup> Interpretation 303-3 to Standard 303: Academic Standards and Achievements states that “[A] law school shall provide the academic support necessary to assure each student a satisfactory opportunity to complete the program, graduate, and become a member of the legal profession. This obligation may require a school to create and maintain a formal academic support program.” STANDARDS FOR APPROVAL OF LAW SCH. & INTERPRETATIONS, *supra* note 8. In at least one reported case, this standard requiring an academic support program may account for a decision by the ABA to put a law school on probation. See, e.g., Amy Horton, *Accreditation Battles in California*, THE NATIONAL JURIST 14 (FEBRUARY 2006). However, with respect to accreditation, recommendations on revisions to Standard 501-3 candidly admit that with respect to the requirement that law schools admit

Since 1947, the LSAT has been the principal examination used to screen law school applicants and its reputation as a predictive testing instrument, in comparison with other standardized tests, has grown.<sup>19</sup> Over the decades, the manufacture of standardized tests has become scientifically and mathematically rigorous. In the professional test assessment community, tests like the LSAT are evaluated in terms of two criteria: reliability and validity.<sup>20</sup> Most lay people—including most faculty and even some admissions professionals—do not understand the significance of these two standards when they are applied to testing in the admissions process, either in terms of what the test can predict or how fair the test is.<sup>21</sup> As a consequence, faculty and admissions professionals use the LSAT to compare and rank students based on their respective scores and the percentile rank provided in the LSDAS report, often permitting a difference of a point or two to determine whether a

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students capable of completing a law school program, “there are some levels of UGPA, LSAT, attrition and bar passage rates that, if occurring frequently, almost always lead to further inquiry by the Accreditation Committee.” Sebert, *Recommendations*, *supra* note 8. Complaints about the failure of accreditation committees to follow this “totality of the circumstances test” and the perception that there is a “de facto cut off score” for the LSAT can be found in this Symposium issue. See 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, 176–77 (2006); see also George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 115 (2003). For a more thorough discussion, see *infra* notes 54–57 and accompanying text. See also George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J.L. & PUB. POL'Y 637, 642 (2003).

<sup>19</sup> LaPiana, *supra* note 13, at 986–89.

<sup>20</sup> The LSAC claims that the LSAT has both content validity and predictive validity. Definitions of validity and reliability can be found in the LSAC Manual. LAW SCH. ADMISSION COUNCIL, *supra* note 11, at 11–12. The academic literature on these two measures is specialized and intelligible only to those specialists who work in the various fields involved in educational or employment testing.

<sup>21</sup> Consider the following quote from the *Interpretive Guide for LSAT Score Users*:

To assess the reliability or consistency of LSAT scores, a reliability coefficient is computed for each LSAT form. The larger the value of the reliability coefficient, the more consistent a test taker's performance should be . . . . LSAT scores contain a certain amount of measurement error that is assessed with the standard error of measurement for individual scores (SEM<sub>1</sub>). The SEM<sub>1</sub> is more useful than the reliability coefficient for interpreting the precision of individual test scores.

LAW SCH. ADMISSION COUNCIL, INTERPRETIVE GUIDE FOR LSAT SCORE USERS (2003).

candidate is accepted or rejected.

The LSAC can rightfully claim that the LSAT is a testing vehicle having the highest correlation with first year performance in professional schools.<sup>22</sup> The LSAT is, however, a standardized, multiple-choice, pencil and paper examination.<sup>23</sup> It is used to measure aptitude, not achievement, and that in itself is controversial.<sup>24</sup> The test purports to assess logical and analytical

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<sup>22</sup> See LISA ANTHONY STILWELL, SUSAN P. DALESSANDRO & LYNDA M. REESE, PREDICTIVE VALIDITY OF THE LSAT: A NATIONAL SUMMARY OF THE 2001–2002 CORRELATION STUDIES 12 (2005). The Graduate Record Examination (“GRE”) is probably the worst predictor of success in graduate school. The score on that test explains only nine percent of the variation in grades of graduate students. See generally Peter Sacks, *How Admissions Tests Hinder Access to Graduate and Professional Schools*, CHRON. HIGHER EDUC., June 8, 2001, at 11.

<sup>23</sup> Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 957 (1996).

<sup>24</sup> Cognitive psychologists classify standardized tests in two ways: achievement and aptitude. Aptitude tests are predictive. That is, they are said to “assess students’ capacity for future learning.” Achievement tests measure the mastery of subject matter. The LSAT is a half day standardized test consisting of multiple-choice questions that assess reading and reasoning skills. See LAW SCH. ADMISSION COUNCIL, About the LSAT, <http://www.LSAC.org> (follow “The LSAT” hyperlink, then follow “LSAT General Information” hyperlink). Although the LSAC would reject the characterization of the LSAT as an aptitude test, it is used to predict an applicant’s aptitude for the study of law based on the assessment of a narrow set of skills. In this respect it resembles its cognate, the SAT, an aptitude test. In 2001, the University of California conducted a study that compared the predictive ability of the SAT, the SAT II, and high school grade point average. The SAT did not correlate as well with success in college than either the GPA or the SAT II. See Saul Geiser & Roger Studley, *UC and the SAT: Predictive Validity and Differential Impact of the SAT I and SAT II at the University of California*, EDUC. ASSESSMENT 1 (2002). The achievement tests were considered a fairer test for four reasons: “[T]hey measure accomplishment rather than promise; they can be used to improve performance; they are less vulnerable to charges of cultural or socioeconomic bias; and they are more appropriate for schools because they set clear curricular guidelines and clarify what is important for students to learn.” See Richard C. Atkinson, Keynote Address at the Conference on Rethinking the SAT: The Future of Standardized Testing in University Admissions (Nov. 16, 2001), available at <http://www.ucop.edu/pres/comments/satucsb.htm>.

In 2002 the College Board announced a “new” SAT. Many named the UC system, particularly Richard C. Atkinson, President of the UC system, as the catalyst for the change. The new test will eliminate word analogies and now claims to be “more aligned with the high school curriculum.” See Olivia Winslow, *Revamp on Tap for SAT Exam*, NEWSDAY, June 28, 2002, at A6. The changes were cited as examples of the way the test has evolved “from a test that measures students’ aptitude to one that comes closer to assessing how well they learned the material taught in high school.” Michael A. Fletcher, *College Board to Vote on an Overhaul of the SAT: Shift Aimed at Measuring Learning in High School*, WASH. POST, June 26, 2002, at A14; see also John Cloud, *Inside the New SAT: America’s College Gatekeeper is Changing Dramatically*, TIME 48, Oct. 27, 2003. The LSAT continues to measure aptitude.

reasoning, reading comprehension, and certain cognitive skills. Admittedly these skills are useful in navigating through some of the first-year law school curriculum,<sup>25</sup> but certainly there are other skills that are important to success in law school and the profession—skills that can be said to distinguish the good lawyer.<sup>26</sup> The skills that lawyers need and use are not limited to analytical and logical reasoning or reading comprehension—skills emphasized on the LSAT and on first-year examinations. Reliance on the LSAT alone or giving it too much weight in predicting law school success reflects an unduly narrow emphasis on certain academic skills while undervaluing other important lawyering skills and core values of the profession.

The test score, a product of one three-hour test, has a statistically significant correlation to first-year grades and is offered as a reliable predictor of whether an applicant will succeed in the first year of law school.<sup>27</sup> But even this limited

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<sup>25</sup> The LSAC Manual states that the LSAT is designed to measure the following four skills: “the reading and comprehension of complex texts with accuracy and insight; the organization and management of information and the ability to draw reasonable inferences from it; the ability to think critically; and the analysis and evaluation of the reasoning and arguments of others.” LAW SCH. ADMISSION COUNCIL, *supra* note 11, at 7. Rather than mastery of subject matter, the LSAT tests the skills that fall within one subsystem of the cognitive domain. Reasoning or problem solving might be examples of “executive functions,” as that term is used by neuro and cognitive psychologists, except that in some of the literature in this area, abstract thinking and reasoning are preliminary to “integrative and control processes” and different from the “integrated or gestalt functioning,” which is greater than the sum of the parts or the multiple components in the process of cognition. Sara S. Sparrow & Stephanie M. Davis, *Recent Advances in the Assessment of Intelligence and Cognition*, 41 J. CHILD PSYCOL. & PSYCHIATRY 117, 117 (2000).

<sup>26</sup> Professor Marjorie Shultz and Sheldon Zedeck are investigating lawyer competencies in order to identify the qualities or skills that an alternative to the LSAT might test in order to predict who would be a good lawyer. They have identified twenty-six effectiveness factors, including creativity and innovation, integrity and honesty, passion and engagement, empathy, listening, and others we might call people skills. These are not tested on the LSAT unless one utilizes the writing sample for more than basic familiarity with grammar and syntax. *See Shultz & Zedeck, supra* note 9. Researchers in the field of psychology speculate that practical intelligence and “tacit knowledge” play a large role in the success of individuals in their jobs or professions. *See, e.g.,* Robert J. Sternberg, Richard K. Wagner, Wendy M. Williams & Joseph A. Horvath, *Testing Common Sense*, 50 AM. PSYCHOLOGIST 912, 913, 916 (1995).

<sup>27</sup> For the year 2001, the median correlation of the LSAT with performance in the first year of law school was .35; the median correlation with GPA was .28; the mean correlation with a combination of LSAT and GPA was .46. LAW SCH. ADMISSION COUNCIL, *supra* note 11, at 11–12; *see* LISA C. ANTHONY, VINCENT F.

claim is contested, and the LSAC itself states that any predictive validity must be assessed on an individual school basis. This is because there is variation in the correlation between LSAT and first-year grades from school to school.<sup>28</sup> Correlation of test scores and performance in law school for minorities and women are not as clear. Some have argued that the test scores under-predict the potential for achievement of some groups that remain underrepresented in law schools, while others cite statistics that show that the LSAT over-predicts the performance of minorities.<sup>29</sup>

Notwithstanding the qualifications LSAC attaches to the claim that the LSAT has predictive validity, decision-makers often treat the test score as a definitive measure of aptitude and merit well beyond the first year. Test scores are accepted as if they can measure in absolute terms the applicant's ability to succeed academically and professionally. The LSAC explicitly cautions those who use its services that the LSAT should be used along with other predictive tools, but two reputable studies by one of the leading researchers in the field have shown that seventy to eighty percent of all admissions are determined strictly on the numbers.<sup>30</sup> Despite—or because of—the recent

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HARRIS & PETER J. PASHLEY, LAW SCH. ADMISSION COUNCIL, PREDICTIVE VALIDITY OF THE LSAT: A NATIONAL SUMMARY OF THE 1995–1996 CORRELATION STUDIES 3, 5–6 (1999), available at <http://members.lsanet.org/> (follow “Research” hyperlink; then follow “Research Reports” hyperlink).

<sup>28</sup> The range in 2004 was .06 to .58. LAW SCH. ADMISSION COUNCIL, *supra* note 11 at 11. Law schools are advised to “[e]valuate the predictive utility of the LSAT” for their schools. *Id.* at 56. As the letter quoted *infra* note 50 illustrates, belief in the predictive validity of a test defies empirical evidence to the contrary.

<sup>29</sup> There are studies that say that the LSAT under-predicts the success of minority students. See Lani Guinier, *Reframing the Affirmative Action Debate*, 86 KY. L.J. 505, 517 (1998). Others report that the LSAT over-predicts the performance of minority students and women. See LISA ANTHONY STILWELL & PETER J. PASHLEY, LAW SCH. ADMISSION COUNCIL, ANALYSIS OF DIFFERENTIAL PREDICTION OF LAW SCHOOL PERFORMANCE BY RACIAL/ETHNIC SUBGROUPS BASED ON 1999–2001 ENTERING LAW SCHOOL CLASSES X (2003); Charles L. Finke, *Affirmative Action in Law School Academic Support Programs*, 39 J. LEGAL EDUC. 55, 58 (1989). If both these studies are valid, then one possible conclusion is that the LSAT is unable to predict the performance of minority students at all. See generally Dorothy A. Brown, *The LSAT Sweepstakes*, 2 J. GENDER RACE & JUST. 59, 59 (1998) (recounting a tongue-in-cheek fictionalized account of white reaction to a statistical study which has blacks outperforming whites on the LSAT).

<sup>30</sup> Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models with Current Law School Data*, 53 J. LEGAL EDUC. 229, 235 (2003) [hereinafter Wightman, *Consequences of Race-Blindness*]; Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of*

affirmative action cases, including *Grutter v. Bollinger*<sup>31</sup> discussed below, it is unlikely that this law school culture will change without activism by those who support stronger inclusionary policies for admissions and entry into the profession and oppose the reduction of a concept of merit to a single score on a standardized examination.

Seeking to have its clients—the law schools and test takers—engage in proper, informed usage of test scores and related information it offers, the LSAC has emphasized in its literature that relatively modest differences in scores do not matter.<sup>32</sup> Even as much as ten points under the current scoring system may be inconsequential in predicting the relative success of competing students in a law school class. Notwithstanding the LSAC's cautionary words and the availability of alternative assessment systems such as “banded” scores,<sup>33</sup> law schools continue to use the LSAT as a blunt instrument to determine the fate of applicants whose scores may be within two or three points of each other and to set absolute lines of demarcation for admitting and rejecting students.<sup>34</sup> Law schools seeking to enhance their

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*Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 27–28 (1997) [hereinafter Wightman, *Threat to Diversity*].

<sup>31</sup> 539 U.S. 306 (2003).

<sup>32</sup> In 2003, LSAC provided an example for the most recent LSAT form.

The SEM<sub>D</sub> is 3.85 which we round up to 4 points to compare scores. If two test takers have scores of 150 and 154, for example, their true score difference will lie in the range of 0 to 8 points (4 point difference, plus or minus the rounded 4 point SEM<sub>D</sub>), approximately 68% of the time.

LAW SCH. ADMISSION COUNCIL, INTERPRETIVE GUIDE FOR LSAT SCORE USERS, *supra* note 21.

Douglas Laycock, who has been involved in the battle over affirmative action in both Texas and Michigan, provides an explanation that might be easier to understand. “The standard error of the LSAT is 2.6 points, meaning that if a student scores 160, there is a 68% chance that her ‘true score’ is between 157.4 and 162.6 . . . .” Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1798 (2004).

<sup>33</sup> “Score bands, or ranges of scores that contain a test taker’s true score a certain percentage of the time, can be derived using SEM<sub>1</sub>.” LAW SCH. ADMISSION COUNCIL, INTERPRETIVE GUIDE FOR LSAT SCORE USERS, *supra* note 21.

<sup>34</sup> The LSAC cautions that “[c]ut-off LSAT scores (those below which no applicants will be considered) are strongly discouraged.” LAW SCH. ADMISSION COUNCIL, *supra* note 11, at 56; see also Philip D. Shelton, *Admissions Tests: Not Perfect, Just the Best Measures We Have*, 47 CHRON. HIGHER EDUC. B15 (2001) (“[T]he LSAT must be used appropriately. It was never meant to be the only factor that law schools consider, and it should not be given so much weight that it is effectively the sole factor.”). There is irony in the fact that while law schools are

reputations with alumnae and improve their rankings issue reports touting their median LSAT scores even as they decry the use of the first and third quartile LSAT scores by *U.S. News & World Report* in measuring selectivity for the purpose of ranking. Indeed, rankings tend to reinforce the use of nationally comparable, “finite” scores rather than other alternatives such as banded scores or school specific scores that move away from artificial and ever more detailed calibration of differences.

Even if the LSAT score is a valid predictor of first-year grades, over-reliance on the LSAT in admitting students is troublesome. Over-reliance is built on the unstated assumption that only those who are successful in the first year are likely to do well in subsequent years or that others who may do well despite a slow start are not worth admitting. This narrow definition of merit is inaccurate and unfair. As faculty and legal education administrators, we know that some students obtain higher grades in their second or third years of law school than in the first year.<sup>35</sup> Moreover, because the test assesses the statistical likelihood that one will succeed, heavy reliance on the test denies individuals a chance to show that the generalization does not apply in their case, that the prediction is wrong. Not only are these individuals denied an opportunity to achieve, the law school and the legal profession may be deprived of the valuable contributions this person would make to both communities. It may also be true that the test and the first-year grades reflect the presence of similar conditions. Research on the effect of stereotype threat on the performance of black students taking standardized tests has a parallel in studies that report on the effect of a hostile law school learning environment on minority students.<sup>36</sup> Success in law school is too narrowly defined if prediction of grades and class standing at the end of

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precluded from overweighing race—i.e., using it more than as a “plus” factor, in admissions decisions, they continue to overweight available quantitative scores which negatively correlate with race and income.

<sup>35</sup> Kevin Brown, *The Hypothetical Opinion in Grutter v. Bollinger from the Perspective of the Road Not Taken in Brown v. Board of Education*, 36 LOY. U. CHI. L.J. 83, 92 n.39 (2004) (listing studies done at Boalt Hall on the correlation between law school performance over three years and LSAT score).

<sup>36</sup> See Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 675 (1994) (“Minority law students experience acute isolation, which in turn, produces serious psychological and academic ramifications.”); see also discussion of Claude Steele’s theory of stereotype threat *infra* note 89.

the first year can determine one's fate. It leaves out many applicants who cannot compete on this measure but who may be quite successful in law school, if success were defined as something other than class rank or GPA or, after graduation, in their professional careers or in practice.<sup>37</sup>

Another concern arising from undue reliance on the LSAT score is skepticism about the accuracy of the assertion that the LSAT measures a student's potential for learning rather than previously acquired substantive knowledge. Even questions that test reasoning may require knowledge about a given area.<sup>38</sup>

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<sup>37</sup> See, e.g., Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 496–97 (2000); David L. Chambers, Richard O. Lempert & Terry K. Adams, *Doing Well and Doing Good: The Careers of Minority and White Graduates of the University of Michigan Law School 1970–1996*, 42 L. Quadrangle Notes 61 (1999), available at <http://www.law.umich.edu/NewsAndInfo/lawsuit/survey.htm>.

<sup>38</sup> For example, a sample LSAT test, which can be downloaded from the LSAC website, contains the following question:

Archeologist: A large corporation has recently offered to provide funding to restore an archeological site and to construct facilities to make the site readily accessible to the general public. The restoration will conform to the best current theories about how the site appeared at the height of the ancient civilization that occupied it. This offer should be rejected, however, because many parts of the site contain unexamined evidence.

Which one of the following principles, if valid, justifies the archeologist's argument?

- (A) The ownership of archeological sites should not be under the control of business interests.
- (B) Any restoration of an archeological site should represent only the most ancient period of that site's history.
- (C) No one should make judgments about what constitutes the height of another civilization.
- (D) Only those with a true concern for an archeological site's history should be involved in the restoration of that site.
- (E) The risk of losing evidence relevant to possible future theories should outweigh any advantages of displaying the results of theories already developed.

LAW SCH. ADMISSION COUNCIL, THE OFFICIAL LSAT SAMPLE PREPTEST 57 (1996), available at <http://www.lsac.org/pdfs/2005-2006/LSAT-test-new.pdf>.

The answer is, of course, E. To reach that conclusion, the reader has to be able to draw inferences from the facts with respect to the effect of public access on a site and the way theories are developed, tested, and replaced according to a scientific method. If the reader were unable to make those inferences, then he or she might choose D because it suggests a certain risk, perhaps from ignorance or a profit motive to the site and to the integrity of the process of restoration.

If the LSAT tests knowledge, perhaps the test takers and test makers should

Unfortunately, there is little discussion of the knowledge that is required in order to do well on tests like the LSAT. Research in cognitive psychology suggests that cognitive entry behaviors (past-mastered learning) may predict future academic success.<sup>39</sup> There are other studies that suggest that there may be some positive correlation between undergraduate major and success in law school and in the legal profession.<sup>40</sup> Students who prepare to take the LSAT do not study content but test taking methods, which are marketed as the best way to increase test scores by the companies that have developed and profited from the growth of the testing industry.<sup>41</sup> And while law schools do and should try to teach students to solve problems,<sup>42</sup> the kind of logical reasoning tested on the LSAT, which requires the test taker to accept the premises of the problem whether he believes them to be true or false, is far removed from the kind of contextual reasoning that most lawyers use in practice.<sup>43</sup>

The LSAT is not offered by the LSAC to predict performance in law school after the first year,<sup>44</sup> nor is any claim made that the

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spend a little more time talking about the extent to which subject matter is tested on the exam.

<sup>39</sup> See François Gagné & François St. Père, *When IQ Is Controlled, Does Motivation Still Predict Achievement?*, 30 INTELLIGENCE 71, 75 (2001) (discussing past studies that found significant predictive value of past learning scores).

<sup>40</sup> See, e.g., R. Kim Craft & Joe G. Baker, *Do Economists Make Better Lawyers? Undergraduate Degree Field and Lawyer Earnings*, 34 J. ECON. EDUC. 263, 277 (2003).

<sup>41</sup> A visit to the LSAT review page of the Princeton Review website is instructive with respect to the methodology employed in test preparation courses. The Princeton Review, Law School and the LSAT, <http://www.princetonreview.com/home.asp> (follow "LSAT" hyperlink under "Improve Your Score and Skills") (last visited Feb. 16, 2006).

<sup>42</sup> See SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM—REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (listing problem solving and legal analysis as two of the many skills that must be developed in law school and in practice).

<sup>43</sup> The classic work describing the different kinds of reasoning used in law schools is KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (2d ed. 1951). Deductive reasoning still has a role in legal analysis, or perhaps it would be better to say in the rhetorical tradition of the law, but the rejection of formal rules in most instances makes deductive reasoning problematic. See Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 307, 377–78 (2003); Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA L. REV. 813, 820–25 (2002).

<sup>44</sup> See LAW SCH. ADMISSION COUNCIL, CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES (2005), available at <http://www.lsacnet.org/publications/CautionaryPolicies.pdf>.

test can predict professional competence and success in the practice of law.<sup>45</sup> But despite LSAC disclaimers and opposition to this kind of misuse, employers have been known to ask candidates for their LSAT scores in job interviews with firms in the private sector, government agencies, courts, and even legal education institutions.<sup>46</sup> This information has negligible value in assessing a candidate who has completed law school, especially if he or she already has work experience. The practice of prospective employers of asking for LSAT scores reflects the deeply embedded sentiment that the test captures “merit” in a way that other criteria cannot.

To the extent law schools and prospective employers over-rely on the LSAT as a broad-based predictive measure, they fail to give appropriate consideration to other attributes and skills that are important to success before and after graduation. The LSAT does not measure motivation, perseverance, character, imagination, interpersonal skills, problem-solving skills, oral communication and listening skills, or empathy for clients—a whole range of qualities that are important to consider in determining who is accepted to law schools and eventually who obtains a legal job.<sup>47</sup> With the advent of affirmative action, law schools and the legal profession have had a chance to assess what they could not know during the long history of segregation and exclusion on the basis of gender, race and ethnicity. It is hard to miss what you do not know exists but we know how legal institutions have been transformed for the better because of a commitment to diversity. It is therefore possible to imagine the consequences of exclusion; the real cost to us all of policies or practices that deprive us of the valuable contributions that surely

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<sup>45</sup> See Hall, *supra* note 9, at 23; Shultz, *supra* note 9, at 25–26.

<sup>46</sup> For example, our students have reported that judges have asked them to divulge their LSAT score along with their GPA, class ranking, or other indices of success. The LSAC has addressed this problem stating that potential employers and other decision makers should “[a]void encouraging use of the LSAT for other than admission functions.” See LAW SCH. ADMISSION COUNCIL, *supra* note 11, at 57.

<sup>47</sup> See Hall, *supra* note 9, at 24; Shultz, *supra* note 9, at 26. There are scholars in the field of psychology who argue that new constructs are needed to explain who succeeds in the academic setting and in the workplace. One of those constructs is the concept of practical intelligence or tacit knowledge. See Anit Somech & Ronit Bogler, *Tacit Knowledge in Academia: Its Effects on Student Learning and Achievement*, 133 J. OF PSYCHOL. 605, 606 (1999). According to these scholars, tacit knowledge is not tested or predicted through “conventional intelligence tests.” One aspect of practical knowledge is “knowledge about aspects of self-motivation and self-organization.” *Id.*

will be made by applicants who are summarily rejected at present because of test scores.

Despite the fact that problems with the test and the controversy over standardized testing, the possibility of meaningful reform of the format or use of the LSAT is remote without forceful leadership advocating for a broader and more realistic definition of merit. Self-interest and self-esteem have often muted criticism about the use of test scores by members of the legal community. Those who were successful as law students and who now teach in law schools read the files of applicants to law school and assign meaning to the LSAT score. Faculty members, many of whom are very successful test takers, have an emotional or psychological commitment to a system that confirms their own intellectual superiority. Besides the beliefs of decision-makers which support their continued use, attempts to challenge standardized tests may be futile given the power and wealth of the testing industry. There are powerful incentives for the industry to maintain a pervasive system of testing which affects all aspects of society.<sup>48</sup> Undoubtedly the individual professionals who work in this industry believe in the inherent fairness of these testing instruments. It is also the case that because of their specialized skills, they are a small elite group controlling the future of hundreds of thousands of students.

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<sup>48</sup> Daria Roithmayr has written about the “switching costs” in a “lock-in model” of inequality, borrowing from scholarship on these costs in a market context. See generally Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191 (2004). As for the power of the LSAC, it is a non-profit organization that does not release its financial statements. In 1993, the then-president of LSAC mentioned LSAC assets at of about \$50–60 million. Ken Myers, *Head of LSAC/LSAS Resigns to Resume Teaching Position*, NAT’L L.J., Apr. 26, 1993, at 4. The giant in the testing industry is Educational Testing Service (“ETS”), which contracts with the College Board to prepare the various SAT tests. ETS is self-described as “the world’s largest private educational testing and measurement organization.” Tom Zeller, Jr., *Measuring Literacy in a World Gone Digital*, N.Y. TIMES, Jan. 17, 2005, at C1. In 2002, ETS had revenues of \$700 million. *New Jersey Joins ETS’ Growing List of State Testing Contracts*, EDUC. MARKETER, Jan. 20, 2003. ETS formerly prepared the LSAT pursuant to a contract with LSAC. Now, however, LSAC prepares its own tests. In any event, the profitability of testing and the related industries cannot seriously be questioned.

The man who developed the SAT, Carl Brigham, warned against the creation of a testing empire like ETS. He was afraid “that any organization that owned the rights to a particular test would inevitably become more interested in promoting it than in honestly researching its effectiveness.” LEMANN, *supra* note 14, at 40.

## II. INSTITUTIONAL PRESSURES TO MISUSE THE LSAT TO ENHANCE PRESTIGE

Admissions professionals often complain that they are under tremendous pressure to secure admission of students with high test scores rather than admit others with lower scores whose files might otherwise suggest potential for achievement. There are many reasons for this. The admissions process is distorted because admissions professionals are pressured by deans and faculty members to raise median LSAT scores in the belief that the talents of the faculty may be wasted on students who are not adequately prepared for law school. They may also believe that the admission of students who are not prepared for law school might detract from the classroom experience, frustrating both the students who cannot do the work and their classmates who can. Deans and faculty, in their turn, are pressured by external forces, like the ABA accreditation process, selectivity rankings in *U.S. News & World Report*, and by alumnae and trustees who also have an interest in seeing the reputation of their school improve or maintain a competitive edge over other law schools.

At most law schools, LSAT scores, alone or in combination with undergraduate GPA, are the primary screening mechanisms for admissions. Law schools seem bent upon identifying and admitting students with increasingly higher LSAT scores, equating excellence with high scores and defining their competitiveness as an institution in terms of their applicants' and admitted students' scores.<sup>49</sup> This preference for numbers and a quantitative means of comparing candidates is based on faulty assumptions and self-fulfilling prophecies: (1) the higher the score, the more intelligent the applicant;<sup>50</sup> (2) higher LSAT

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<sup>49</sup> In a recent article replicating an earlier study, Linda Wightman found that there is a very high correlation, .83, between an admissions model based exclusively on numbers—LSAT and GPA—and actual admission of white students to law school. See Wightman, *Consequences of Race-Blindness*, *supra* note 30, at 235. The correlation for minority students was lower but still higher than it has been in the past. The correlation between LSAT/GPA and admission is actually higher than the correlation between these two numbers and the performance in law school. One could conclude, on the basis of this data, that it is easier to predict the behavior of law school admissions officers and committees with respect to the test than it is to predict the behavior of law students who are admitted on the basis of the test.

<sup>50</sup> An example of all of these assumptions appears in the following letter from an admissions professional:

Each year, the LSAC provides all member schools with LSAT correlation and validity studies. These studies consistently demonstrate a significant

scores increase the quality of the student body and the status and marketability of the law school; (3) higher LSAT scores improve bar passage rates; and (4) higher test scores will please faculty, alumni, and law school and university trustees.<sup>51</sup>

LSAT scores have become benchmarks of success that obstruct efforts to define merit in a fair and just way.<sup>52</sup> Neither a

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correlation between \_\_\_\_ students' LSAT scores, undergraduate GPA's and their first year law school grades. This trend continues with the current study, which reports data for the 1999, 2000 and 2001 entering classes. [Authors' note: The correlation study to which this writer refers showed a .27 correlation between the LSAT scores and performance in the first year of law school.]

LSAT scores serve other purposes as well. Although not specifically validated for this purpose, a wealth of research supports the conclusion that there is a strong positive correlation between LSAT score(s) and first time bar passage. . . . For better or worse, a school's LSAT profile is often viewed as a measure of institutional quality for ranking purposes. We can agree with the various rankings or not, but the reality is that many accepted applicants base their matriculation decisions on them. For this reason, it behooves us to consider what impact our LSAT profile has on how others perceive \_\_\_\_.

In short, law schools rely on the LSAT because, despite its limitations, it remains the most valid predictor of success in law school and, ultimately, on the bar exam.

E-mail from Grant Keener, formerly Dean of Admission at Touro Law School, Assistant Dean for Admissions and Financial Aid, University of Illinois, to Professor Deborah Post (July 31, 2003) (on file with Deborah Post).

<sup>51</sup> While most admissions officers and deans would never suggest that the LSAT measures intelligence, it is hard to square this statement with the repeated use of the LSAT score in law school marketing as a measure of the improvement in the entering classes. Each class is "better" than the last because the median LSAT score is higher. *See supra* note 50. The psychologists who study IQ are more candid in their statements about the relationship between the idea of intelligence and the measure of aptitude. *See, e.g.,* Robert L. Linn, *A Century of Standardized Testing: Controversies and Pendulum Swings*, 7 EDUC. ASSESSMENT 29, 36 (2001) ("Although *scholastic aptitude* is more modest in scope than *intelligence*, it still has a popular connotation of being an unmodifiable ability.")

<sup>52</sup> For a history of the idea of merit, see Guinier, *supra* note 16, at 131–34. After describing the move from criteria of selection that focused on "character" as a surrogate for wealth and social status to a definition of merit based on scores that were scientific and objective measures of aptitude and finally to the reintroduction of issues of character—"motivation, work ethic, and the ability to overcome obstacles"—Guinier suggests that:

Moving back and forth from subjective to objective to subjective measures, the admissions pendulum never settled on a single, fixed view of merit. Without a stable template for admissions choices, shifts in the values and identities of those making the choices, as well as the process of selection itself, came to define qualification.

*Id.* at 134.

The current public discourse by opponents of affirmative action sets up a false

concern with individual merit nor a concern with the public's need for access to justice and competent and caring lawyers who can provide quality legal services informs this preference for test scores. We are concerned that good students with potential to become effective advocates—some of whom might choose to represent underserved communities or culturally and ethnically diverse communities within this pluralistic society—or leaders in the fields of business or politics are being denied admission to law school because of undue reliance on the “competitive” LSAT score. Over-reliance on test scores puts the policies that promote inclusiveness and diversity in law schools in jeopardy and ultimately it may operate to compromise the delivery of services to those most in need of legal representation.

Critics argue that the accreditation process also encourages greater reliance on the LSAT. While Section 503 of the *Standards for Approval of Law Schools* of the ABA Section on Legal Education and Admission to the Bar no longer refers to the LSAT, the *Standards' Interpretation* does. For those schools using the LSAT, interpretation of 503-2 states explicitly that no minimum score on the LSAT is required and no particular weight must be assigned to the test in the admissions process. Although the predictive value of the LSAT is cited in the explanation for

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opposition between affirmative action and race-conscious remedies for discrimination and merit. An example would be Robert Bork's statement:

[I]t is crucial that we do end this misbegotten [affirmative action] policy. . . . The most basic objection is that it is destroying what America means, changing us from a society whose rewards may be achieved by individual merit to one whose rewards are handed out according to group identity.

ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 248–49 (1996).

Merit is used as a synonym for “qualified,” and both are translated into the language of entitlement—a claim that justifies a demand for a seat in a law school. For example, Gail Heriot, a professor of law at San Diego and co-chair of the Proposition 209 campaign in California in 1996, which outlawed the consideration of race in college admissions, argues that a “bare plurality” of Americans, forty-nine percent, support affirmative action, but the more meaningful statistic is that ninety-four percent of whites say that “college admissions should be based ‘strictly on merit and qualifications other than race/ethnicity.’” Gail Heriot, *Supreme Court Decision Upholds Principle of Racial Preferences*, SAN DIEGO UNION-TRIB., June 29, 2003, at G1 (quoting a poll conducted by the *Washington Post*). Professor Heriot's use of statistics is disingenuous. For a more complex picture that emerges from polling data, see GALLUP ORG., GALLUP POLL SOCIAL SERIES: MINORITY RIGHTS AND RELATIONS (2003), available at <http://www.usatoday.com/news/polls/tables/live/0623.htm>.

the revisions to the *Standards* and the *Interpretation*, over-reliance on the combined LSAT/GPA scores is expressly discouraged because LSAC validity studies show that “these two measures alone do not account for all of the factors that contribute to an individual’s actual performance.”<sup>53</sup> The 2003 revisions to the ABA *Standards* and the cautionary language in the *Interpretation* might have been a response to criticism of the over-reliance on the LSAT by accrediting committees, but one can argue that even with the changes, the *Standard* and the *Interpretation* still send mixed messages. Current proposed revisions to Chapter 5 of the *Standards* move this cautionary language from the *Interpretation* to the *Standard* itself.

Critics of that *Standard*, prior and proposed, and the entire accreditation process have argued that although the ABA has not set a minimum LSAT score for any applicant to law school, in practice there is a de facto floor of 141–143.<sup>54</sup> They argue that because concern with LSAT scores below 143 showed up more than once in evaluations of new schools, schools whose median LSAT approaches that number will have difficulty getting accreditation. If every applicant to law school with a score between 141 or 143 is automatically denied admission, without review of his or her file, the consequences for minorities is dire.<sup>55</sup>

Although it is important to make sure that students who are admitted to law school have a good chance of success, the validity of a standardized test does not mean that a test score alone is an adequate predictor of success in any individual case. This is especially true when applicants are nontraditional students. Law schools located in underserved communities or established to provide an opportunity for legal education to nontraditional or minority students may feel pressured to exclude from consideration for admission any student whose LSAT score would jeopardize the school’s chances for accreditation. Because the median LSAT scores for minorities are lower than those for whites, the use of a floor or an automatic cut off will almost certainly reduce the number of minority students in the

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<sup>53</sup> SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, INFORMATION AND COMMENTARY ON 2002–2003 CHANGES TO THE STANDARDS, INTERPRETATIONS, AND RULES 14 (2003), available at <http://www.abanet.org/leadership/2003/journal/300b.pdf>.

<sup>54</sup> See *supra* note 18 and accompanying text.

<sup>55</sup> See *supra* note 18 and accompanying text.

applicant pool. Although the practice of setting a floor for LSAT scores is discouraged by the LSAC,<sup>56</sup> schools may find it easier to raise the median score rather than risk either probation or denial of accreditation.

For most accredited schools, however, it is more often a concern about competitive ranking among peer institutions that drives admissions decisions to misuse the LSAT.<sup>57</sup> The *U.S. News & World Report* makes "selectivity" in admissions one of the variables used in ranking law schools. The LSAT is given greater weight than the GPA of entering students. After receiving much criticism about the impact of its approach, *U.S. News* made some changes, even adopting a ranking based on diversity,<sup>58</sup> which is presented in a different index. The magazine seems grudging in its account of the value of diversity, noting that "[l]aw schools rich in racial and ethnic diversity are thought to offer their students a chance to encounter ideas and experiences different from their own, which can be good practice for the life of a lawyer."<sup>59</sup>

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<sup>56</sup> See LAW SCH. ADMISSION COUNCIL, CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES, *supra* note 44.

<sup>57</sup> The Association of American Law Schools ("AALS") *Handbook: Statements of Good Practices* has the following statement, adopted in 1990, by the AALS, the ABA Section of Legal Education and Admission to the Bar, the LSAC, and the National Association of Law Placement: "[W]e believe that any ranking or rating of law schools, based upon the data the magazine has asked deans to provide, must be meaningless or grossly misleading." ASS'N OF AM. LAW SCH., AALS HANDBOOK: STATEMENT OF GOOD PRACTICES (2006), available at [http://www.aals.org/about\\_handbook\\_sgp\\_ran.php](http://www.aals.org/about_handbook_sgp_ran.php). The LSAC features a letter to law school applicants from law school deans which notes that "ranking" systems "purport to reduce a wide array of information about law schools to one simple number that compares all 190 ABA-approved law schools." LAW SCH. ADMISSION COUNCIL, DEANS SPEAK OUT, available at <http://www.lsac.org/LSAC.asp?url=lsac/deans-speak-out-rankings.asp> (last visited Jan. 28, 2006).

<sup>58</sup> U.S. NEWS & WORLD REP., *America's Best Graduate Schools 2006: Law School Diversity Index*, available at [http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawdiv\\_brief.php](http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawdiv_brief.php) (last visited Jan. 28, 2006).

<sup>59</sup> *Id.* The use of the passive voice is instructive. The reader might well ask, "Who thinks this?" Not the magazine or its editors or publishers. In fact, debate about the value of diversity has focused on use of "personal testimonials" rather than hard data to support claims that diversity should be valued. See Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143, 152-69 (Gary Orfield & Michal Kurlaender eds., 2001), available at <http://www.civilrightsproject.harvard.edu/research/lawmichigan/DiversityandLegalEducation.pdf> (reporting on results of high response rate to survey by Gallup and survey of students at Harvard and Michigan about the value of diversity, especially for white students who have had little interracial contact); see also Robert Perloff &

Ostensibly, *U.S. News & World Report* ranks law schools for the benefit of consumers, allowing potential law students and their parents to make informed choices about the institutions they are considering. The method it uses to rank however, has encouraged law schools to play a numbers game to maintain their competitive edge. Some law schools concerned about the effect of the rankings on their ability to compete for students have adopted a quick-fix method of raising the median LSAT just a few points or, as revealed in the national press relatively recently, cooking the books on the resources spent on students, so that the institution can move up in competitive ranking of *U.S. News & World Report*.<sup>60</sup> While both the *U.S. News* as ranker and law schools as manipulators have been criticized by legal education organizations such as AALS, LSAC, ABA, and SALT, rankings are closely followed by deans, faculty, administration, alumnae, and prospective applicants. A move down the pecking order is greatly feared; a rise is hailed as proof of the vast improvement of the school.<sup>61</sup>

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Fred B. Bryant, *Identifying and Measuring Diversity's Payoffs: Light at the End of the Affirmative Action Tunnel*, 6 PSYCHOL. PUB. POL'Y & L. 106-07 (2000). But see Stephen J. Ceci, *So Near and Yet So Far: Lingerings Questions About the Use of Measures of General Intelligence for College Admission and Employment Screening*, 6 PSYCHOL. PUB. POL'Y & L. 233, 237-38 (2000) (criticizing the work of Perloff and Bryant for relying on the personal testimonials of business and education leaders to prove the value of diversity).

<sup>60</sup> This is one of the questionable practices discussed by Dale Whitman, former president of the AALS, using hypotheticals drawn from reported practices at particular law schools. See Dale Whitman, *Presidents' Messages: Doing the Right Thing*, AALS NEWSLETTER (Ass'n of Am. Law Sch., Washington, D.C.) Apr. 2002, available at <http://www.aals.org/presidentsmessages/pmapr02.html>; see also STEPHEN P. KLEIN & LAURA HAMILTON, Ass'n of Am. Law Sch., *The Validity of the U.S. News & World Report Ranking of ABA Law Schools 2* (1998), available at <http://www.persuasiveauthority.com/links/USNValidity.htm>. The AALS report was published and distributed to law school deans as Memorandum 98-10, criticizing the rankings. While the report discusses the deleterious effects of reporting median LSAT scores, *U.S. News* now uses scores from the first and third quartiles. In reaction to this practice, and with pressure from law school deans, the ABA has begun collecting data on median LSAT scores again. It did this because the 25/75 percentile ranking by *U.S. News* had the unintended side effect of creating tension between the desire schools have to increase student diversity and their perceived need to raise the indicators used by *U.S. News* to measure quality of the entering class. For a discussion of strategies used to increase the calculation of resources spent on each student, another variable used by *U.S. News and World Report* in its ranking, see Alex Wellen, *The \$8.78 million Maneuver*, N.Y. TIMES, 4A, July 31, 2005.

<sup>61</sup> The ability to move between tiers varies with the economic climate and the number of applicants applying to law schools. There is seldom much movement in

Rankings and median LSAT scores are used by deans and other administrators in fundraising and in alumnae relations. As a consequence, in some institutions, admissions is a numbers game, with admissions officers calculating how many students with certain scores have to be admitted before they can begin to admit deserving candidates with lower scores.<sup>62</sup>

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the first and the fourth tiers, but much is made of the movement between the second and third tiers. For instance, Hofstra University attributed its move from the third to the second tier—from position 101 to 89—to an increase in applications and a rise in the median LSAT to 157 (the national median at the time was 155 for people accepted to law school). See Leigh Jones, *Upward Mobility: Hofstra's Ranking Rises as Scholarships and Recruiting Expand*, N.Y. L.J. Apr. 20, 2004, at 16. In recent years Santa Clara Law School and the University of San Francisco Law Schools have also moved up in the rankings because of a change in their reported median LSAT scores. See generally Alexei Oreskovic, *USF Soars, Stanford Stays Steady in Annual Survey*, RECORDER, Apr. 7, 2003. One has only to visit the websites for the different law schools to collect examples of this. Boston College, for instance, welcomed the class of 2005 by telling them that they were members of “one of the most competitive and impressive” entering classes in the history of the school. BC Law Welcomes Class of 2005, <http://www.bc.edu/schools/law/newsevents/2002-archive/83002/> (last visited Feb. 16, 2006). Much is made of the diversity in the school, but the bottom line seems to be selectivity—7,232 applications for 265 places in the class and an increase in the median LSAT to 163. See *id.* Northwestern Law School touted the highest median LSAT score ever, “rising from 164 to 165.” Press Release, Northwestern University, New Program Puts Personal Touch into Law School Admissions (Mar. 12, 1998), available at [http://216.239.51.104/search?q=cache:\\_BFxabpu8UcJ:www.northwestern.edu/univ-relations/media/news-releases/\\*archives97-98/\\*law/pertouch-law.html+northwestern+news+%22rising+from+164+to+165%22&hl=en&gl=us&ct=clnk&cd=1](http://216.239.51.104/search?q=cache:_BFxabpu8UcJ:www.northwestern.edu/univ-relations/media/news-releases/*archives97-98/*law/pertouch-law.html+northwestern+news+%22rising+from+164+to+165%22&hl=en&gl=us&ct=clnk&cd=1). Southern Methodist University reported that its median LSAT score was 160, noting that “[o]ver the last five years . . . scores on the LSAT have increased from the 74th (157) to the 83rd (160) percentile.” Press Release, Southern Methodist University, Entering SMU Law Class One of Best Ever in Terms of GPA, LSATs (Sept. 18, 2002), available at <http://www.smu.edu/newsinfo/releases/02031.html>. We do not mean to single out any particular school. The point is that although the law schools generally condemn the use of LSAT scores by *U.S. News* to rank schools, they use them internally as well as publicly to measure their own “progress” as an institution.

<sup>62</sup> In a recent exchange on a law school listserv, Law Professor, a faculty member at one school asked for support for his proposal to *U.S. News & World Report* that they report only the LSAT score at the 75th percentile of admissions. This would, he thought, “cut in half the portion of the class admitted solely on the index, leaving much more discretion with the admissions personnel at each school to admit the students they think will be the best lawyers.” Jeffrey Evans Stake, *Reducing the Impact of Rankings on Law School Admissions: A Proposal*, JURIST, Feb. 4, 2003, available at <http://jurist.law.pitt.edu/forum/forumnew93.php>. This proposal prompted Ken Gallant at the University of Arkansas at Little Rock William H. Bowen School of Law to respond that:

This system would encourage schools to shift scholarship money from needs based consideration to chasing high LSATs . . . . If only the top 25% counted in the US News rankings, law schools would have the incentive to

The notion that mean LSAT scores measure the quality of the incoming class and the need to maintain high LSATs for purposes of the rankings process have affected the distribution of financial aid as well. More often now than before the advent of rankings, law schools “buy” students with high LSAT scores without regard to these students’ needs. Given the prohibitive cost of legal education, the debt burden that the least well-off students will have to bear when they graduate, and the limited availability of loan-forgiveness programs for students who accept employment in public interest and social justice jobs, the practice of having LSAT scores drive important policy decisions about how to award financial aid is disturbing.<sup>63</sup> Not only does wealth affect performance on the test, a higher score on the test then diminishes the cost of a legal education to an already privileged test taker.

The LSAT was not designed to measure the quality of law schools. The strength of a legal education institution can be measured in many ways: service to the community, including underserved clients; the quantity and the quality of scholarship of the faculty; the standing of the faculty in the legal community, both local and national; the richness of the diversity in the student body; the quality of the services provided to students; the level of student satisfaction; the success of its graduates; and much more. If resources are devoted to the quest for competitive LSAT scores, these resources may be diverted from other

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concentrate all that money on chasing up to 25% of its student body, meaning even more of the law school class would graduate with huge debts, and many more non-rich kids might be priced out of law school.

Posting of Ken Gallant, ksgallant@ualr.edu to lawprof@chicagokent.kentlaw.edu (Jan. 13, 2003) (on file with Deborah Post). Fred Moss, of the Southern Methodist Law School, noted with some irony that he did not see how law schools “could be any more focused on buying with scholarships the highest LSATs” than they are now. Posting of Fred Moss, fmoss@mail.smu.edu to lawprof@chicagokent.kentlaw.edu (Jan. 13, 2003) (on file with Deborah Post). Charles Sullivan from Seton Hall, noted the particularly troubling effect on “tuition driven” schools:

This proposal, whatever its other merits, would also heighten the competition for high-end LSATs, resulting in a tendency towards free rides for everyone in any given schools top quarter LSAT. For tuition driven schools, the result would be to exacerbate the trend toward low-end LSATs paying the whole cost of legal education, usually with loans that (as a group) they will be less equipped to repay than high enders (as a group).

Posting of Charles Sullivan, sullivch@shu.edu to lawprof@chicagokent.kentlaw.edu (Jan. 13, 2003) (on file with Deborah Post). This email exchange was reproduced with the permission of the participants.

<sup>63</sup> See, e.g., *infra* note 111; see also Whitman, *supra* note 60, at 3.

valuable and productive uses.

Past president of AALS, Dale Whitman, has emphasized how law schools' focus on status and competitive ranking "induce[s] us to behave in ways that we would not otherwise choose, and to distort our educational judgments and priorities."<sup>64</sup> The questionable behavior he refers to includes distorting the selection process because of a perceived need to manipulate scores of students accepted for reporting purposes, inviting minority students enrolled in neighboring institutions to transfer in the second year when their LSAT scores will not affect the ranking of the school, and engaging in creative accounting practices to boost the "costs per student" figure used by *U.S. News* in its calculations.<sup>65</sup>

In effect, the meaning of the LSAT scores of incoming students has been hijacked, or at least diverted, from its original purpose in other ways. One serious concern is the willingness of institutions to correlate LSAT scores with likely successful bar passage by students on their first effort. Both *U.S. News & World Report* in its ranking and the ABA in the accreditation process evaluate schools in terms of LSAT scores and the bar-passage rates of schools, reinforcing a sense of connection between the two.<sup>66</sup> Because of their fear of the effects of poor bar-passage rates in state allocation of funding, alumni support, and ranking, some law schools now rely uncritically on LSAT scores in the admissions process in order to try to boost future bar-passage rates. Just as the correlation between LSAT score and first-year performance varies from school to school, so does the correlation between LSAT and bar results. Moreover, for many

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<sup>64</sup> Whitman, *supra* note 60, at 1.

<sup>65</sup> See Wellen, *supra* note 60.

<sup>66</sup> See STANDARDS FOR APPROVAL OF LAW SCH. & INTERPRETATIONS, *supra* note 8. To explain its methodology, *U.S. News & World Report* stated, "The ratio of the school's bar passage rate of the 2003 graduating class to that jurisdiction's overall state bar passage rate for first-time test takers in summer 2003 and winter 2004. The jurisdiction listed is the state where the largest number of 2003 graduates took the state bar exam." *America's Best Graduate Schools 2006: Law Methodology*, U.S. NEWS & WORLD REP., available at [http://www.usnews.com/usnews/edu/grad/rankings/about/06law\\_meth\\_brief.php](http://www.usnews.com/usnews/edu/grad/rankings/about/06law_meth_brief.php) (last visited Jan. 28, 2006). Jim Vaselick, Executive Assistant to the President and Associate Counsel of the LSAC responded to the statement that the correlation between bar passage and LSAT score was "almost perfect." In fact the correlation was 0.30, lower than the correlation with law school grades, 0.38. As Mr. Vaselick points out, it is often dangerous to generalize from aggregate data to the case of a particular individual. *Letter to the Editor*, THE BAR EXAMINER, Feb. 2005.

schools class standing may be a fairer and more accurate predictor of bar passage. It is hard to see how a generalized claim can be made that the LSAT is a predictor of bar-passage rates of students in the absence of school-specific evidence of a strong correlation. Overweighting and relying on the LSAT as a predictor of performance on the bar examination excludes from law school consideration students who may start slow, but improve quickly after the first year. Moreover, first time bar passage may not correlate with successful use of a law degree, in practice or not, and students with low predictors often graduate, pass the bar after a second try, and go on to successful practice. Of course, as SALT has recognized elsewhere, the value of a post-graduation bar examination is highly problematic as a means of qualifying students to practice law.<sup>67</sup> Schools that are concerned with the bar-passage rate could more profitably direct their attention to academic support and other programs to assure success for their students, consistent with the goal of training effective members of the profession.<sup>68</sup> A “rationalized” efficiency approach to admissions and bar passage can compromise the search for diverse, well-qualified students.

There are other institutional pressures to misuse the LSAT that have to do with notions of efficiency or cost cutting. If the applicant pool seems unwieldy, which may often be the case for “elite” or highly competitive schools, or when there are limited resources available for the admissions process, which is often the case for large state-supported institutions, schools may use the LSAT to reduce the size of the applicant pool for which anything more than a cursory review is necessary. As Nicholas Lemann noted in his history of the development of the SAT and the growth of ETS, the development of a machine-graded multiple-choice exam makes it possible to test hundreds, even thousands, of students at one time and to sort them more effectively than could be done without such exams.<sup>69</sup>

As a general proposition, the LSAT is a much cheaper way to make an admissions decision than a “whole file” review. The test

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<sup>67</sup> See Society of American Law Teachers, *Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 446 (2002).

<sup>68</sup> See *id.* at 448–49.

<sup>69</sup> See Nicholas Lemann, *The Structure of Success in America: Educational Testing, College Admissions, and the Social Elite*, ATLANTIC MONTHLY, Aug. 1995, at 41.

score is a quick method to "evaluate" a large volume of applications, sorting files into "presumptive admit" and "presumptive deny" categories on the meager informational basis of GPA and LSAT score.<sup>70</sup> Unfortunately, most law schools do not often have a large number of trained admissions staff much less a substantial number of faculty members who are willing to engage in the time-consuming "whole file" assessment process. The understaffed admissions offices and overburdened faculty may feel pressured to over-rely on scores. The quantitative score, in short, offers a seductively simple but deceptive way of defining merit that appears to be "neutral" to the uncritical eye.<sup>71</sup>

One of the most pernicious consequences of the use of a set arbitrary cut off for LSAT scores is the effect on African American admission opportunities. Because the number of potential minority applicants in the pipeline is much smaller in absolute numbers than whites, and the number of African Americans who actually apply is also very small, the likelihood that there will be substantial numbers of minorities in the admissions pool of any law school is slim.<sup>72</sup> Those minorities who perform well on the LSAT are attractive to all schools. When differences in performance between groups, including whites and minority students, are also considered, it is apparent that absolute cut offs leave law schools with disproportionately fewer minority candidates than whites from which to choose.<sup>73</sup> Thus,

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<sup>70</sup> The LSAC also cautions against the use of the LSAT for this purpose. See LAW SCH. ADMISSION COUNCIL, CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES, *supra* note 44. In 1997, at least one elite school, University of California at Berkeley (Boalt Hall), is reported to have admitted 500 out of 850 students administratively. See Abiel Wong, Note, "Boalt-ing" Opportunity?: Deconstructing Elite Norms in Law School Admissions, 6 GEO. J. ON POVERTY L. & POL'Y 199, 242 n.196 (1999). One newspaper reported that only one-third of the applications (1200 of 4000) were ever read. See *id.*

<sup>71</sup> "From the beginning, the LSAT was meant to be a tool, and from the beginning, the magic of the 'objective' numerical score exercised its power over the legal mind." LaPiana, *supra* note 13, at 978.

<sup>72</sup> LSAC tables show that dramatically fewer black males than other males are in the pipeline. See LSAC Volume Summary by Ethnic and Gender Group, <http://members.lsacnet.org/> (last visited Jan. 29, 2006); see also Laycock, *supra* note 32, at 1799; Dean Nussbaumer reports that the median reported score for African American males in the last two years has fallen below what he characterizes as the de facto cut off or presumptive denial for many competitive law schools. See Nussbaumer, *supra* note 18.

<sup>73</sup> See, e.g., Vernellia Randall, Discrimination in Law School Admission, <http://academic.udayton.edu/race/03justice/LegalEd/%202003Memo.htm> (email to SALT-LIST@lists.umn.edu). The report found that sixty-eight percent of the 99,504

the pressure to overweight scores profoundly exacerbates the problem of scarcity with respect to African American applicants. Using an automatic cut off, moreover, suggests that those who fall below that number are “unqualified,” which feeds into claims that blacks or other minorities are the intellectual inferiors of whites.<sup>74</sup> It bears noting again that a score difference of a few points—or even ten—may not say anything at all about a candidate’s capacity to do the work in the first or in subsequent years in law school or in the practice of law. Yet for those who are—often unconsciously—predisposed to racial stereotypes about competency,<sup>75</sup> the dearth of minority students who survive quantitative review confirms what they believe to be true about racial hierarchy in the natural order of things. The risk is clear. Predominantly white law schools run the risk of regressing to a state of de facto segregation.

Litigation and political pressure to maintain preferences that work in favor of middle-class whites who have traditionally been disproportionately accepted works against reform challenging the reliance on test scores. Law schools have generally espoused a commitment to greater diversity than admissions decisions based primarily on the numbers would produce, but they are also afraid of lawsuits alleging reverse discrimination and political reaction that would follow.<sup>76</sup> As a

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people taking the LSAT were white but in twenty-six of the top schools, the classes were ninety percent white and over half of the 179 law schools had student bodies which were over eighty percent white. See Memorandum from Vernellia R. Randall to the Provost of the University of Dayton (Jan. 2004), *available at* <http://academic.udayton.edu/TheWhitestLawSchools/index.htm>. This “overrepresentation” of whites is attributable in part to the gap in scores between whites and minorities. See LISA C. ANTHONY & MEI LIU, LAW SCH. ADMISSION COUNCIL, ANALYSIS OF DIFFERENTIAL PREDICTION OF LAW SCHOOL PERFORMANCE BY RACIAL/ETHNIC SUBGROUPS BASED ON THE 1996–1998 ENTERING LAW SCHOOL CLASSES 6 (2003). Figure 1a plots the difference between the LSAT mean for white and black students at 142 schools. The difference ranged from 1.5 to 13.5, but at almost 100 schools, the difference in the LSAT mean was between 5.5 and 9.5 points.

<sup>74</sup> See *supra* notes 52–65 and accompanying text (discussing the racialized and racist history of standardized testing).

<sup>75</sup> See generally Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995) (discussing and defining the kinds of stereotypes that plague the legal world).

<sup>76</sup> See Wightman, *Threat to Diversity*, *supra* note 30, at 2–3. Ward Connerly and organizations that support his cause and laud his victory with California’s Proposition 209, have taken the battle to Michigan. Only one other state, Washington, has adopted a similar referendum. In Florida a 20% plan, similar to that adopted in Texas after *Hopwood*, was implemented by executive order of

consequence, law schools have preferred "hard" data based on test scores and pre-law GPA, avoiding the risk that a more holistic approach, including valuing an applicant's race, gender, and other life experiences, will be challenged as violative of the Constitution. This was certainly the decision-making environment in the aftermath of *Hopwood v. Texas*<sup>77</sup> and before *Grutter v. Bollinger*.<sup>78</sup> Rejecting the *Hopwood* reasoning, the *Grutter* court returned to the approach first articulated in Justice Powell's opinion in *Bakke* and concluded that narrowly tailored race-conscious selection methods can be used to promote the compelling interest of diversity.

Since *Grutter*, there has been no abatement in the attack on affirmative action. Currently Professor Richard Sander is campaigning for the adoption of policies that would effectively remove most black students from elite schools. Unlike earlier similar arguments by Lino Graglia and Stephen and Abigail Thernstrom railing against unqualified blacks in elite institutions, Sander uses a statistical analysis employing data collected by LSAC and himself. He positions himself as an advocate for African American students, concerned with the harm to them because they cannot compete with the white students in their schools. His emphasis is on elite schools, but the remedy he proposes would displace Black students at every level and send them tumbling down to the next lowest tier—unless they were already in the lowest tier, in which case there would be no where to go. The controversy that has been stirred by Sander is a current example of the power of numbers and the risk of their misuse.<sup>79</sup> If we put aside for a moment the debate about the usefulness of a measure of merit that consistently

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Governor Jeb Bush.

<sup>77</sup> 78 F.3d 932 (5th Cir. 1996).

<sup>78</sup> 539 U.S. 306 (2003).

<sup>79</sup> See, e.g., Eli Lehrer, *Demystifying Statistics Is Murray's Number*, INSIGHT ON NEWS, Mar. 1, 1999 (discussing the Statistical Assessment Service at George Mason University, a non-profit, non-partisan organization affiliated with the Center for Media and Public Affairs); see also Eric R. Sowe, *The Getting of Wisdom: Educating Statisticians To Enhance Their Clients' Numeracy*, AM. STATISTICIAN, May 2003, at 89 (acknowledging the "increasing use of quantitative evidence in public policy debates and . . . the bewitching power of numbers on the general public" as a reason for promoting "functional numeracy" on the part of the public); Stats at George Mason University, <http://www.stats.org/record.jsp?type=page&ID=26>, ("STATS monitors the media to expose the abuse of science and statistics before people are misled and public policy is distorted.") (last visited Dec. 11, 2005).

produces higher and lower scores for different groups of people, there is also the potential for abuse by those who recognize obfuscatory power of numbers.<sup>80</sup> Richard Sander uses inferential statistics to support his theory that if whites and blacks with the same LSAT scores are placed together in the same law schools, there would be no appreciable difference in their performance in law school, on the bar exam, or beyond. According to Sander, eliminating affirmative action “would put blacks into schools where they were perfectly competitive with all other students—and that would lead to dramatically higher performance in law school and on the bar. Black students’ grades, graduation rates, and bar passage rates would all converge toward white students’ rates.”<sup>81</sup> The proof for this assertion ostensibly is found in Sander’s extensive and questionable use of regression analysis.<sup>82</sup>

Most lay people have no idea what a regression analysis is or what role it can or should play in explaining or solving social problems.<sup>83</sup> When, however, as is the case here, statistics are

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<sup>80</sup> Although test makers suggest that there is no cultural bias in the test and they can support this with their own research, the persistence of the sorting effect of standardized tests suggests that there is some relationship between identity and performance of certain cognitive tasks. The debate has centered on genetic and innate differences, on the one hand, and nurture or social, economic, and sometimes cultural differences on the other. See, e.g., Charles Murray, *The Inequality Taboo*, COMMENTARY, Sept. 2005, at 13 (noting the statements of Lawrence Summers, who recently resigned his position as President of Harvard, about “the innate differences between men and women in their aptitude for high-level science and mathematics”).

<sup>81</sup> Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 474 (2004).

<sup>82</sup> For a very cogent discussion of regression analysis see Alan O. Sykes, *An Introduction to Regression Analysis*, in CHICAGO WORKING PAPER IN LAW & ECONOMICS 1, (E. Posner ed. 2000), available at [http://www.law.uchicago.edu/Lawecon/WkngPprs\\_01-25/20.Sykes.Reggression.pdf](http://www.law.uchicago.edu/Lawecon/WkngPprs_01-25/20.Sykes.Reggression.pdf).

<sup>83</sup> In our reading, we ran across one cautionary example that involved educational policy, although not higher education. When California invested \$5 billion in reducing class size in elementary schools, it expected a much higher change in education outcomes than occurred. The expenditure was justified by the Student/Teacher Achievement Ratio (“STAR”) study. One critic concluded:

Brute empirical data does not speak its own meaning. The main policy use of educational research is to enable us to make good predictions about which interventions will yield significant effects in new situations—by understanding of the root causes of the observed effects. In a domain as causally complex as mass education, “statistical significance” no matter how rigorously derived must be interpreted with a wary eye.

E. D. Hirsch, Jr., *Classroom Research and Cargo Cults*, POL’Y REV. 51, 69 (Oct./Nov. 2002). In other words, social problems that flow from a long history of exclusion, discrimination, and/or economic disadvantage can seldom be fixed with a simple solution like the one Sander suggests.

used to confirm or vindicate deeply held beliefs, the flaws in methodology and proof almost cease to matter.<sup>84</sup> There is no doubt that what makes Sander's argument so powerful in the mind of many who are skeptical of affirmative action is his suggestion that blacks belong in lower-tier schools and his reliance on LSAT scores to support and to "prove" his theory.<sup>85</sup> The impotence of the cautionary efforts of the LSAC, the AALS and the ABA in the face of such misuse is yet one more reason to consider whether the LSAT should be privileged as an admissions criterion.

Wary of moving away from the allure of quantitative scores as a way of defining merit, it is likely that some courts will continue to question diversity's value, demanding strong, consistent justification for recognizing it as a goal and permitting only the most narrowly tailored use of race or other nontraditional factors in the selection process. Courts predisposed to colorblindness will likely continue to favor the "certainty" in defining merit that can be found in quantitative measures. In fact, many students and other members of the community continue to believe that admission to the law school of choice is a prize that should be awarded to the person who competes for and receives the highest score on the LSAT. It is thus likely that despite *Grutter*, there will be perpetuated an unnecessarily narrow conception of merit.<sup>86</sup> Law schools may be

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<sup>84</sup> For criticisms of Sander's methods and conclusions, see generally Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1817-27 (2005) (finding that Sander's analysis is flatly contradicted by his own numbers, which show that affirmative action actually enhances the chances that blacks will succeed in law school and pass the bar exam); David L. Chambers, et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1868-73 (2005) (discussing, in part, Sander's failure to test adequately or disclose the weakness of his statistical analysis); Michelle Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1905 (2005) (criticizing Sander's methodology and discussing the increased risk of misleading the public with inaccurate data and analysis when empirical study is published in a journal that is not peer reviewed); Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander's Affirmative Action Study*, J. BLACKS HIGHER EDUC., Winter 2004/2005, 102-05 (describing Sander's claim that the end of affirmative action would cause an eight percent increase in the number of black lawyers "implausible").

<sup>85</sup> "Any 'official' measurement of performance . . . gains credibility in an innumerate society simply from having been stated, never mind what it really means (or whether it means anything at all!)." Sowe, *supra* note 79, at 90.

<sup>86</sup> See, e.g., Jeffrey Rosen, *How I Learned To Love Quotas*, N.Y. TIMES, June 1,

for this reason disinclined to move toward “soft” indicators for fear that disgruntled, rejected candidates will be recruited by organizations like the Center for Individual Rights, which continues to pursue class actions alleging reverse discrimination.<sup>87</sup> For this reason, faculty must play a critical role in educating the public and making a compelling case for diversity.

### III. THE PAST AS PRESENT: STANDARDIZED TESTS AND THE RHETORIC OF RACIAL INFERIORITY

We contend that rather than fostering a system in which there is no pernicious discrimination, over-reliance on the LSAT does exactly the opposite. LSAC states that the test “is fair to all takers regardless of racial, ethnic, gender, regional, or national background.”<sup>88</sup> The reality is that test results on the LSAT continue to correlate with race, gender, and class. There are many theories but no completely satisfactory explanation for the group-based differences in performances on this and other

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2003, § 6 (Magazine) (implying that excellence and diversity are mutually exclusive goals). This idea that a choice has to be made between excellence and diversity assumes that the applicants with the highest LSAT are the only “excellent” candidates.

<sup>87</sup> The Center for Individual Rights (“CIR”) has engaged in a strategy of impact litigation, bringing suits in Texas and Michigan among others, arguing that the use of race in admissions discriminates against whites. They seem to be following the blueprint for social change that was first adopted by Charles Hamilton Houston and the NAACP in its attempt to attack and defeat segregation. The strategy is described in an early article, Ethan Bronner, *Conservatives Open Drive Against Affirmative Action*, STAR TELEGRAM (Fort Worth), Jan. 26, 1999, at A10. After the proposed revisions to 210 and 211 of the *Standards for Approval of Law Schools*, the Center for Equal Opportunity, the Center for Individual Rights, and the National Association of Scholars sent letters to the Department of Education complaining about the changes the ABA had adopted to promote equal opportunity and nondiscrimination and asking that the ABA’s authority to accredit law schools be revoked. The organizations contend that the changes to the standards impose a “politically correct” posture and mandate race conscious policies that violate the law in some jurisdictions. Katherine S. Mangan, *Foes of Affirmative Action Seek Revocation of ABA’s Accrediting Power*, THE CHRONICLE OF HIGHER EDUCATION 30, VOL. 52, NO. 28, Mar. 17, 2006.

<sup>88</sup> LAW SCH. ADMISSION COUNCIL, *supra* note 11, at app. B, at 58. Although the various studies conducted for and on behalf of LSAC continue to show differential performance between women and men and between majority and minority applicants, the test is considered fair because it over-predicts, rather than under-predicts, the performance of minorities. See generally ANTHONY & LIU, *supra* note 73, at 14.

standardized tests.<sup>89</sup> For that reason, if for no other, concerns about the misuse of the LSAT should be examined recognizing historical as well as political contexts.

Historically, standardized testing in the United States has been linked to anti-immigrant, class and race-based discriminatory beliefs and policies.<sup>90</sup> This legacy makes the conversation about the use of the LSAT more problematic. Neutrality and objectivity are claims made by advocates of standardized tests and these attributes are valued because performance on this test can decide what educational opportunities, and consequently other life possibilities, are available to the test taker. The history of standardized testing in this country, however, gives rise to justifiable skepticism about such claims and whether such testing is just.<sup>91</sup> As Nicholas Lemann, the author of a history of the SAT, has pointed out, such tests are "an organized system to distribute opportunity . . . [which is] the great onrushing force in American society, the thing that every single person is supposed to have as

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<sup>89</sup> In his commentary on articles in a symposium issue on intelligence testing and admission, Ceci stated:

My point is simply that a disjunction exists between prediction and explanation. When it comes to prediction, there is broad agreement that measures of general intelligence (the most popular of which is the IQ test itself and its surrogates such as the SAT and GRE), do improve predictions of grades and supervisor ratings. However, the explanation given to the predictions is still open for debate.

Ceci, *supra* note 59, at 249. He specifically takes on the argument by Jensen and others that racial disparities on IQ and aptitude tests exist because there are differences in the ability of the two groups to reason abstractly. *Id.* Research on the source of such differences has been conducted by Dr. Claude Steele of Stanford who is well known for his theory of stereotype threat. See, e.g., Claude M. Steele, *A Threat in the Air*, 52 AM. PSYCHOLOGIST 613 (1997); Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44.

<sup>90</sup> See generally PETER SACKS, STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT (2000).

<sup>91</sup> The history of the testing movement, in which conceptions of intelligence and aptitude are implicated is placed in a broader context and described in the following way: "Some of the American use of IQ tests has been premised on arguments that there exists a monolithic evolutionary order of intellectual development, together with associated conceptions about intelligence, genius, and degeneracy and retardation as properties of superior or inferior human beings." Sheldon H. White, *Conceptual Foundations of IQ Testing*, 6 PSYCHOL. PUB. POL'Y & L. 33, 39 (2000). Data from tests were given "social and political interpretations that owe much to the legendry and very little to scientific information about what the IQ test is and does." *Id.* at 33.

a fundamental right and whose denial is morally unacceptable.”<sup>92</sup> What should be demanded of those in charge of this distribution is fairness in appearance and in reality.

Because in the past, standardized tests were used to “prove” the intellectual superiority of Northern European whites and the mental inferiority of African Americans, Jews, and Southern European immigrants, the fairness of such tests continues to be questioned.<sup>93</sup> In the past, results on standardized tests were cited as evidence of the need for restrictions on immigration from Africa and Southern Europe. Indeed, although he later recanted his earlier position on the subject, Carl Brigham, the individual who devised the first standardized tests for use in college entrance exams, was at one time a proponent of immigrant restrictions and eugenics.<sup>94</sup>

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<sup>92</sup> LEMANN, *supra* note 14, at 155. Peter Sacks, a critic of admission examinations for professional schools observes: “If nothing else, the nascent technology of mental testing came packaged with an ideology—which largely survives to this day—that one’s ability to perform any given type of work or academic subject can be predicted with a single instrument that tests one’s general mental prowess.” Peter Sacks, *How Admissions Tests Hinder Access to Graduate and Professional Schools*, CHRON. HIGHER EDUC., June 8, 2001, at B11 [hereinafter Sacks, *Admissions Tests*]. Sacks then notes that while the tests actually are very poor predictors of performance in graduate school:

[T]he various cognitive tests do sort candidates quite capably along class and race lines . . . . According to 1999 data from E.T.S., for example, a white male has a 117-point advantage, on average, over a white female on the verbal, quantitative and analytical parts of the GRE.

*Id.* Studies have shown similar gaps between white and blacks and that the majority of students admitted automatically to schools like U.C.L.A. were children of professionals or higher income. See *id.* Compare Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 10 LA RAZA L.J. 363 (1998) (arguing that merit standards disproportionately exclude minorities), and Guinier, *supra* note 29, at 505–08 (attempting to reframe the affirmative action debate in the context of larger issues of democracy and fairness), and William C. Kidder, *The Rise of Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167 (2000) (discussing inherent biases in the LSAT), with LaPiana, *supra* note 13 (arguing that the LSAT must be viewed in context in admissions decisions).

<sup>93</sup> Henry H. Goddard, who was invited by the U.S. Public Health Service to conduct research at Ellis Island, found that 83% of Jews, 80% of Hungarians, 79% of Italians, and 87% of Russians were “feeble minded.” These results had an important effect on immigration policies. Goddard reported that deportation of aliens for feeble mindedness increased 350% in 1913 and 570% in 1914. Leon J. Kamin, *The Pioneers of IQ Testing*, in THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS 476, 488 (Russell Jacoby & Naomi Glauberman eds., 1995).

<sup>94</sup> Consider the following statement by Carl Brigham in 1923 in his book, *A Study of American Intelligence*:

At the present state of development of psychological tests, we cannot

Elite law schools began using aptitude tests in the early twentieth century.<sup>95</sup> This movement favoring testing coincided with the burgeoning efforts of working-class people to attain professional status through educational advancement.<sup>96</sup> The use of tests spread, and in the late 1940s, an organization that was the predecessor of LSAC was formed and contracted with Educational Testing Services to produce and administer a test and to provide other admissions-related services. The first standardized test for law school admissions was based upon the early IQ tests administered by the Army to recruits of the First World War. Data from these World War I tests had been used to prove that Eastern European immigrants and blacks were less intelligent than Northern and Western Europeans.<sup>97</sup> These historical connections with racialized thinking, prejudice, and xenophobia have fostered skepticism among critics of the LSAT about efforts to maintain the preeminence of testing in admissions decisions.<sup>98</sup> Even as the LSAC seeks to eradicate any risk that the test itself operates to disadvantage minority groups

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measure the actual *amount* of difference in intelligence due to race or nativity. We can only prove that differences do exist, and we can interpret these differences in terms that have great social and economic significance. The intellectual superiority of our Nordic group over the Alpine, Mediterranean, and Negro groups has been demonstrated.

Carl C. Brigham, *A Study of American Intelligence*, in THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS, *supra* note 93, at 571, 575. For a discussion of Brigham's work, his criticism of the idea that a test could measure intelligence, and his attempt to distance himself from the eugenics movement, see LEMANN, *supra* note 14, at 33; see also Roithmayr, *supra* note 92, at 403.

<sup>95</sup> LaPiana, *supra* note 13, at 956.

<sup>96</sup> Steven C. Bahls & David S. Jackson, *Essay: The Legacy of the YMCA Night Law Schools*, 26 CAP. U. L. REV. 235, 236 (1997).

<sup>97</sup> The Alpha and Beta Army tests were administered for purposes of dealing with draftees at the time of the First World War. The differential performance of groups on the test was used to influence public opinion and public policy.

It is on the basis of these tests that the Nordic races have been granted the heaven-sent mental superiority over South Europeans which entitles them to entry into this country; that a prominent College president and pulpit orator of the East justifies the policies of segregation in the public schools; and that one observer bewails the fact that "There seems to be no immediate possibility of convincing the public of the necessity for preventing the reproduction of these groups."

Horace M. Bond, *What the Army "Intelligence" Tests Measured*, in THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS, *supra* note 93, at 583, 586.

<sup>98</sup> See generally Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089 (2002) (suggesting that equal protection analysis should focus on group conduct and competition); Roithmayr, *supra* note 92 (arguing that merit standards tend to exclude minority candidates).

unfairly, the standardized testing legacy fuels current debates about the significance of racial, class, and gender differentials in performance on standardized tests. The assumption that test scores measure the cognitive ability of test-takers is rampant and leads to discussions where opponents of affirmative action claim disproportionate representation of whites in law schools is justified by racial differences. Despite attempts by the LSAC to clarify the purpose and meaning of test scores, public discourse and even judicial decisions continue to conflate test scores, intelligence, and merit.<sup>99</sup>

Justice Scalia's comments at the oral argument in *Grutter* exemplify the intransigence of the linked ideas—high test scores and merit:

[T]he problem is a problem of Michigan's own creation, that is to say, it has decided to create an elite law school. . . . Now it's done this by taking only the best students with the best grades and the best SATs or LSATs knowing that the result of this will be to exclude to a large degree minorities.<sup>100</sup>

Justice Scalia's statement assumes that GPA and LSAT are the only ways to determine the merit of applicants: who the "best" applicant might be or who is more qualified to earn a law degree at an elite institution. He echoes the earlier commentary

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<sup>99</sup> The field of testing is wedded to the goal of predicting academic success. Academic success is, in turn, highly dependent on certain kinds of cognitive processes—analytical skills, such as those emphasized in the LSAT. Research has been conducted on the correlation between competing models of human intelligence—practical and creative intelligence—and success in some professions. Grigorenko & Sternberg, *supra* note 9, at 57. Analytical intelligence, or "G," correlates with a remarkable number of variables that are used to study "success" in American society: school grades, salary, performance ratings, and even marital success. *Id.* There is some circularity to this system of proof because testing predisposes most members of this society to classify some people as smart and some as less smart or even stupid. Prior success in testing may affect subsequent evaluations. Those who do research on intelligence tests maintain that it is a measure of cognitive ability, even as they concede the possibility of multiple intelligences and the fact that research shows "intelligence" might be context dependent. See Sternberg, *supra* note 9, at 160, 164–65 ("[I]ntelligence is in the match between a person's talents and the talents that are valued in a sociocultural context.").

<sup>100</sup> Transcript of Oral Argument at 31, *Grutter v. Bollinger*, 539 U.S. 306 (No. 02-241), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/02-241.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-241.pdf). The attorney for University of Michigan, Maureen Mahoney, a partner in Latham & Watkins, dismissed Scalia's assumption. "I don't think there's anything in this Court's cases that suggests that the law school has to make an election between academic excellence and racial diversity." *Id.*

of Lino Graglia and Stephan Thernstrom who argue that elite institutions are admitting "unqualified" minority students and foreshadows the current controversy over the work of Richard Sander.<sup>101</sup> In the article, Sander focuses attention on African Americans, and not members of any other minority group or women, and his argument is dressed up and presented as empirical research. Although clearly the inferences and conclusions Sander's draws from the data do not promote the interests of African Americans, he claims his research was motivated by a desire to improve the condition of African-American students. This he would do by limiting their access to education at elite institutions. The fact that this would be likely to limit access to positions of power and importance in the academy, business, and politics is completely disregarded in Sander's weighing of benefits and burdens for African Americans.<sup>102</sup>

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<sup>101</sup> In some cases the language criticizing affirmative action and referring to disparate test scores is so intemperate that racial animus is palpable. See Stephan Thernstrom, *Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's "The Threat to Diversity in Legal Education,"* 15 CONST. COMMENT. 11 (1998), as an example of a critique of Linda Wightman's study. His language refers to "inferior academic qualifications" of students who receive "racial preferences in admissions." More troubling perhaps is his use of data about the performance of blacks and whites on the LSAT.

In the 1996-1997 admissions cycle, some 2,646 white applicants placed in the top 7.7 percent of LSAT-takers and had college GPAs of 3.5 or better. These credentials are very good, obviously, but not phenomenal; the average student who was admitted to Boalt Hall this year had an LSAT in the 97.7 percentile and a GPA of 3.74. And yet a mere 16 African Americans in the United States and 45 Hispanics had records that strong! In this elite group of applicants, whites outnumbered blacks 165 to one. If we relax the standard substantially and look at students in the top sixth (83.5 percentile or better) on LSATs[,] and a GPA of only 3.25, 7,715 whites and just 103 blacks qualify.

*Id.* at 41; see also Lino Graglia, *Do Racial Preferences Cause Rather than Remedy the Black Academic-Performance Gap?*, 80 TEX. L. REV. 933, 948 (2002) (reviewing JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* (2000) ("McWhorter's name-calling does not make Herrnstein and Murray's position that the academic-performance gap may have a genetic component less plausible than his position that the primary, if not the sole, explanation of the gap is that racial preferences have blunted the incentive of blacks to excel academically.")).

<sup>102</sup> See Sander, *supra* note 4, at 368 (remarking how important questions, such as the types of jobs and opportunities presented to minorities after they graduate, are rarely addressed in the affirmative action debate); see also Harris & Kidder, *supra* note 84, at 102-05 (criticizing Sander's assumptions and flaws in his analysis). A very compelling argument about the cost to blacks of exclusion from elite schools is included in David B. Wilkins, *A Systematic Response to Systemic*

In the public discourse on affirmative, attention has been focused almost exclusively on the qualifications, and the merit, of African Americans. There is an explanation for this. Differential scores on tests have become convenient justifications for exclusion, built as they are on persistent stereotypes about inequality and the intellectual or cultural inferiority of blacks. These notions are all the more fixed because they rely on a faith in the ability of science to devise some standard by which human capabilities can be measured and a desire for objective or neutral measures to facilitate individual competition for scarce resources.<sup>103</sup>

The Supreme Court in *Grutter v. Bollinger*<sup>104</sup> has confirmed that law schools can legitimately seek to create an admissions process designed to bring about a diverse classroom, learning environment, and ultimately a more diverse profession. The Court acknowledged that quantitative scores like the GPA and LSAT, if they are the exclusive admissions criteria, may not accomplish these objectives.<sup>105</sup> As Justice O'Connor mused, "race unfortunately still matters."<sup>106</sup> The opinion validated narrowly tailored, race-focused means of selecting students to meet diversity and educational objectives. We have argued here that misuse and abuse of the LSAT score impedes the openness of the

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*Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1931 (2005) (pointing out the important benefits of attending an elite law school, such as networking opportunities and the credential benefits of graduating from a particular law school). Wilkins concludes that Sander, a man who positions himself as a liberal who is interested in improving the condition of blacks, seems bent on causing African Americans harm. "[T]he manner in which Sander suggests making this disclosure [of harm of mismatch] seems destined to reinforce, rather than to correct, the discouragement and disengagement that Sander argues plays a crucial role in producing the disquieting statistics he cites." *Id.* at 1955.

<sup>103</sup> The "social roots" of testing is discussed in Eva L. Baker, *supra* note 14, at 1-12. It was grounded first and foremost in the rationalist tradition of empiricism and the belief that human capacity could be measured, but it found fertile ground in a society that was ideologically opposed to a hereditary aristocracy but deeply committed to individual competition for positions in a social and economic hierarchy. "Because Americans were sensitized to class-based decisions, the use of tests for selection was intended to emphasize the preeminence of merit over pedigree in providing access to economic benefits." *Id.* at 4. See generally LEMANN, *supra* note 14, at 155-65 (discussing the problems faced by Blacks as the lowest-ranking group on standardized tests).

<sup>104</sup> 539 U.S. 306 (2003).

<sup>105</sup> *Id.* at 329-31 (acknowledging that there are a number of real benefits that can only be achieved by enrolling a diverse student body).

<sup>106</sup> *Id.* at 333.

process<sup>107</sup> that satisfies the Supreme Court's standards.

In *Grutter*, Justice O'Connor reasoned:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.<sup>108</sup>

The commitment of legal education to diversity has several motives. These include remediation of past and continuing discriminatory treatment of minorities as well as recognition that value is added to education when schools bring together students of diverse backgrounds—development of the socially important capacity to interact and be aware of others, securing full participatory opportunities that are fundamental to a democratic society, improving the quality of classroom learning with opportunities for the exchange of ideas by students and faculty of diverse backgrounds. The reliability of tests as predictive indicators is neither so strong or uncontroverted; nor are there any truly compelling public policies promoted by tests that would justify ignoring the extent to which over reliance on standardized test scores compromises a commitment to diversity and to the principle of inclusion.<sup>109</sup>

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<sup>107</sup> *Id.* at 309 (describing the flexibility of the law school's admissions scheme that gives weight to all aspects of an applicant's file, with no one variable determinative of an admission decision).

<sup>108</sup> *Id.* at 332–33 (quoting *Sweatt v. Painter*, 339 U.S. 629 (1950)).

<sup>109</sup> As Professor LaPiana observed:

The assault on affirmative action has lead [sic] to a perversity . . . [The LSAT] becomes the only criterion for admission . . . Law schools are now rated on criteria which gives an utterly disproportionate importance to the test scores of the entering class. The reputation of a school becomes its LSAT median—a frightening result.

He further noted that one state legislature tied levels of financial aid for publicly supported law schools to the LSAT scores of students. *Id.* The impact on law school diversity subsequent to the voter initiatives in California and elsewhere is unquestionable; African-American enrollments dropped approximately two-thirds,

There is a tendency to shy away from affirmative outreach because of a fear of litigation. The fear is well grounded and understandable. It is for this reason, and for reasons of fairness and justice, that we must undertake to reverse the process by which conceptions of merit have been reduced to a single test score or an index score and to create a definition of merit that ensures that both excellence and inclusion are valued. We offer below alternatives that SALT, the LSAC, and the authors propose to remedy the crisis that has been precipitated by misuse of test scores.

#### IV. PROPOSALS FOR REFORM

There are risks inherent in any selection process that lacks standards, inviting abuse and bias. We could not in good conscience propose a system without standards or one that was uninformed by the shared values we have raised in this Article. What we strive for in offering recommendations for reform of the admissions process and reconsideration of the role that standardized tests play in that process is an admissions process that is open, inclusive, and fair in the selection of the best candidates for law school.

In its Statement on the LSAT, SALT has emphasized that misuse of the LSAT is ubiquitous and far reaching in its effects. In this Article we have identified the ways in which the test is misused and also described some of the institutional constraints,

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and Latino/a and Native American enrollments were cut in half during the first several years following the introduction of these initiatives. Although more recently there has been some increase in the numbers of students of color despite these prohibition of race-sensitive admissions standards, the Harvard Civil Rights Project reports that no race-neutral alternative has been identified that can effectively produce an admissions pool that meets the objective of inclusion. See Cheryl I. Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487, 2530–31 (2003) (reviewing LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* (2002) (commenting that the Harvard Civil Rights Project has concluded that three challenged admissions plans do not “constitute viable race neutral means of achieving meaningful racial diversity”)). On the other hand, the success of a program might be measured by the amount of resistance it generates. If so, the ten percent plan in Texas is a huge success. The facts are murky. While the vice provost says that the data shows that the students admitted under the program do better than their classmates, the critics say the SAT scores are “a better measure of students’ abilities.” Jonathan D. Glater, *Diversity Plan Shaped in Texas Is Under Attack*, N.Y. TIMES, June 13, 2004. Most experts agree that the fight over the ten percent rule is about class—pitting parents and school administrators from rural and urban schools against the parents of students from “elite high schools in wealthy areas.” *Id.*

social pressures, and cultural beliefs that explain why the test is used improperly. We have shown that some decision makers: (1) improperly use the LSAT scores in ranking schools, in making admission decisions, allocating financial aid, and judging the quality of the education or the quality of the students at a particular institution; (2) improperly treat the LSAT as a measure of intelligence and prospective competence as a law student and a lawyer, none of which can be accurately measured or predicted by the test; (3) treat the test scores as if a difference of one, two, or even five points signals a significant difference in the capability of applicants; (4) misuse the test by treating it as an unqualified predictor of applicants' chances of passing the bar exam; and (5) misrepresent the significance of studies of the relative performance of groups on the examination in order to "prove" that one group is more qualified to attend law school or to be educated at "elite" institutions.

*A. Reforming the Test and the Way Scores Are Reported*

The LSAT is a test that is psychometrically validated. The validity of the test, however, is only useful in predicting performance in the first year of law school for some, but not all, accepted students. A sound, fair admissions program is

not merely an exercise in predicting first-year academic performance. Its goal is much broader—assembling a class of individuals to share each other's learning experiences, and who possess talents and skills that will contribute to the profession, frequently talents and skills *not* measured on the LSAT or captured in undergraduate grades.”<sup>110</sup>

The LSAC is currently experimenting with or supporting research that seeks to identify alternative criteria that can be incorporated into the test that will be useful in predicting success beyond the first year or that can be used in conjunction with other instruments providing the same level of reliability.<sup>111</sup> Some

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<sup>110</sup> *New Models to Assure Diversity, Fairness, and Appropriate Test Use in Law School Admissions*, available at <http://academic.udayton.edu/race/01justice/LegalEd/LSA%20Practices.pdf> (last visited Jan. 24, 2006). As one cognitive psychologist has noted: “The problem with the test validation procedure as it is typically done is that it creates closed systems—systems that are circular and that can make tests look good, regardless of whether they are. Correlating tests either with other tests or with school grades is problematic.” Sternberg, *supra* note 9, at 160 (citation omitted).

<sup>111</sup> See Hall, *supra* note 9, at 23–24 (describing a multi-year study funded by the LSAC, which looks at factors that may predict lawyer effectiveness).

of the proposed reforms actually test what might be called “social competence.”<sup>112</sup> The ability to listen to others, for example, is a skill critical to the adequate representation of clients. If it were possible to assess an applicant’s ability to empathize with others, that might be a valuable addition to the examination as well. Research on the problem of timing has been undertaken. Separating cognition from speed puts distance between aptitude tests and some of the recognized problematic aspects of IQ tests.<sup>113</sup> Perhaps the most significant aspect of the LSAC’s work is the development of a more individualized, computerized module that expands the kinds of testable skills that can be assessed.

The LSAT measures certain skills rather than knowledge of particular subject matters, or so the LSAC maintains. Verbal ability and reading comprehension are tested, both very important to the practice of law. Questions that test logical reasoning, however, advantage those who are able to draw the proper inferences from facts in a problem, and in this context, knowledge of subject areas matters. It is not possible to make a test “culture free,” but test makers should strive to make tests “culturally fair”<sup>114</sup> in every respect. If the content of the knowledge tested on the LSAT were made explicit, the test would be fairer and the process more transparent.

The LSAC has voiced concern about problems of misuse and over-reliance on the LSAT and must continue to do so. The LSAC must continue to caution publicly against overuse and over-reliance on LSAT scores and LSDAS reports. It must

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<sup>112</sup> In the literature debating the meaning of the word “intelligence,” there are some who advocate an approach that identifies the “typical features” of intelligence. Among these are practical problem-solving ability, verbal ability, and social competence. See Sternberg, *supra* note 9, at 160–65 (discussing three theories of the meaning of “intelligence”).

<sup>113</sup> At a minimum, the claim is made that those with higher intelligence are able to process information faster than those with a lower IQ. This “speed” factor is built into standardized tests, which are timed. See Stephen Ceci, *IQ Intelligence: The Surprising Truth*, PSYCHOL. TODAY, July/Aug. 2001, at 46, 48. For a criticism of the effect of speediness on exam scores, see William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 979 (2004) (criticizing timed tests as measures of IQ because the two “are viewed as distinct, separate abilities with little or no correlation”).

<sup>114</sup> White, *supra* note 91, at 40 (arguing that getting beyond nineteenth century assumptions about tests would involve cultural fairness along with several other propositions listed by the author).

develop reporting practices that will make such abuse more difficult if not impossible. One attempt at reform—the use of bands rather than a single numerical score for each candidate—could curb the worst abuses with respect to the use of LSAT scores, but this alternative has not been vigorously pursued.<sup>115</sup> Another strategy is to construct LSAT scores in a way that makes them irrelevant or unusable in the ranking process. LSAC has experimented with the idea of a test score that is “school specific” in its reports to applicants.<sup>116</sup> Since some of the most pernicious uses of the test scores are caused by the use comparatively of test scores to generate rankings, we support the LSAC in its exploration of different ways of reporting information.<sup>117</sup> These alternatives potentially do less damage than current practices to the goals of fairness and justice in legal education but still leave the LSAT situated prominently in the decision-making process.

A more radical strategy is to move away from quantitative scores—even bands—and use qualitative indicators keeping in mind the need to provide schools with information about the capacity of the test taker to perform in law school. For this purpose, it would be sufficient for a school to be apprised that a test-taker's performance was below average, average, or above average. A student whose performance is below average is a student whose score raises doubts about his or her ability to read or to do inferential reasoning based on cues contained in problems at a level required for those starting law school. This

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<sup>115</sup> The LSAC explains the score band in the following way: “[Score bands] reflect the precision of the LSAT and are expressed as a range of scores that have a certain probability of containing your actual proficiency level.” See LAW SCH. ADMISSION COUNCIL, YOUR LSAT SCORE, available at <http://lsat.org/LSAC.asp?url=/additional-info/lsat-score/asp> (last visited Jan. 24, 2006). The LSDAS report includes both a banded score and an actual score. It is the single score that is used by both *U.S. News* and law schools in their promotional materials.

<sup>116</sup> LSAC has the capacity to communicate information to the law schools and student test takers without a numerical score; alternatives that are currently under study include score bands and school specific scoring as well as a test more tailored to the needs of the individual test taker. Some of the proposals are designed to subvert some of the over-reliance and overuse prevalent in its present form. See Daniel Golden, *Law Schools Hatch Rebellion Against U.S. News Rankings*, available at <http://www.chesslaw.com/wsjs-usnews.htm> (last visited Jan. 24, 2006).

<sup>117</sup> See, e.g., *New Models to Assure Diversity, Fairness, and Appropriate Test Use in Law School Admissions*, *supra* note 110 (offering eight models for consideration by law schools).

kind of broad assessment could and should be complemented with other pertinent information about the candidate that more fully documents her potential for success.

It is true that differences in law schools—in instructional techniques and in the balance struck between doctrinal law and explorations of theory—may have significance both in terms of the academic achievements of students that the school may wish to accept and in the intellectual and ideological preferences of the students who wish to apply. While the LSAT claims only to measure reading comprehension and reasoning ability, not the depth or proficiency a student may have achieved in college, LSAT scores may signal a level of sophistication in both reading and reasoning. These differences cannot and should not be expressed using a point system, which suggests that because one score is “higher” than another, sometimes by as little as one or a few points, one candidate is superior to another.

This last suggestion, even more than some of the other strategies discussed in this Article challenges the value of seeking ever more calibrated or sharply defined scores for use by law schools to distinguish between or among applicants. Schools might find that there are incidental benefits to them in moving away from a single score as such a system would also limit the extent to which test scores could be used to calibrate differences between law schools in any ranking system.

Finally, to the extent that scores are affected by socioeconomic factors, a reporting system should be devised that alerts schools to the potential of students whose performance on the LSAT exceeds or surpasses what might have been predicted. If, for example, a student from a rural high school in the Midwest attends a state institution of higher education and her LSAT score is very high, but not as high as a graduate from a private high school and Ivy League college, who is the more qualified candidate for law school? Some might argue that one whose performance is exemplary, especially since he or she did not have the academic advantages and resources available to more privileged students, is the more qualified candidate. This student’s “merit” is undervalued by a strict numerical ranking of performances on a standardized test.<sup>118</sup> While whole file review

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<sup>118</sup> The statistics that demonstrate the amount of economic inequality in the U.S. vary, but one statistic frequently cited is that three-fourths of the college students at the most selective universities and colleges come from the wealthiest

can address these merit-related issues, we argue that more vigorous exploration of ways to construct and to report test scores is also justified.

*B. Creating a Broader and More Inclusive Definition of Merit*

No one disputes that the LSAT has predictive validity with respect to the academic success in the first year of some, though not all, students. The LSAT tests a narrow range of cognitive skills and neglects others, which may be equally important to the problem solving abilities necessary for the practice of law. Some of these, including emotional intelligence, and tacit and practical intelligence, have been investigated by cognitive psychologists but have not been incorporated in the design of the LSAT. This research on alternative forms of intelligence should be investigated for alternative questions or testing methodologies that are less hegemonic and narrow in evaluating the merit of an applicant. Research on the intellectual skills that make professionals successful also draws on expertise and methodologies from other disciplines and raises questions about the predictive validity of the test with respect to the actual practice of law or the other fields of employment law school graduates might enter. A range of lawyer competencies is currently being investigated by Berkeley Professors Marge Shultz and Sheldon Zedeck.<sup>119</sup>

Finally, the writing component of the LSAT is undervalued by both applicants and faculty and admissions professionals. The LSAC, a true service provider to law schools, is responding to concerns about the quality of writing by students in law school. Writing skills may soon be subjected to the quantification in much the same way the other sections of the LSAT. But the writing sample could be used to explore more than familiarity with the rules of grammar. The answers most students currently

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quarter of society. See Anthony W. Marx, Amherst College 183rd Commencement Address (May 23, 2004), *available at* <http://www.amherst.edu/commencement/2004/address.html>. For a discussion of the issues of economic inequalities in higher education, see generally REALITY CHECK: LEFT BEHIND—UNEQUAL OPPORTUNITY IN HIGHER EDUCATION (2004), *available at* <http://www.tcf.org/Publications/Education/leftbehindrc.pdf>, and WILLIAM G. BOWEN, THE QUEST FOR EQUITY: "CLASS" (SOCIO-ECONOMIC STATUS) IN AMERICAN HIGHER EDUCATION (2004), *available at* <http://www.mellon.org/questforequity.pdf>.

<sup>119</sup> See Hall, *supra* note 9, at 24 (listing certain "effectiveness factors" that Shultz and Zedeck have identified as indicative of effective lawyering).

give to these questions are mechanical, reflecting the strategies urged on applicants by the test preparation companies and a cost/benefit analysis that counsels them to restrict the time devoted to this exercise. The problems are always interesting and the answers sometimes show great insight or creativity. Encouraging applicants to commit their reasoning process to a written record could give faculty and admissions professionals a real tool for detecting the talents and potential of an applicant. If this opportunity to reason through a short problem was not simply incidental to a test designed to produce a numerical score, and if the writing sample is not itself converted into a perfectly calibrated score assigned by the testing company, the writing sample could be part of a truly evaluative decision-making process.

Law schools cannot continue to express a commitment to diversity and affirmative action while over-relying on and overusing the LSAT scores as a predictive measure. We advocate a redefinition of merit that could be used to consider the qualifications of all students. We acknowledge that LSAT scores correlate with students' race and class background. Persons of color as well as those with lower socio-economic backgrounds do not do as well on the test.<sup>120</sup> It is indisputable that using a decision process that privileges the LSAT, even in combination with the GPA, substantially reduces the proportion of applicants of color who are admitted to law school.<sup>121</sup> One expert determined that if only LSAT and GPA scores had been utilized in admissions decisions in 1990–91, a mere ten percent of the students of color admitted that year would have been accepted.<sup>122</sup>

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<sup>120</sup> See Guinier, *supra* note 29, at 511 (describing the relationship between family income and scores on standardized tests: as income goes up, scores go up at well); Kidder, *supra* note 92, at 194 (illustrating the lower graduation and bar-passage rates for certain ethnic groups); Roithmayr, *supra* note 48, at 192 (discussing the racial scoring gap on the LSAT).

<sup>121</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003) (referring to the testimony of Erica Munzel, Director of Admissions, who “asserted that she must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores”). To maintain their status, elite law schools like Michigan continue to rely on the use of high LSAT scores as an admissions tool to reach some students and supplement the GPA and LSAT with other indicators to identify other qualified applicants, including not only non-whites and other under-represented candidates, but also alumni/ae connections and others. See *id.* at 338 (providing examples of the “many possible bases for diversity admissions”).

<sup>122</sup> Wightman, *Threat to Diversity*, *supra* note 30, at 21.

The elimination of discrimination in order to achieve a truly inclusive and diverse student body (and profession) is thwarted by over reliance on the LSAT. The conflation of merit with a numerical score on an examination contributes to racial stereotyping. The LSAC and other decision makers have taken some constructive steps to emphasize to decision makers in the law schools and in the legal community that the LSAT simply cannot be the single most important variable in the admissions process and that its use beyond statistical prediction of the first-year grades is inappropriate. More can be done.

Considerations of efficiency should not drive the admissions process. It is critical that law schools identify and increase the use of other evaluative techniques and tools for use in making admissions decisions. At present, though, the best solution is the use of a "whole file" review. Redefining merit in a way that expands criteria of selection in this way is much more time-consuming and expensive, but it represents a fairer and more equitable way to allocate resources like legal education. Whatever the criteria of selection are, they should predict not only an applicant's potential success in law school, but also the likelihood that the student will be a hardworking and productive lawyer and that he or she will be able to employ the knowledge he or she gained in law school in important ways in whatever profession he or she decides to pursue. Ultimately this will promote adherence to standards and lawyering values important to the legal education and the profession. Admissions decisions should also take into consideration the needs of clients, both those that are presently served and those who are now underserved in part because of present admission practices.

There have already been some significant efforts to redefine merit in the admissions work of some law schools. Some initiatives have been supported by grants from the Diversity Research Fund of the LSAC, a fund that no longer exists.<sup>123</sup>

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<sup>123</sup> In 2000, the Board of the LSAC adopted its LSAC Resolution on Diversity in Legal Education and Proper Use of the LSAT, which says in pertinent part:

Due to this concern regarding undue emphasis on the LSAT, the Law School Admission Council commits the expenditure of up to \$10 million over the next five years to:

- Study, and encourage change where warranted, the culture and attitudes of legal educators, lawyers, judges, law students, prospective law students, prelaw advisors, journalists, and the public regarding the use of the LSAT;

There is no reason why organizations like the ABA and the AALS cannot adopt more flexible rules that would encourage experimentation with admissions standards and more research on this subject. The LSAC, an organization of law schools which profits from the administration of tests, should continue to fund empirical research and experimental trials of alternative admissions procedures. In the past, the LSAC itself developed a set of alternative admissions policy initiatives that used the LSAT in a more limited fashion. The LSAC engaged a number of law schools in a project to use and assess these new approaches to admissions decision making. Such initiatives are not likely to be widely adopted without the backing of faculty and there is very little information available to educate faculty about these initiatives. Such efforts should be more widely publicized at AALS meetings and other academic conferences and in other fora open to faculty and administrators.

Faculty must be better informed about the admissions process, the controversy over testing, its impact on diversity, and the questions of fairness and justice raised by the narrow definition of merit. This is a critically important project, notwithstanding the ruling of the Supreme Court in *Grutter*.

### *C. Abandoning the LSAT as a Criterion for Admission to Law School*

If a competitive ethos continues to prevail in law schools with the LSAT exam scores as the measure of success; if the perception of standardized tests as a measure of innate intelligence cannot be altered; if those who administer admissions programs continue to rely on the test even when there is no correlation between the test results and the performance of their student body; if faculty and admissions professionals cannot or will not assess candidate scores in a fair and accurate way, then it may be in the best interest of legal education to abandon the LSAT. This option is presently not available because of ABA accreditation standards, except in the

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- Promote appropriate use of the LSAT among all test-score users and test takers; and
  - Develop and implement new approaches to law school admissions that further the diversity goals of legal education.

LAW SCH. ADMISSION COUNCIL, LSAC RESOLUTION ON DIVERSITY IN LEGAL EDUCATION AND PROPER USE OF THE LSAT (2000) (on file with Phoebe Haddon).

rare instance when the ABA formally acquiesces. We raise it as a possibility in a time when the power and infallibility of standardized tests can be questioned. The recent report of errors in grading and challenges to the use of the SAT by colleges<sup>124</sup> have created a moment of opportunity to interrogate our blind commitment to standardized tests. Innovations in the admissions process by liberal arts colleges suggest ways in which indicia of achievement other than GPA and LSAT score can be used in evaluating applicants for admission. All efforts for decision makers to seek and employ alternatives to the test for evaluating and choosing excellent candidates should be encouraged.

The project is really simple. We need an admissions process and admissions standards that will allow us to admit those who want a legal education and who have the potential not just to succeed in law school but to do good work with a law degree. Success may be a job at a large law firm, but it might also be providing legal services to those who need it most. Symposia like the one sponsored by St. Johns University School of Law and published in this Symposium issue of the *St. John's Law Review* and meetings like the Dreamkeeping Conference convened by LSAC to educate minority faculty about the abuses of the LSAT are important. The SALT Statement on the LSAT and the revision of the *ABA Standards for Approval of Law Schools* are a good beginning but they are not enough. If we are to create and maintain momentum in challenging the misuse and abuse of the LSAT and the narrow definition of merit, and if we are to affirm the values of inclusion and diversity, we need more opportunities to meet, to talk, and to collaborate.

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<sup>124</sup> See Karen W. Arenson, *Testing Errors Prompt Calls for Oversight*, N.Y. TIMES, Mar. 18, 2006, at A1.

## APPENDIX

### SOCIETY OF AMERICAN LAW TEACHERS SALT ON THE LSAT

DECEMBER, 2003

Although law schools have access to a host of relevant information about candidates for admission, an applicant's Law School Admission Test (LSAT) score has become the most determinative factor in the admission process. In response to the volume of applications facing admission officers; to the competition created by the misleading but widely-read magazine "rankings"; and to the vociferous complaints of anti-affirmative action forces, the objective-sounding, labor-saving standardized test is riding a tidal wave of popularity.

The LSAT is now widely used as a predictor of success throughout law school and on the bar exam, purposes neither contemplated nor advocated by the test-makers themselves. Most disturbingly, over-reliance on the LSAT serves as a significant barrier to achieving excellence and diversity in our law schools and in the legal profession. As the largest membership organization of law professors in the nation, SALT urges law schools, the Law School Admission Council (LSAC), the Association of American Law Schools (AALS), the American Bar Association (ABA), and others committed to our profession and the public we serve to abandon the improper use of this test. Together, we must identify and promote more accurate ways of defining and measuring merit. This Statement, and the proposals for reform discussed herein, are designed to further this endeavor.

[A more detailed, thoroughly-documented version of this Statement will appear in a forthcoming issue of the St. John's Law Review.]

#### I

#### TODAY'S LSAT: SADDLING ITS MODEST GOALS WITH CRYSTAL-BALL EXPECTATIONS

Notwithstanding the protestations of the LSAC and its

psychometricians, who merely sought to design a test that accurately measures limited skills, test scores continue to be accepted today as a gross measure of intelligence and/or of the test taker's general knowledge and academic competence.

The LSAT is a standardized, three-hour, multiple-choice examination which is intended to measure aptitude, not achievement – a much-contested intention itself. The test purports to measure reading comprehension and analytical and related reasoning skills. The resulting test score is said to predict whether an applicant will successfully complete the first year of law school. Yet even this limited claim is contested. One study finds that the test explains only 16% of the variance in grades among students enrolled at ABA accredited law schools (while the LSAT combined with UGPA explains 25% of the variance). Even more problematic is the variation in the correlation between LSAT scores and first-year grades from school to school. Further, race and gender continue to be negatively correlated with such test scores.

Despite the test-makers' modest goals and warnings from the LSAC against over-reliance on LSAT scores, many deans, faculties and law school admission officers continue to treat the test as a nearly-definitive measure of aptitude and merit. Notwithstanding the claims in glossy law school catalogues that admissions is a "personalized", "holistic" process, studies demonstrate that 70-80% of all admissions are determined strictly on the numbers.

The LSAC has emphasized that modest differences in test scores do not matter. Even as much as ten points under the current scoring system is inconsequential in predicting the relative success of students in law school. Yet, despite these cautionary words and the availability of "banded scores," law schools continue to use the LSAT as a blunt instrument to determine the fate of applicants whose scores may be within two or three points of each other and to set absolute lines of demarcation for admission. In addition, over-reliance on the LSAT as a valid predictor of first-year grades ignores a large body of scholarship suggesting that law students of color and non-traditional students confront an unfamiliar and often hostile learning

environment which may compromise their ability to do well during the first year despite subsequent success in the second and third years and in the profession.

Analytical and reasoning skills and reading comprehension are not the only important (and testable) features of a well-structured first-year curriculum. Over-reliance on the LSAT reflects an unjustifiably narrow emphasis that undervalues other important lawyering skills and core values of the profession. Although the LSAT was never designed to predict overall performance in law school or professional competence in the practice of law, even employers have been known to ask candidates for their LSAT scores in job interviews with firms in the private sector, government agencies, courts and even in legal education.

Far too much emphasis has been placed on how an applicant will do on a first-year essay exam when making the fundamental determination as to whether he or she will make a good lawyer. To the extent that law schools and prospective employers over-rely on the LSAT, they fail to give appropriate consideration to other attributes and skills that are important to success in law school and, ultimately, in the delivery of legal services. The LSAT does not measure motivation, perseverance, character, interpersonal skills, problem-solving skills, oral communication, empathy for clients, commitment to public service, or the likelihood that the applicant will work with underserved communities. Law schools, by neglecting these important qualities, do a disservice to the legal profession and its clients, and they limit the legal profession's ability to provide meaningful access to legal services to all segments of society.

If law schools are utilizing the LSAT to assist them in selecting those applicants who will be the most successful as law students and, ultimately, as practitioners and public servants, their reliance is misplaced.

## II

### INSTITUTIONAL PRESSURES TO MISUSE THE LSAT

Admission professionals at law schools across our nation are under tremendous pressure to secure the admission of students

with high test scores. This pressure is the result of three forces: A) popular magazine "rankings" and their appeal, in our status driven culture, to all of us in the academic food chain – applicants, enrolled students, faculty members, administrators, alumni/ae, employers, and benefactors; B) the cost-saving aspects of a number-based admission process, which reduces much of the need for human intervention; and C) diversity opponents and others who argue that less reliance on test scores and greater attention to other qualifications will compromise America's traditional "meritocracy."

A) *U.S. News & World Report* Rankings

Ostensibly, *U.S. News & World Report* ranks law schools for the benefit of consumers, namely potential law students and their parents. While this ranking has been condemned by the AALS and the ABA for its methodological errors as well as for its incompleteness, rankings are closely followed by faculty members and administrators, as well as by prospective applicants. In this race to improve or at least maintain their rankings, schools fear a fall down the pecking order and hail a rise as proof of significant institutional improvement. Deans regularly refer to improved rankings and high median LSAT scores in fundraising campaigns and in developing alumni/ae relations.

*U.S. News* relies heavily on the mean LSAT of the enrolled law school class, and a difference of one point may separate a "first tier" from a "second tier" school. Consequently, many admission officers, under increasing pressure from deans and professors to better market their school in the popular press, pay inordinate attention to LSAT scores. The process has become a numbers game, with admission officers calculating how many students with certain scores have to be admitted before they can begin to admit candidates with lower scores but with greater over-all merit.

Some law schools, concerned about the effect of the rankings on their ability to compete for students, have adopted quick-fix methods to raise LSAT scores in order to maintain or improve their rankings in *U.S. News*. Former AALS president Dale Whitman has warned about the incentives for unethical behavior: "The desire for high rankings seems increasingly to

induce us to behave in ways that we would not otherwise choose and to distort our educational judgments and priorities.” The questionable behaviors he reports include everything from the commonplace distortion of the selection process in order to maintain an LSAT median that preserves or improves a school’s ranking to soliciting the transfer of minority students enrolled in neighboring institutions in their second year when their LSAT scores will not affect the ranking of the school.

The belief that LSAT scores measure the quality of the incoming class and the need to maintain a high median LSAT for ranking purposes has also affected the distribution of financial aid. Schools now “buy” high LSAT scores without regard to need. Given the prohibitive cost of legal education, the enormous debt burden facing so many students, and the limited availability of loan forgiveness programs for students who pursue public interest employment, the practice of using LSAT scores in awarding financial aid is disturbing.

The LSAT was not designed to measure the relative worth of law schools. Educational quality can be measured by numerous indicators, including, dare we say, the quality of classroom teaching, as well as the quality and variety of clinical offerings, faculty scholarship, faculty standing in the legal community, the richness and diversity of the student body, the quality of services provided to students, the level of student satisfaction, the success of its graduates, and much more. Unfortunately, the LSAT has been accorded a significance and carries a weight far beyond its original, intended purpose.

#### B) Cost-Saving

By and large, law schools have progressed from a system where faculty committees set admission standards, reviewed all the files, and made the hard decisions; to hiring admission professionals to help faculty with the process; and now, to turning over the task almost exclusively to the admission office. Admission professionals bring valuable training and expertise to the process, yet the sheer volume of their work can be overwhelming, and, most significantly, they are under increasing pressure from deans and faculty members to raise median LSAT scores. Inevitably, over-reliance on the LSAT has become

widespread, and individual assessments have become increasingly cursory. With the "presumptive deny" and "presumptive admit" systems, it has been reported that admission officers at nearly one-half of our nation's law schools read less than 30% of the files; at 75% of the schools, they read less than one-half of the files; and at only 10% of the schools do they read more than 70% of the files.

Over-reliance on the LSAT offers an inexpensive, simplified way to make admission decisions. The process is streamlined, efficient and predictable, but it fosters a misguided sense of certainty about the performance of admittees and unfairly results in the rejection of deserving students. Nor is it likely to identify and select the most capable future lawyers best suited to serve all segments of society. Not surprisingly, it also serves to perpetuate an overwhelmingly white legal profession. Because faculty members at so many law schools have abdicated their role of thoroughly reviewing applicant files, they remain largely unaware of the dominant role that the LSAT plays at the expense of other criteria. In short, we have turned a human enterprise into a numbers game which compromises other genuine efforts to achieve an excellent and diverse bar.

The LSAT has become an enormously popular labor-saving device which, conveniently but undeservingly, has been accorded the career-defining attributes of a crystal ball. The pursuit of excellence requires that we avoid seductive shortcuts in the admission process, always keeping in mind the goals of our institutions and the central role which our profession plays in a nation committed to principles of justice and equality. Former ABA president William Paul has urged us to abandon our over-reliance on the LSAT and put more of our budget into the admission process in order to better assess personal qualities such as character, leadership, and proclivity toward serving the underserved. This approach, he acknowledged, would require, at the least, more careful file review, and perhaps even personal interviews – interviews that would reveal those marvelous applicants with focus and direction and clarity of purpose, the ones who have asked the deeper questions and are less likely to become dissatisfied later.

C) Today's Anti-Diversity Forces and the Racialized Legacy of Standardized Testing

Although the LSAC maintains that its test "is fair to all takers regardless of racial, ethnic, gender, regional, or national background," test results vary significantly along race, gender and class lines. While there are many theories but no definitive explanation for these differences in performance, an understanding of the history of standardized testing may provide some valuable insights.

From the very beginning, standardized tests were used to "prove" the superiority of Northern European whites, the inferiority of African Americans, Jews and Southern European immigrants, and as evidence of the need for restrictions on immigration. Indeed, Carl Brigham, who devised the first standardized test for use in college entrance exams and who subsequently headed the Educational Testing Service, had once been a major proponent of immigration restrictions and eugenics. The pioneers of ability testing developed their tests as part of a call for "standards" in the professions, often a euphemism for racial, ethnic, and income-status exclusions.

The elite law schools began using aptitude tests in the early twentieth century. Their use spread, and in the late 1940s an organization was formed to develop a test for law school admissions. The first LSAT-type test in 1947 was based upon the original IQ test and data collected by the Army to test recruits in World War I. Such data had also been used to prove that Eastern European immigrants and African Americans were less intelligent than Northern and Western Europeans. Thus, the original LSAT had historical roots in efforts to substantiate racial inequality and nativism.

Despite this history, contemporary discourse insists on correlating test scores with intelligence and merit. Today, the Educational Testing Service (ETS) and the LSAC are working hard to eradicate any risk that the LSAT itself operates to unfairly disadvantage minority groups, yet the racialized history of standardized testing fuels current debates about the significance of racial, class, and gender differentials in performance. The belief that test scores are a measure of

cognitive ability leads inevitably to discussions of racial inferiority/superiority and the privileges that should belong exclusively to those who are superior. Despite attempts by the LSAC to clarify the purpose and the meaning of test scores, public discourse and even some judicial decisions continue to conflate test scores, intelligence, and merit.

Conservative legal scholars and others opposed to affirmative action all make the same argument: merit is best measured by UGPA and LSAT scores, and, thus, racial and ethnic minorities are, as a group, less meritorious – that is, less qualified – than whites. Given the prevalence of racially-based attitudes in American society generally, and our culture's abiding faith in the ability of science to devise some standard by which human capabilities can be measured, standardized tests have enormous appeal. Tests are potent symbols, especially when the aggregate difference in performance between whites and certain minority groups is invoked by those who wish to "prove" that the quality of higher education has been impaired by the admission of "unqualified" minorities. In this argument, we hear the echo of the past, the notion that Western culture is at risk unless those who do not belong, those who are inferior, are kept at bay.

Recently, the Supreme Court, in *Grutter v. Bollinger*, recognized that law schools can legitimately seek to devise a race-conscious admission process designed to create a challenging and diverse learning environment and, ultimately, to graduate better qualified legal professionals. Over-reliance on the LSAT impedes the attainment of these objectives.

### III PROPOSALS FOR REFORM

We at SALT recognize that there are risks inherent in any process that involves subjective judgment. Unrestrained and standardless procedures invite abuse and bias. In offering recommendations for reform, we strive for an admission process which identifies the finest candidates for a law school education and service to the public.

#### A) Reform the Way Test Scores Are Reported

SALT urges the LSAC to continue to publicly caution against

over-reliance on LSAT scores for law school admission. Unfortunately, one potentially effective attempt at reform, the use of “banded scores” in addition to a single numerical score for each candidate, has been largely ignored by law schools, as well as by the magazine rankings. Currently, the LSAC is experimenting with offering school-specific LSDAS reports in place of individual test scores. SALT recommends that the LSAC not report individual scores at all but, rather, report simply that a test taker’s performance was below average, average or above average. As noted above, slight numerical differences have no statistical significance whatsoever. We also recommend the adoption of a reporting system that would alert schools to the potential of applicants whose performance on the LSAT exceeds (or falls short of) what might have been predicted on the basis of socio-economic factors.

B) Create a More Realistic and Useful Definition of “Merit”

The LSAT does not and was not intended to predict future success in professional practice. Current research into lawyer competencies suggests that other skills can and should be tested. In addition, recent research on various forms of intelligence should continue to be investigated in order to devise more sophisticated, more encompassing, and less hegemonic means of testing.

The goal of admitting the most qualified entering class of law students cannot be achieved as long as the LSAT remains the dominant factor in admissions. As the LSAC reminds us, the LSAT “simply cannot be the single most important variable” in the admission process, and its use beyond statistical prediction of first-year grades is indefensible. True “merit” embraces far more qualities than can be measured on a three-hour standardized test. SALT believes that law schools must identify and utilize other, more meaningful criteria in making admission decisions. We recommend “whole file” review, paying close attention to the many relevant criteria noted above, and the renewed engagement of faculty members in that process. Admission officers should also take into account the needs of those individuals and communities underserved by the legal profession, a problem attributable, in part, to long-standing, LSAT-driven admission practices.

Simply stated, law schools cannot continue to verbalize a commitment to excellence, equality and diversity in the legal profession while continuing to utilize the LSAT as the primary gate-keeper. Significant efforts are being made to re-define merit in the admission process, and SALT encourages increased support for this work by the LSAC and other funding organizations, as well as by faculty members and administrators, the practicing bar, and all other stakeholders.

C) If All Else Fails, Abandon the LSAT as a Criterion for Admission to Law School

If law schools continue to compete for distinction through popular magazine rankings, where high LSAT scores determine success; if there remains an unwillingness to challenge the perception that standardized tests measure innate intelligence; if those who administer admission programs continue to rely on the LSAT even when there is no correlation between test scores and either the performance of their students or the professional contributions of their graduates; if budgetary constraints are such that a careful, "whole file" review system is regarded as prohibitively expensive and time-consuming, then it may be in the best interests of legal education to entirely abandon the Law School Admission Test.

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