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Alex M. Johnson, Jr.

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## **INCLUDING DIVERSITY IN U.S. NEWS' RANKINGS: ONE SMALL STEP IN THE RIGHT DIRECTION**

ALEX M. JOHNSON, JR.\*

Robert Morse, director of data research at *U.S. News & World Report*, is the principal architect of that magazine's annual ranking project: America's Best Graduate Schools which ranks American Bar Association (ABA) accredited law schools (the rankings).<sup>1</sup> *U.S. News & World Report (U.S. News)* has been publishing the rankings since 1990 and Mr. Morse has played the preeminent role in developing the current methodologies that are used in the rankings as well as playing an active role in survey design, methodology changes, discipline changes, and monitoring data collection. It is fair to state that Mr. Morse is not only the public face of the rankings, he is also the primary defender of its methodology and validity. Over the years, he has become a familiar face to legal educators as an honest, open and staunch proponent of the rankings.

Hence, it was no surprise that Mr. Morse appeared at the program: Opening Doors: Making Diversity Matter in Law School Admissions, which is the subject of this symposium, to defend the validity of the rankings and to explain specifically why *U.S. News* does not include

\* Perre Bowen Professor of Law and Director, Center for the Study of Race and Law, University of Virginia Law School. I thank Jonathan Schulman for his excellent research assistance; all remaining faults are my own.

<sup>1</sup> Mr. Morse is also responsible for the publication of the magazine's Best Colleges ranking project. Since 1952, the Council of the Section of Legal Education and Admissions to the Bar (the Section) of the American Bar Association (ABA) has been the accrediting body for U.S. law schools per the Department of Education mandate. Once approved, a law school is subject to reaccreditation per a site review every seven years (the sesquicentennial review). The provisional, full, and reaccreditation decisions are based on the Standards for Approval of Law Schools (referred to as Standard) which are promulgated and published by the Section and disseminated to law schools. See *infra* notes 26-35 and accompanying text (discussing the relevant Standards in this article). A law school receiving provisional or full accreditation is deemed to be an ABA approved law school and the graduates of that law school may sit for the bar examination in any U.S. jurisdiction.

diversity as a weighted evaluative metric in evaluating law schools in the rankings. Although I was unable to attend the conference due to a conflict,<sup>2</sup> I perused with interest the slides that Mr. Morse shared with the audience that day and his written remarks<sup>3</sup> on why *U.S. News* does not include diversity as an evaluative metric in the rankings.

I did so for two reasons. First, I find it odd that that *U.S. News* has gone to the trouble of collecting and publishing the *U.S. News* Diversity Index (the Index), which was created during the 2010-2011 academic year,<sup>4</sup> yet has elected not to include that index in the rankings. Instead, the Index has been published as a separate metric unconnected to the rankings. That separate publication of the Index and non-inclusion in the rankings results in the Index being largely ignored by most in academia.<sup>5</sup> Second, and perhaps more importantly and as addressed in greater detail *infra*,<sup>6</sup> I contend that the growth and the import of the rankings legal education has resulted in a lessening of diversity in law schools and I consequently view the inclusion of a diversity index in the rankings as an important counterweight to that unintentional (I hope) consequence of the rankings.

Consequently, I was hopeful that Mr. Morse would provide a cogent and reasonable explanation regarding this lacuna—the lack of inclusion of the Index in the rankings—that would put to rest any contention that *U.S. News* minimizes or fails to value the benefit of diversity. Indeed, I was hopeful that Mr. Morse would announce a change in policy that would result in the inclusion of the Index in future iterations of the rankings. However, after viewing the slides and reviewing Mr. Morse's article, I was left puzzled and frustrated; puzzled because the reasons Mr. Morse provided for failure to include the Index in the rankings do not seem to be defensible or meritorious, and frustrated because Mr. Morse, and other defenders of the rankings, refuse to acknowledge the deleterious impact the rankings have

<sup>2</sup> As Director of the University of Virginia Law School's Center for the Study of Race and Law, I was hosting a conference on Increasing Diversity in the Legal Profession on the same date.

<sup>3</sup> See Robert Morse, *U.S. News' Views on Including Diversity in Our Best Law Schools Ranking*, ST. JOHN'S J. C.R. & ECON. DEV. (forthcoming Nov. 2013).

<sup>4</sup> As noted in Mr. Morse article, *supra* note 3, the methodology used to compute the Index was not developed by Mr. Morse, but is based on a 1992 article by Phillip Meyer and Shawn McIntosh in *The International Journal of Public Opinion Research*. The fact that Mr. Morse has not developed his own methodology to measure diversity may lend some support to the point that measuring diversity is not truly an important evaluative metric for the magazine.

<sup>5</sup> As discussed in greater detail *infra*, this results in minimizing diversity in two ways. First, not many pay attention to the Index when it is published, so the "benefit" of being most diverse and the "harm" of being least diverse carries little, if any, weight when compared to the law school's ranking in the rankings. Second, the fact that diversity is not included in the rankings sends a very strong message that diversity is not integral to the law schools' mission and is something ancillary that can be taken care of in something akin to a footnote.

<sup>6</sup> See *infra* Part II.A.

had on maintaining diversity in law schools. Further, *U.S News* and Mr. Morse have not proposed an appropriate remedy to that harm.

These are two distinct, but related, claims and I address them as follows: In Part I, I briefly summarize the reasons given by Mr. Morse for *U.S. News'* failure to include the Index in the rankings. I then examine the methodologies employed in the rankings to see if they are so different from the alleged methodological weaknesses or differences created by the Index to test the claim that it makes little sense to include the Index in the rankings. I conclude Part I by presenting a defense for inclusion of the Index in the rankings that addresses the alleged shortcomings of the Index.

Part II, on the other hand, broadens the focus of the inquiry to detail why the rankings should include the Index given the deleterious effect the rankings have had on diversity in law schools. First, I note that the United States Supreme Court's recent grant of certiorari in *Fisher v. University of Texas*,<sup>7</sup> and the Supreme Court's recent pronouncement on affirmative action in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>8</sup> has created much speculation and dread that affirmative action may be limited or prohibited in higher education at the conclusion of next term (notwithstanding the Supreme Court's recent pronouncement in *Grutter v. Bollinger*,<sup>9</sup> that seemed to provide safe harbor for affirmative action policies for at least twenty-five years<sup>10</sup>). However, I demonstrate that the Court's decisions, past and prospective, have had little impact on diversity in legal education because the existence and influence of the rankings has effectively caused schools to voluntarily forego affirmative action policies in favor of seeking higher rankings. In effect, the battle to increase diversity in legal education has been lost *sub silentio* in the last twenty years as the rankings have increased in import.

Just as importantly, Part II documents that the rankings not only have an effect on law schools and their respective admission policies, but that the rankings have had a detrimental effect on the choices that law school applicants make in selecting which law schools to apply to and matriculate at. The result of this impact is the misapplication of law students to law schools with a resulting decline in the number of African-American students matriculating at our law schools. Although I cannot produce

<sup>7</sup> 645 F. Supp. 2d 587, 593 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

<sup>8</sup> 551 U.S. 701 (2007).

<sup>9</sup> 539 U.S. 306 (2003).

<sup>10</sup> *See id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

empirical evidence that establishes a direct correlation between the use and impact of the rankings and a decline in African-American matriculants, my review of the data does demonstrate the widening scope of misapplication and does allow me to present a reasonable hypothesis that the misapplication is due to the influence of the rankings.

A brief Part III concludes, then, predictably with a call for inclusion of the Index in the rankings as one small step in the right direction in valuing diversity in legal education and rewarding those schools that successfully accomplish the same. Not only does the Index fit comfortably within the current construct of the rankings, but its inclusion as a viable evaluative metric would be a visible testament to its import. More importantly, given that diversity, like a school's median LSAT score, is something that can be improved at little cost to the law school,<sup>11</sup> and if past behavior is any guide, the inclusion of the Index will incentivize deans and professors to increase diversity to improve their ranking.<sup>12</sup>

However, I am putting the cart before the horse. The place to begin is with the stated reasons for failing to include the Index in the rankings. For that, I turn to Mr. Morse's article and his articulation of why *U.S. News* chooses not to include the Index in the rankings and whether those stated reasons make sense given the existence and influence of the rankings.

### I. A DIVERSITY INDEX, BUT WITH NO IMPACT ON THE RANKINGS?

A close read of Mr. Morse's paper and slides allows me to group his objections to the inclusion of the Index in the rankings into three relatively broad categories that I will address in turn: 1) diversity is ill-defined and too broad to be included in the rankings (this one is actually stated at the

<sup>11</sup> This is, of course, something of an overstatement. Efforts to increase diversity are not costless and no doubt entail monetary (increased recruiting and outreach costs) and emotional consequences (the emotional consequences flow from students like Ms. Fisher who claim that they were victims of reverse discrimination and those who claim that affirmative action is inimical to its beneficiaries. See Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371 (2004) (claiming that the beneficiaries of affirmative action are harmed by its use by matriculating at schools in which they cannot successfully complete academically). My point here, and discussed in greater detail *infra*, is that certain evaluative metrics which go into the rankings, like faculty resources and, say, student-faculty ratio, are very costly to improve. Other metrics like academic reputation are almost impossible to impact or manipulate given what goes into establishing a "reputation," but some metrics, like median LSAT are relatively easy to attain and cheap as well. See *infra* Part II.A. The Index is more like the LSAT metric currently included in the rankings than, for example, faculty resources or law school reputation.

<sup>12</sup> Here the argument is straightforward: the same impetus that caused deans to try to increase their median LSAT which counts only 12.5% of the rankings, should cause them to expend the same effort on diversity if it is weighted similarly or more heavily. See *infra* notes 56-58 and accompanying text.

beginning of the paper and then restated in another guise near the end of the paper);<sup>13</sup> 2) *U.S. News* does not want to influence the public debate on diversity;<sup>14</sup> and 3) including diversity would result in *U.S. News* engaging in social engineering (appearing to support diversity) and would cause the behavior of law school's to change (presumably to increase efforts to attain diversity as measured by the Index).<sup>15</sup>

Along the way, Professor Morse makes what I would characterize as relatively minor objections to inclusion of the Index in the rankings that I will also address.<sup>16</sup> Although I will address each of the three major objections, one global observation needs to be made regarding all of the objections—they either prove too much or prove too little and cannot withstand scrutiny when the Index is compared to the rankings. By “prove too much,” I will demonstrate that if Mr. Morse’s objections to the inclusion of the Index in the rankings are valid, these arguments can be used to delegitimize the rankings itself.<sup>17</sup> By “prove too little,” I will use the methodologies employed in the rankings and defended by Mr. Morse for that purpose to undermine Mr. Morse’s reasons for not including the Index in the rankings.

<sup>13</sup> See, e.g., Morse, *supra* note 3 for the initial assertion and claim that law schools are not in agreement on a definition of diversity and later, on the note, he asserts that “[m]any questions remain over incorporating diversity in the formula. If diversity is really more than just ethnic diversity, what standard[s] should be used. . . .”

<sup>14</sup> I take the point here that *U.S. News* is agnostic about the use of affirmative action and wants to maintain that neutrality in the debate over the efficacy and use of affirmative action in higher education. As noted *infra*, *U.S. News* is not being asked to take a position pro/con on affirmative action but to simply measure how well the law schools achieve their stated goal of achieving diversity as required by Standard 212 of the Standards and Rules for Procedure for Approval of Law Schools (hereinafter “Standards”) promulgated by the Section of Legal Education and Admission to the Bar (hereinafter “the Section”).

<sup>15</sup> This objection starts with the assertion that, “*U.S. News* has not wanted the rankings to be part of the ongoing policy debate of how to achieve diversity goals in schools.” I am not sure I understand what is meant by this statement. Having diversity goals is one metric. Measuring if those goals are met is yet another metric. How those goals are met or not, that is, which are the most efficacious policies to attain those goals is yet a third metric. As I understand and view this issue, no one is making the contention that *U.S. News* should be the arbiter or evaluator of which methods best serve the goal of achieving diversity.

<sup>16</sup> Prominent among the minor reasons for lack of inclusion would be the slippery slope effect that it would create, perhaps requiring the inclusion of a diversity index in all of *U.S. News* rankings. As I address *infra*, so what! This is probably a good thing for all of the rankings.

<sup>17</sup> Many in legal education, including myself, would prefer that the “proves too much” scenario would prevail and that the arguments can and will be used to marginalize the rankings. Alas, that is not the case. As I document *infra*, even given the weaknesses in the rankings exposed by Mr. Morse’s remarks, the rankings will remain given their profitability and the American public’s insatiable desire to rank everything. Although I have no basis to support this claim, I believe that the desire for rankings can be attributable to the popularity and use of football rankings post World War II.

### *A. Diversity Cannot be Defined, Therefore it Cannot be Measured*

As noted above, Mr. Morse makes the claim that diversity has no fixed definition and therefore cannot be measured. Later, Mr. Morse expands on this objection by claiming that diversity has many components, including, ethnic, economic, and geographic, to name a few, and that if one includes a diversity index in the rankings, one must first define which type of diversity is important enough to be ranked. To be honest, I was quite surprised at this rationale for failure to include the Index in the rankings because this is perhaps the easiest rationale to debunk.

First and foremost, am I the only one to notice that the Index already defines and measures a certain type of diversity based, according to Mr. Morse, on a published methodology which I assume has some validity?<sup>18</sup> Hence, the issue as I understand it is not whether an index can be developed to measure diversity, but whether the existing Index, with all of its strengths and weaknesses, should be included as a weighted variable (preferably of equal or greater weight than the LSAT metric which is now at 12.5% of the rankings<sup>19</sup>) or metric in the current and future iterations of the rankings. As I reviewed both Mr. Morse's description of the methodology employed in the Index and descriptions of the methodology it is quite clear that it measure two variables: race and ethnicity. More to the point, it appears that the racial and ethnic categories it establishes and measures are those that have been used in the United States Census for decades.<sup>20</sup> And, although the racial categories have no scientific basis and

<sup>18</sup> Since I am not a psychometrician and claim no empirical expertise, I cannot verify that the methodology used in the current Index is empirically sound. Nor can I claim that it is an optimal or suboptimal methodology for accomplishing the task of measuring diversity. Given, however, Mr. Morse's expertise and long-standing role as director of data research for the magazine, I am relying on his expertise to insure that it is a valid methodology. Indeed, although it is not cited in Mr. Morse's remarks, the full cite to the methodology that the Index uses to measure diversity is Phillip Meyer & Shawn McIntosh, *The USA Today Index of Ethnic Diversity, in Research Notes*, 4 INT'L. J. PUB. OPINION RES. 51, 56-57 (1992). The methodology created by Phil Meyer of the University of North Carolina and Shawn McIntosh of USA TODAY, called *The USA TODAY Diversity Index*, measures diversity as "the probability that any two people chosen at random from a given area are of different races or ethnicity." It ranges from 100 (most diverse) to 0 (least).

<sup>19</sup> See *infra* notes 48-60 and accompanying text for a discussion of the weight of factors that are included in the rankings. Of course, adding a factor worth 12.5% means that percentage must be reduced from the other variables in some fashion. I leave the mechanics to Mr. Morse.

<sup>20</sup> See, e.g., *What is Race?*, U.S. CENSUS BUREAU, <http://www.census.gov/population/race/> (last visited Oct. 19, 2013) (providing the Office of Management and Budget's (the governmental agency that conducts the Census) racial classification scheme. Although the 2000 and 2010 Census allowed individuals to check more than one racial box in identifying their race and ethnicity, the boxes have largely remained the same: White or Caucasian, African-American or Black, American Indian and Alaska Native, Asian, Native Hawaiian and Other Pacific Islander (in earlier Censuses the last three categories were grouped under Asian-Pacific Islander), and a generic "other" category. With respect to ethnicity, the Census allows one to identify himself or herself as Hispanic, which can be a member of any of the above described racial group); see also, U.S. Census Bureau, *U.S. Census Bureau Race and*

are largely self-referential and self-identified,<sup>21</sup> there really is no serious debate in American society or higher education regarding the meaning of diversity and how that term has been used in litigation involving affirmative action and attempts to increase diversity.

A review of the most recent and salient cases validating and invalidating the use of race to increase diversity in the education context each takes as given that the goal of increasing diversity in *Grutter*<sup>22</sup> and *Parents Involved in Community Schools*<sup>23</sup> means increasing the number of students of color (African-American [I prefer this term to Black and have explained why in print previously], Asian, Native American, and Hispanic) in environments in which the student body is predominantly white. That definition of increasing diversity is the basis of the Index and it is quite stable since affirmative action has entered in the lexicon of American higher education.<sup>24</sup> Furthermore, although many have argued against the policy of affirmative action,<sup>25</sup> no one has made a serious argument that the battle over increasing diversity in education suffers from a definitional void that precludes the attainment of the goal.

Finally, the argument that diversity lacks a definitional construct and therefore cannot be included in the rankings is problematic when one understands that the basis for most of the evaluative metrics in the rankings have their genesis in the ABA Standards and the data that is reported to the ABA as a result of those Standards.<sup>26</sup> For those unfamiliar with the process and how *U.S. News* obtains the data for its evaluative metrics, a brief detour is warranted. One of the most important metrics or factors used to

*Ethnicity Reporting for NCEA Data Collection*, NAT'L CATHOLIC EDUC. ASS'N, [http://www.ncea.org/sites/default/files/documents/Race\\_and\\_Ethnicity\\_Reporting.pdf](http://www.ncea.org/sites/default/files/documents/Race_and_Ethnicity_Reporting.pdf) (last visited Oct. 19, 2013).

<sup>21</sup> See Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 910-11 (1996).

<sup>22</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>23</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

<sup>24</sup> See *A Brief History of Affirmative Action*, UC IRVINE OFFICE OF EQUAL OPPORTUNITY & DIVERSITY, <http://www.oed.uci.edu/aa.html> (last visited Oct. 19, 2013) (explaining that Executive Order No. 10925 issued by President Kennedy established the concept of affirmative action by mandating that projects financed with federal funds "take affirmative action" to ensure that hiring and employment practices are free of racial bias); Lyndon B. Johnson, *Executive Order 11375-Amending Executive Order No. 11246, Relating to Equal Employment Opportunity*, THE AM. PRESIDENCY PROJECT (Oct. 13, 1967), <http://www.presidency.ucsb.edu/ws/?pid=60553#axzz2iBB72NmR> (describing how President Johnson went one better and issued Executive Orders 11246 and 11375 that required organizations accepting federal funds to take affirmative action to increase employment of members of preferred racial or ethnic groups and women).

<sup>25</sup> See generally Sander, *supra* note 11 (arguing that affirmative action has more negative effects than positive effects for minorities).

<sup>26</sup> See *supra* note 1 (stating Standards promulgated by the Section are used to evaluate law schools for the purpose of approving or denying their accreditation as an ABA approved school.).



evaluate law schools is student selectivity, which includes as a component the law school's median LSAT score for that year's matriculating class, as well as the 75<sup>th</sup> and 25<sup>th</sup> percentile scores for that class.<sup>27</sup> That data is not sent by the law schools to Mr. Morse or any other representative of *U.S. News*. Instead, Standard 503 requires that each applicant for law school "take a valid and reliable admission test to assist the school and the applicant in assessing the applicant's capability of satisfactorily completing the school's educational program."<sup>28</sup> For reasons that are largely historical and psychometric, the test to date has been the LSAT.<sup>29</sup>

Standard 509, Basic Consumer Information, requires the law school to "publish basic consumer information"<sup>30</sup> which includes "admission data." That admission data which is reported annually to the Section and published by the Section (and by the law schools) is the median LSAT of the matriculant class.<sup>31</sup> It is that data that *U.S. News* uses in its student selectivity factor and it counts for 12.5% of the weight of the factors used in the rankings (half of the "Selectivity" variable used in the rankings which totals 25% of the so-called quality assessment of the law schools). Indeed, most of the data used by *U.S. News* to compile the rankings is data that is self-reported by the law schools to the Section and subsequently publicized as a result.<sup>32</sup> Without the data, there would be no meaningful

<sup>27</sup> In most recent years, the magazine has used the median LSAT score as a factor included in the selectivity metric. In earlier years, *U.S. News* used the 75<sup>th</sup> and 25<sup>th</sup> percentile of the LSAT score instead of the median. If I recall correctly, when the magazine used the 75<sup>th</sup> and 25<sup>th</sup> percentile, it averaged the two percentiles to compute a median and that median was then used as the evaluative metric in the selectivity index. Computing a median by averaging the 75<sup>th</sup> and 25<sup>th</sup> percentiles can result in slight but meaningful differences when compared to the true median. For example, a school with a 75<sup>th</sup> percentile of 170 and a 25<sup>th</sup> percentile of 150 would have a median, based on these two scores of 160. However, if 75 matriculants have LSAT scores of 155 and above and 75 have 154 or below, true median is 155. It also tells you that several matriculants are clustered between 155 and 150—indeed almost a quarter of the class. Nevertheless the two "medians" are different and impart different information to the evaluator. For the rest of the article I will assume for the sake and ease of exposition that *U.S. News* is and will continue to use the true median score.

<sup>28</sup> *Consultant's Memos, in ABA Standards for Approval of Law Schools, 2013-2014*, AM. BAR ASS'N. 153, [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_consultants\\_memos\\_revised.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_consultants_memos_revised.authcheckdam.pdf) (last visited Oct. 19, 2013) (discussing standards and rules of procedure for approval of law school under § 503).

<sup>29</sup> See William P. LaPiana, *A History of the Law School Admission Council and the LSAT*, LAW SCH. ADMISSIONS COUNCIL 3-4 (1998), [http://www.lsac.org/docs/default-source/publications-\(lsac-resources\)/history-lsac-lsat.pdf](http://www.lsac.org/docs/default-source/publications-(lsac-resources)/history-lsac-lsat.pdf).

<sup>30</sup> *Id.* at 8.

<sup>31</sup> See Mark Hansen, *ABA Legal Education Section, LSAC to Certify Admissions Data About Entering Law Classes*, ABA JOURNAL (June 18, 2012), [http://www.abajournal.com/news/article/aba\\_lsac\\_to\\_certify\\_law\\_school\\_admissions\\_data/](http://www.abajournal.com/news/article/aba_lsac_to_certify_law_school_admissions_data/) (explaining that given the recent spate of law schools misreporting by inflating their admissions data, i.e., reporting higher median LSAT score, the LSAC and the ABA has announced a plan to verify said data).

<sup>32</sup> See Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Misleads*, 81 IND. L.J. 229, 250 (2006) (stating that a major

rankings.

Unsurprisingly, there is a Section Standard that requires diversity. That Standard, 211 Non-Discrimination and Equality of Opportunity, requires that a “law school shall foster and maintain equality of opportunity in legal education . . . on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.”<sup>33</sup> More importantly, Standard 212 Equal Opportunity and Diversity requires that “a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.”<sup>34</sup>

Standards 211 and 212 are met by producing admission data per Standard 509 that documents the ethnicity of the applicant and matriculant pools of that law school’s entering class. That reported data is publicized akin to the median LSAT score and is accessible to *U.S. News* in the same way. Thus, it is somewhat surprising that Mr. Morse makes the claim that diversity is somehow indefinable when it is defined and reported by the law schools in a uniform fashion using the definition of race and ethnicity that is supplied by the Census categories.<sup>35</sup>

This, then, is an objection “that proves too much.” If the data provided by the schools on race and ethnicity as required by the Standards promulgated by the Section is too indefinite to serve as a factor or

exception to this is the “reputation data” that counts for 40% of the weight of the rankings and is compiled and collected by *U.S. News*, annually. This reputation data has been subject to attack for both its heavy weight, its empirical worth given the weaknesses associated with reputation rankings given the “echo effect” of such rankings and the small number of those who respond to the survey requests from the magazine. In 2010, only 31% of the lawyers and judges responded which is well below the forty percent that is deemed barely adequate for most surveys. Although what is an acceptable response rate to a survey is debatable, some contend that a 50% response rate to a market survey is adequate; anything less inadequate); *see also*, Instructional Assessment Resources, *Response Rates*, UNIV. OF TEX. AT AUSTIN, <http://www.utexas.edu/academic/ctl/assessment/iar/teaching/gather/method/survey-Response.php> (last updated Sept. 21, 2011) (showing that reputation rankings are so unreliable and imprecise that the claim has been made that if Princeton Law School, which does not exist, was included in the rankings it would be ranked in the top 20 by lawyers and judges who in reality would simply be transferring the reputation of the college to that of the fictional law school.); *see generally*, Jan Hoffman, *Judge Not, Law Schools Demand Of a Magazine that Ranks Them*, N.Y. TIMES, Feb. 19, 1998, available at <http://www.nytimes.com/1998/02/19/nyregion/judge-not-law-schools-demand-of-a-magazine-that-ranks-them.html?pagewanted=all&src=pm>.

<sup>33</sup> STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. std. 211 (2013). Subsection (C) of the Standard addresses directly one of Mr. Morse’s concerns that enforcing or creating more diversity may be problematic for religious affiliated or special purpose schools from complying same by allowing those schools to, in effect, opt out as long as notice of the school’s policies are given to all concerned.

<sup>34</sup> STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. std. 212 (2013).

<sup>35</sup> *See supra* note 20 (listing the U.S. Census Bureau racial categories).

evaluative metric for the Index to be included in the rankings, then other data like median LSAT score, expenditures per student for instruction, expenditures per student for financial aid, indirect costs, and overhead, and the like would likewise be unreliable and serve as no basis for use in the rankings.

Briefly, and I will come back to this *infra*, the argument also proves too little because forty percent of the weight given to factors which go into the rankings is the law school's reputation which is measured by academics (law school deans and faculty and worth 25% of the weight) and among lawyers and judges (15%).<sup>36</sup> If something as vague and imprecise as reputation can serve as a factor and be measured by *U.S. News*, then certainly something as accepted and stable as diversity can also be measured and used in the rankings through inclusion of the Index.

#### *B. U.S. News Pleads Neutrality in the Debate over Diversity*

First, to be clear, no one is asking *U.S. News* to take a position on the benefits of diversity or to take a position on the debate over the efficacy and legality of affirmative action. Nevertheless, the claim that *U.S. News* does not wish to take a position on the debate or efficacy of affirmative action is contradicted by Mr. Morse's remarks in which he states, "*U.S. News* believes that law school diversity is very important, which is why it publishes the [] law school diversity index . . . ."<sup>37</sup> How can it be important enough to both compile and publish the Index, but not important enough for inclusion in the rankings? The answer seems rather obvious: it should be included in the rankings. The salience and importance of diversity has been acknowledged through the construction and use of the Index, the articulation of diversity as a positive goal by the Section Standards and its imposition on law schools as part of the accreditation process,<sup>38</sup> and lastly the ongoing societal debate over the use of affirmative action in higher education which has recently culminated in the grant of certiorari in *Fisher*

<sup>36</sup> Robert Morse & Sam Flanigan, *Law School Rankings Methodology*, U.S. NEWS & WORLD REPORT (Apr. 22, 2009), <http://www.usnews.com/education/articles/2009/04/22/law-school-rankings-methodology>. Quality was measured by two surveys conducted in the fall of 2008. *See id.* The dean and three faculty members at each school [184 accredited law schools] were asked to rate schools from "marginal" (1) to "outstanding" (5); 71 percent voted. *See id.* Their average rating for a school is weighted by .25 in the ranking model. *See id.* Lawyers and judges also rated schools; 31 percent responded. *See id.* The two most recent years lawyers' and judges' surveys were averaged and are weighted by .15. *See id.*

<sup>37</sup> Morse, *supra* note 3.

<sup>38</sup> *See supra* notes 33-35 and accompanying text.

*v. University of Texas*.<sup>39</sup>

Again, the argument proves too much if taken seriously because I do not believe anyone claims that *U.S. News* believes in or has taken a position on the validity and use of standardized testing (which has a detrimental impact on students of color given the differential scores or score gap between students of color and white students<sup>40</sup>) because they use and report median LSAT scores in their rankings. Nor has anyone claimed that *U.S. News* is promoting any law school or group of law schools in publishing the rankings. Quite the contrary, *U.S. News* goes out of its way in an attempt to prove that they are objectively neutral in ranking law schools and it does so based largely on the data supplied by the law schools to the Section and made public. Diversity is simply another metric among many and would not result in any claim that *U.S. News* is taking a position. This argument proves too little, however, because if diversity is not important enough to be compiled and included in the rankings, matters that are included in the Index such as expenditures per student, reputation,<sup>41</sup> and others become contestable as well.

### *C. Including Diversity Would Entail Social Engineering*

This claim by Mr. Morse was most puzzling to me. Frankly, I don't see the nexus between including the Index in the rankings and social engineering. The Standards, as previously discussed, require the law schools to make efforts to have a diverse student body. That policy has already been implemented. Data detailing how well or how poorly the goal has been met should not count as social engineering. *U.S. News* would not be adding a requirement or mandating that the schools do something that they are not otherwise accountable for currently.

However, taking the claim seriously, Mr. Morse apparently believes that including the Index in the rankings would alter or influence law school behavior. Guess what, I agree. It is fairly clear that the rankings have had an influence on law schools in the twenty plus years since its inception. But

<sup>39</sup> See 645 F. Supp. 2d 587, 593 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

<sup>40</sup> This differential score or score gap is roughly one standard deviation resulting in whites attaining a median score of 153 on the LSAT and African-Americans, for example, attaining a median score of 143. Hispanics scores are similarly depressed. Asians, however, score slightly higher than their white peers. What this all means, i.e., why is there this persistent gap and what it portends for legal education is addressed in Alex M. Johnson, Jr., *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT is not the Problem and Affirmative Action is not the Answer*, 24 STAN. L. & POL'Y REV. 379 (2013); see also *infra* notes 72-77 and accompanying text.

<sup>41</sup> See *supra* note 32.

this argument proves too much. The fact that the inclusion of the Index would have an effect on law schools, encouraging them to increase the diversity of their student bodies (and hopefully their faculty), is exactly why the Index should be included in the rankings.

Plus, it is somewhat laughable for Mr. Morse to resist inclusion of the Index in the rankings because it may influence law school behavior when, as I demonstrate *infra*, the rankings have already had a tremendous negative impact on diversity in our law schools. The use of the median LSAT as one of the factors in the rankings (albeit a relatively minor one at 12.5% or half the Selectivity variable or metric) has caused deans to seek to increase their median LSAT score.<sup>42</sup> When that is coupled with the score scale differential between whites and students of color, increasing the median LSAT score has a disproportionately negative impact on students of color.<sup>43</sup> *U.S. News* did probably not intend this change in behavior, but its impact on diversity has been documented and is discussed below. More importantly, this negative impact has been shared with *U.S. News* with a call by law school deans for the elimination of this data in the rankings. *U.S. News*, then, cognizant of the negative impact that including the median LSAT score in the rankings has had on diversity and law school culture has chosen to ignore that impact and continue to use this data.

Hence, *U.S. News* cannot have it both ways. It cannot claim to be concerned about the rankings impact on law schools if the Index is included when clearly the rankings have already had an impact on law schools of which it is aware and ignores in its pursuit of profit. It would be better for all concerned if *U.S. News* would recognize the harm to diversity created by the rankings and attempt to ameliorate the same by including the Index in the rankings as an equally rated factor when compared to the median LSAT scores weight in the selectivity factor, i.e., worth 12.5%.<sup>44</sup> As discussed, that inclusion of the Index in the rankings would have a positive impact on law school behavior.

#### D. Some Miscellany

I note, in passing, that Mr. Morse makes two additional arguments for *U.S. News's* failure to include the Index in the rankings. First, he states that law schools themselves do not agree on the definition of diversity.<sup>45</sup> Later,

<sup>42</sup> See *infra* Part II.

<sup>43</sup> See *infra* notes 72-85 and accompanying text.

<sup>44</sup> See *infra* notes 57-59 and accompanying text.

<sup>45</sup> Morse, *supra* note 3.

in the same paragraph he contends that there is also “no agreement or consensus among the law schools that achieving diversity adds to the academic quality of law schools.”<sup>46</sup> Although these remarks seem to be similar to those decrying the lack of definition of diversity, I take them to mean something different. These remarks seem to blame the law schools for lack of inclusion of the Index in the law school rankings.

Again, however, these arguments do not withstand scrutiny when the rankings are analyzed and compared to the Index. No one seriously claims that there is a consensus among law schools regarding how law school quality should be measured, but that is exactly what the rankings attempt to do with a claim that it is methodologically superior to any other. The law schools, to the contrary, believe that the rankings do not accurately measure their quality in the one size fits all model that is the evaluative metric of the magazine, but that has not stopped the magazine from continuing to rank them.

The same could be said for the second objection, that there is no consensus that diversity adds to the academic quality of the law schools. Nowhere have I seen a consensus that increasing one’s expenditure per students is a valid indicia of law school quality. The fact that this metric favors well-endowed, older, private schools, with small student enrollments (see, for example, Yale and Washington and Lee) is beyond doubt. Whether that necessarily translates into a better academic experience, however, is contestable; yet, Mr. Morse is not arguing that this factor should not be included in the rankings or that it lacks methodological support.

## II. THE RANKINGS IMPACT ON LAW SCHOOLS AND LAW STUDENTS

The inclusion of the Index in the rankings is part of a larger debate over the impact of the rankings on law schools and law students. Many contend that the rankings have had no impact on either the delivery of legal education or the behavior of law school students. In this Part, I disaggregate these two claims and demonstrate that the growing import and influence of the rankings has clearly had the effect of lessening diversity in law schools. It is an unintended result, but a result nevertheless and one that can be documented and traced to the inclusion of the median LSAT in the

<sup>46</sup> *Id.*

selectivity factor of the rankings.

Another surprising effect of the rankings is the change in behavior of prospective law students as a result of the rankings. I contend that law school applicants are misapplying to law schools, that is, applying to law schools they have no chance of being accepted to in large part due to the students' internalization of the rankings and their desire to matriculate at a highly ranked school. Not all of the blame can be placed on *U.S. News* for this recent development given that I also contend that the applicants' perception of the availability of affirmative action and their belief that it is being used aggressively by law schools causes students to misapply as well. However, in an ironic twist, even though affirmative action is available (lawful) for most law schools,<sup>47</sup> it is not used aggressively, if at all, by law schools—especially selective law schools—<sup>48</sup> because of the impact such use would have on the school's median LSAT and, consequently, its ranking.

#### A. *The Impact on Law School Behavior*

In 2006, I wrote an article that addressed a similar issue, the impact of *U.S. News* on the admissions of students of color (denominated "underrepresented students" in that article) in law school entitled, *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*.<sup>49</sup> In that article, I contend that the use of the rankings, which includes the law school's median LSAT score as 12.5% of its value to rank law schools is harmful to the goal of achieving diversity in law schools, and has resulted in marginalizing the use of affirmative action in law schools (notwithstanding the legality of said use per the Supreme Court's decision in *Grutter v. Bollinger*<sup>50</sup> and its companion case *Gratz v.*

<sup>47</sup> Oklahoma, New Hampshire, Arizona, Nebraska, Washington, California, Florida, and Texas have, either by legislation, amendments to the state's constitution, or executive action, limited or banned the use of affirmative action in higher education admission decisions. Michigan's former ban on the use of race in the admission process has been reversed by court action. See *Affirmative Action: State Action*, NAT'L CONFERENCE OF STATE LEGISLATURES (Nov. 2012) <http://www.ncsl.org/issues-research/educ/affirmative-action-state-action.aspx>.

<sup>48</sup> I use "selective" rather than "elite" so as not to connote any quality attribute to such schools and to track the attribution of that metric as employed by *U.S. News* in the rankings (selectivity counts a total of 25% of the weight of the evaluative factors for the ranking). Selectivity is addressed *infra* notes 104-106 and accompanying text.

<sup>49</sup> Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 310 (2006) [hereinafter Johnson, *Destruction*]. That article appeared as part of a symposium that addressed an issue similar to the issues addressed in this symposium, but with a focus almost solely on the impact that the rankings have on the admission process and how that impacts the debate over the efficacy of affirmative action.

<sup>50</sup> 539 U.S. 306 (2003).

*Bollinger*<sup>51</sup>).<sup>52</sup>

Indeed, although I believe I made a fairly strong claim that the ratings caused a lack of diversity in law schools, the evidence since, which is detailed *infra*,<sup>53</sup> conclusively proves that contention. Consequently, the assertion that the rankings have had no impact or have not had a negative impact on law school behavior is patently and demonstrably false. To prove that point, I examine anew the law school admission process and briefly summarize the thesis I first set forth in my earlier article.<sup>54</sup> This part, then, represents to a large extent, a summation of the arguments made previously.

What is new, however, and very important, is the documentation of the decline in diversity at American law schools notwithstanding the validation of the use of affirmative action by the Supreme Court in 2003 in *Grutter* and *Gratz*. However, instead of increasing diversity in law schools, the opinions seem to have had the perverse effect of minimizing it. That, of course, is ridiculous and not the case. Instead, what has been created by the rankings is the irrelevance of affirmative action.

To prove that point, one must begin with an examination of the differential LSAT scores attained by whites and persons of color, the use of the LSAT score in the rankings, and lastly, and perhaps most importantly, the role of the deans and admissions officers due to the intersection of the differential LSAT scores and the median LSAT score's use as a weighted factor in the rankings. To begin, I start with a rather startling assertion for those unfamiliar with the results generated by what are called "power" tests (that is, tests upon which something, some valuable entitlement like a seat to a law school, turns): it is undeniable that certain racial subgroups score lower than members of other groups on such tests—across the board. White test-takers score approximately one standard deviation above certain recognized minority subgroups of test-takers on the LSAT. To be precise, African-American test-takers score on average ten points less (143-153) than whites on the LSAT.<sup>55</sup> Because African-Americans score lower than whites, and if both groups apply in proportionate numbers to law schools, whites will have scores that are approximately ten points higher than African-Americans.<sup>56</sup> That African-Americans score lower than whites on

<sup>51</sup> 539 U.S. 244 (2003).

<sup>52</sup> Johnson, *Destruction*, *supra* note 49, at 311.

<sup>53</sup> See *infra* Part II.

<sup>54</sup> See generally Johnson, *Destruction*, *supra* note 49.

<sup>55</sup> See *id.* at 332.

<sup>56</sup> See Linda Wightman, *The Consequences of Race-Blindness: Prediction Models with Current*



the LSAT creates a barrier to admission to law schools that necessitates the use of affirmative action to diversify the entering classes at selective law schools.<sup>57</sup>

Given that the LSAT is one of the factors used in the rankings, albeit a minor one weighing in at 12.5%, it would appear logical that emphasizing or increasing that median LSAT score on the part of law schools would have relatively little impact on the rankings and would not alter law school behavior. On the contrary, that is not the case given the pressure placed on deans to increase their median LSAT score, and, thereby, increase their rankings. The fact that there is an almost-perfect correlation between a law school's median LSAT score and their ranking<sup>58</sup> provides a strong incentive for deans to increase their median LSAT score by all legal means.<sup>59</sup>

It provides a strong incentive to increase the median score because when a dean's goal is to increase the school's ranking that dean faces a question of how best to achieve that goal. Given the various factors that go into compiling the rankings, the easiest, cheapest, and surest way to do so is to increase the median LSAT score. However, before turning to the LSAT a brief examination of the other evaluative metrics is warranted to assess their place and utility in the rankings.

Given the various factors it might seem more logical that a law school

*Law School Data*, 53 J. LEGAL EDUC. 229, 245 (2003).

<sup>57</sup> Professor Wightman's data indicates that if law schools did not employ affirmative action and used only a "numbers approach" to admissions relying on LSAT and undergraduate grade point average (UGPA) only 20% (687 of the 3435) of the African-American applicants who were admitted to any law school for the fall of 1990 "would have been accepted if the LSAT/UGPA-combined model had been used as the sole means of making admissions decisions." Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 15 (1997).

<sup>58</sup> See generally Richard A. Posner, *Law School Rankings*, 81 IND. L.J. 13 (2006) (examining the correlation between the median LSAT score and a law school's ranking).

<sup>59</sup> One would think that even concluding that the median LSAT score has an impact on the rankings that it would have no or little effect on diversity given that a median simply means that half of the students in the matriculating class would have LSAT scores above that number and half would have LSAT scores below that number. Hence, those applicants with LSAT scores below the median the school could aggressively pursue affirmative action and admit underrepresented students of color with no detrimental consequences to that median score. This mathematical certainty and the legal permissibility of affirmative action is obvious. Moreover, even though the obvious and preferable solution to the use of the median LSAT in the rankings, the declining number of African-Americans matriculating at law schools demonstrates that deans and admission professionals are not seeking to diversify their entering classes by admitting diverse students in the bottom half of their respective classes. Once a median LSAT is achieved most admitted students have LSAT numbers that are heavily clustered around that median so that the range of admitted students when ranked by LSAT score is extremely narrow. That eliminates a significant number of applicants with LSAT scores anywhere from 8 to 10 points below the median which has the impact of eliminating a significant number of African-American applicants at most schools since they reside at the bottom of the applicant pool when measured by LSAT score.

should make a sustained effort to increase the school's academic reputation, which is the most heavily weighted variable accounting, as noted above, for 40% of the rankings, and many deans do so.<sup>60</sup> Alternatively, the dean seeking to improve the school's ranking may focus on other less heavily weighted variables like expenditure per student, library size, employment rates for graduates, and bar passage rates—and some try to improve these outcomes as well. The problems with the “reputation” variable, to the contrary, are that no one really knows how to improve the law school's reputation without a massive expenditure of resources and that expenditure will not produce immediate results—one's reputation is earned over a period of time.<sup>61</sup> The other variables are either costly (expenditure per students) or beyond the direct control of the law school—employment rates for graduates, for example.

The reality is that that the preferred method for improving the law school's ranking, if that is the goal—and I believe it is for every competent dean—is improving the median LSAT score of the entering class. And, there are three excellent reasons why the focus should be, and is on, improving the median LSAT. They are the previously documented three “C's”—correlation, cost, and certainty.<sup>62</sup>

I have already addressed the almost perfect correlation between the median LSAT score and the law school's ranking.<sup>63</sup> My point, and it is an obvious one, is that a dean (or other administrator) observing the correlation between the median LSAT score and rankings and comes to the rational conclusion that, should the correlation persist (as it has for the past several years), he or she should increase the median LSAT score to increase that law school's ranking.

With respect to “cost,” there is no doubt that recruiting the very best students, or even students with higher LSAT scores, is somewhat costly. What is unclear is the incremental cost imposed on law schools in seeking these students. Most deans do not view recruiting or attracting the best students as a separate cost. Most assume that recruiting the best student is integral to the mission of the law school and best student is easily quantifiable and ranked when measured by the one uniform metric that can be applied to all of the applicants: the LSAT score. More than likely, however, the dean and the faculty will not internalize the cost of recruiting

<sup>60</sup> Johnson, *Destruction*, *supra* note 49, at 349 n. 149.

<sup>61</sup> See *supra* note 32.

<sup>62</sup> Johnson, *Destruction*, *supra* note 49, at 350.

<sup>63</sup> See *supra* note 58 and accompanying text.

the best students (when measured by LSAT score) as a separate cost incurred to increase the ranking, or if they do, view it as an unreasonable cost. Who would object with the dean's desire to obtain the best students for the entering class?

Focusing on the median LSAT also provides "certainty" in two respects. First, since the correlation between median LSAT and the ranking is so strong, a dean can be certain that if the median LSAT improves, so, too, will the ranking of his or her school. The same cannot be said or proven with any other variable in the ranking.<sup>64</sup> Second and most importantly, increasing the median LSAT has the certainty of what I have characterized elsewhere as "goal attainment."<sup>65</sup> By that I mean that deans can control this variable to a greater extent than they can control the other factors contained in the rankings.

Compare increasing the median LSAT score with the other weighted variables or factors in the rankings, all of which are important, all of which would be considered in any strategic plan to improve a school's ranking. The law school would have to spend a significant sum to improve its reputation (whatever that term means) among fellow academics, practitioners, and judges. Nevertheless, given how reputation is forged and perceived, how can a dean or anyone else reliably state that spending *X* number of dollars annually will result in a quantifiable and correlated improvement in the rankings? That certitude or correlation is lacking.

But having shown that an increase in the median LSAT score correlates with the school's ranking, is less costly to attain than other factors, and produces a more certain outcome, it therefore becomes the primary strategy employed by deans to improve their ranking. However, that does not necessarily correlate with a decrease in diversity or a lessening of the use of affirmative action given, as noted *supra*,<sup>66</sup> that an increase in a median LSAT score simply means that half of the class must have an LSAT score at or above that median score.

Unfortunately, once the median score is achieved, law schools admit students that, when measured by LSAT score, populate a narrow range or band. For example, if schools have a median LSAT score of 165 for the students admitted to the law school, and therefore the matriculants, will have scores that coalesce around that 165 resulting in most matriculants having scores of 160-170. The reason why students will not typically

<sup>64</sup> Expenditure per student is a close second in that it is highly correlated with a law school's ranking but not perfectly correlated like the school's median LSAT score.

<sup>65</sup> Johnson, *Destruction*, *supra* note 49, at 353.

<sup>66</sup> See *supra* note 59.

exceed the 170 is that having a score at or above that makes the student very attractive and desirable to schools with higher median LSAT scores and since a higher median LSAT score correlates to a higher ranking and applicants internalize and value the law school's ranking,<sup>67</sup> students with an LSAT score will inevitably be drawn and matriculate at the higher ranked schools. The converse is true in that students with lower LSAT scores will find the law school with the median LSAT of 165 attractive and apply (indeed, misapply<sup>68</sup>), but they will not be admitted in great numbers for several reasons.

First, even though median LSAT means half the class will have an LSAT score below that number, the law school will admit students with scores below that number who achieve a score as close to that sought after median score to insure that the median score, if not achieved, will only be slightly lower (164 instead of 165). Second, and most importantly, the law school will admit applicants with LSAT scores as near as possible to its medium score in order to maintain as narrow a gap as possible between the 75<sup>th</sup> and 25<sup>th</sup> percentile given that these two numbers are reported and can be used by *U.S. News* to arrive at a median if it so chooses.<sup>69</sup>

Given this later phenomenon, this pushes deans and admissions officers to maintain a 25<sup>th</sup> percentile that is relatively close to the median. The pressure from above, that is schools attracting students with LSATs higher than the law school's projected or sought after median so that a school with a 165 median may have a 168 75<sup>th</sup> percentile. To maintain the law school's median of 165 when the 75<sup>th</sup> percentile and 25<sup>th</sup> percentile are averaged, a law school has to have a 25<sup>th</sup> percentile of 163. Now, as a result, 75% of the matriculants have scores between 163 and 168 with most clustered around the 165 median given how the market for law school applicants functions and how students react.

Law schools, then, would feel comfortable admitting students below the hypothetical 25<sup>th</sup> percentile of 163 with no recrimination. However, they do not do so. The range restriction that I have described with respect to LSAT score appears throughout the matriculating class so that in our hypothetical it would not be uncommon for a school to admit more than 98% of its matriculating class with LSAT scores of 163-168 making the top and bottom of the class, when measured by LSAT score of the matriculant, almost completely flat. The flatness at the top is, as previously explained, a

<sup>67</sup> See *infra* at notes 78-85 and accompanying text.

<sup>68</sup> See *id.*

<sup>69</sup> See *supra* note 27 and accompanying text.

product of the “admissions market” that means higher scoring students will matriculate at higher ranked law schools.<sup>70</sup> The flatness at the bottom is a result of a combination of factors including concerns that students with LSATs considerably below that of 75% of the class will be at a competitive disadvantage to concerns that the law school has about those with lower LSAT scores passing the bar exam (the bar passage rate being one factor reported to the ABA and used in the rankings).<sup>71</sup>

So, to sum up, a law school with a median LSAT score of 165 will admit a matriculating class comprised almost entirely of students with LSAT scores of 163 to 168. This has the impact of eliminating almost all students who score below a 160 from serious consideration in the admission process. Further, since African-Americans score one standard deviation below that of white applicants with a median LSAT score of 143 versus 153, the overwhelming majority of African-Americans who apply to the law school with a median of 165 will have an LSAT score below 159.<sup>72</sup>

What this means for law schools is that there will be a very narrow and limited number of African-American applicants to select from for that school’s entering class—those with LSAT scores above 160. And, since those students are few in number, the fight for those students among the most selective schools will be fierce (which it is), as they will be rewarded in kind with scholarships and other emoluments.<sup>73</sup> Thus, there will be very few African-American students that are “admissible” for our hypothetical law school with a median LSAT of 165 and those that are will have plenty of law schools to choose from.

The problem, of course, is that the vast majority of African-American students who have the lower LSAT scores will not be admitted, notwithstanding that these students are the logical beneficiaries of affirmative action (think of an African-American student with a 155 LSAT

<sup>70</sup> Indeed, although schools may be tempted to attract a superior student, say a student with a 175 LSAT score, with scholarship money, this would ultimately be a suboptimal strategy given that the outlier student with the 175 will have negligible impact on the 75<sup>th</sup> percentile and the school’s median. The school would be better advised to give more scholarships to students starting with 166, who presumably are easier to matriculate, in order to garner a matriculating class with half the students with an LSAT above 166 thereby increasing its median.

<sup>71</sup> Although hard to tease out, there is increasing evidence that there is a significant correlation between one’s LSAT score and the ability to pass a bar exam, meaning the higher the LSAT score, the higher probability of initial bar passage. See Johnson, *Destruction*, *supra* note 49 in which the claim is documented, i.e. that there is a positive correlation between achieving the median LSAT score—153—and passing the bar exam.

<sup>72</sup> See, e.g., Susan P. Dalessandro, Lisa C. Antonio, & Lydia M. Reese, *LSAT Performance With Regional, Gender, and Racial/Ethnic Breakdowns: 2005-2006 Through 2011-2012 Testing Years*, LAW SCH. ADMISSIONS COUNCIL (2012), [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/tr-12-03.pdf?sfvrsn=4](http://www.lsac.org/docs/default-source/research-(lsac-resources)/tr-12-03.pdf?sfvrsn=4).

<sup>73</sup> See Sander, *supra* note 11.

and a 3.5 UGPA applying to a law school with a median LSAT of 165), will not be admitted to said law school and unless that student applies to a “safety school” with a median closer to 155, and may not be admitted to any law school as a result of applying only to law schools with high median LSAT scores.<sup>74</sup>

The resultant lack or diminishing diversity in law schools is therefore largely attributable to the fact that since members of certain subgroups score lower than whites, members of that subgroup will not be admitted proportionately (proportionate to their percentage in the applicant pool<sup>75</sup>) due to the impact of the rankings on the law schools’ admissions processes. Any variability in the admissions process that would result in members of those subgroups being appointed with lower LSAT scores (the so-called holistic approach in admissions<sup>76</sup>) is abandoned when the predominant variable in the admissions process is the applicant’s LSAT score since it correlates to the law school’s ranking and the school seeking to improve that ranking believes it can do so by increasing the median. As a result, instead of our classes becoming more diverse as a result of the affirmation of affirmative action in *Grutter*, they have become less diverse—a fact that is verifiable.<sup>77</sup>

### *B. The Negative Impact on Student Behavior*

What can also be documented now, that could not be documented in my 2006 article,<sup>78</sup> is the impact that the rankings have had on law school applicant and student behavior. Again, although this impact is not intended, the impact nevertheless exists, is quantifiable, and is yet another reason why *U.S. News* should include the Index in the rankings to minimize the detrimental impact that the rankings continue to have on diversity in law schools.

As documented by the Society of American Law Teachers (SALT), the number of African-American matriculants at ABA approved law schools is declining relative to the number of seats available for law school

<sup>74</sup> See *infra* notes 78-85 and accompanying text.

<sup>75</sup> See *infra* notes 85-97 and accompanying text.

<sup>76</sup> Johnson, *Destruction*, *supra* note 49, at 353.

<sup>77</sup> In Johnson, *Destruction*, *supra* note 49, I noted that the “disturbing trend” at that time was that African-American matriculants to law school was remaining relatively constant at 9200-9400 down from an historic high of 9700 matriculating during the 1994-1995 academic year, even though total J.D. enrollment had increased over the same period of time by 12,000 seats given the additional approved law schools and growth of existing law schools. See *id.* at 353 n. 168. As documented below, that “trend” has been reversed and the number of African-American matriculants is instead declining.

<sup>78</sup> See generally *id.*

matriculants.<sup>79</sup> This decline is occurring notwithstanding the legality of affirmative action and the improving qualifications of underrepresented applicants.<sup>80</sup> Furthermore, there can be many reasons for this decline ranging from a shrinking population of potential applicants to the group's collective lack of interest in pursuing legal education. Nevertheless, since the population of African-Americans as a percentage of the populace has not lessened significantly since the 2000 Census,<sup>81</sup> that ostensibly is not a factor in the decline of African-American matriculants. Further, and as detailed below, since the pool of potential law school matriculants consists predominantly of recent college graduates, if the pool of African-Americans receiving BA and other advanced degrees is relatively stable or increasing, that cannot be used as a causative factor in the shrinking pool of African-American matriculants.

As a consequence, the only plausible "neutral" explanation for the decline in African-American matriculants must rely on some theory that these recent graduates of colleges have opted not to attend a law school because they deem a law school to be less desirable than their other career alternatives. In other words, law as a career has become less attractive than other feasible alternatives. Thus, the argument would be that the legal profession fails to attract its fair share of members from underrepresented groups as applicants to law schools (the crucial entry point to the profession) because it is deemed unattractive. Quite the contrary, the numbers below present a strong argument that the legal profession is doing quite well in attracting highly sought-after members of these prized groups to apply to law school and pursue a legal career.

One could, of course, argue that these very bright African-American graduates may be choosing to attend other graduate and professional programs. I disagree with the implicit conclusion that fewer Blacks attending law school means more Blacks attending other graduate or

<sup>79</sup> See *Diversity in the Legal Profession: The Challenge Ahead*, SOC'Y OF AM. LAW TEACHERS, <http://www.saltlaw.org/contents/view/278> ("The percentage of African-American and Mexican-American students enrolled at U.S. law schools declined in the last 15 years, even though students in both groups improved their grades and LSAT scores. According to this new analysis of Law School Admissions Council Data, percentages for both groups dropped even though 3,000 more first year seats became available as the number of ABA-approved law schools increased to 200.")

<sup>80</sup> See *id.* ("Despite these circumstances, there was a 7.5 percent drop in the representation of African-American students entering the class of 2008 compared to 1993, with an 11.7 percent decline in Mexican-American students during that period. This trend is especially disturbing because the number of applicants held relatively constant and average undergraduate grade-point averages and LSAT scores improved over the 15-year period. None of the new 3,000 seats at the twenty-four new law schools have been filled by students from these traditionally underrepresented racial and ethnic groups.")

<sup>81</sup> See, e.g., Sonya Rastogi, et al., *The Black Population: 2010-Census Bureau*, U.S. CENSUS BUREAU (Sept. 2011), [www.census.gov/prod/cen2010/briefs/c2010br-06.pdf](http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf).

professional schools. More precisely, I contend that the leakage in the pipeline of members of underrepresented groups is not a zero-sum game that will inevitably benefit other professions or allow those choosing to bypass law school to pursue other advanced degrees. Although there has been, to my knowledge, no study done to date on this precise issue of whether those who choose not to matriculate at law school instead pursue other advanced educational degree, my surmise is that most of those who have expressed an interest in becoming members of the legal profession by applying to law school<sup>82</sup> choose not to pursue another advanced degree when they apply to and ultimately do not **matriculate** at a law school.<sup>83</sup>

If, on the other hand, the number of African-Americans interested in pursuing a legal career is stable or increasing, a conundrum is presented: Why is there a decline in the number of matriculants if the interest is the same or stronger, if the objective indices achieved by these applicants is the same or stronger, if affirmative action is viable, and if the number of seats available for those attending law schools have increased?<sup>84</sup> If the answer to all of these questions is yes, as I contend and document below, then what is the basis for what I characterize as the leakage in African-American

<sup>82</sup> By focusing on those applying to law school, I am conceding that many applicants who choose to take the LSAT have, to some degree, expressed an interest in pursuing a law degree and perhaps entering the legal profession. However, those who take the LSAT and choose not to apply to law school may do so for a number of reasons including finances, timing, health, etc. Indeed, it seems quite obvious that those who do very well on the LSAT may have other options and choose to explore those options, including attending business school, medical school, or other graduate programs, to name a few. Or, these individuals may simply choose to begin work and not continue their tenure in higher education. As to these individuals, who I presume have viable alternative and, therefore, choose not to apply to law school, I do not think is fair to include them within the category of those for whom there are knots in the pipeline that limit their flow through the pipeline. As to these individuals, I think it is fair to say that they have chosen not to enter the pipeline even though their ride through would be a smooth one. At the other end of the spectrum are those who take the LSAT and receive such a low score that they believe that applying to a law school would not be a viable option or, simply put, would be a waste of time. With these latter individuals, dubbed non-qualifying test-takers, the choice is made not to apply to a law school for perhaps rational reasons (later I argue that there is indeed a law school for everyone and that we shouldn't lose any test-taker from an underrepresented minority group, *see infra* notes 85-115 and accompanying text). What is important for my thesis is that these non-qualifying test takers have not taken the next step, have not tested the waters, to determine if they are admissible, so there is no way of discerning why these individuals have chosen not to pursue a legal career.

<sup>83</sup> I choose matriculation or attendance at law school at this stage as opposed to acceptance to a law school because those accepted into, but not attending law school are part of the unacceptable leakage that occurs in the pipeline that must be stanchd. *See infra* notes 115-17 and accompanying text. Of course, it is true that some, but not a majority, of the individuals included in this category will attend other professional schools or pursue other opportunities. Anecdotally, I have encountered several individuals during my career in academia who have simultaneously applied to business, law, and graduate schools. Several of them, mostly older students, have chosen to attend business schools (some have chosen to pursue the dual degree route leading to the MBA/JD) given the shorter time to degree (two versus three years) and the career rewards. Several younger, more academically minded students have opted for graduate degrees in areas of specialization, including pursuing medical and doctorate degrees.

<sup>84</sup> *See supra* note 77.



students that has caused their declining numbers as matriculants.

I contend that the primary reason that these individuals do not matriculate at any law school is because they were not admitted to a law school that they deemed acceptable. And, as I document, the primary reason that individuals fail to obtain admission at his or her law school of choice is inevitably attributable to those individuals receiving LSAT scores well-below that of the other admitted students at the law school of his or her choice.<sup>85</sup>

Where does the leakage of potential African-American matriculants to law schools begin? Working from first order principles that all people are inherently, randomly equal when it comes to the distribution of an attribute like intelligence across racial and ethnic lines, the crucial question is why certain groups, like African-Americans or Hispanics,<sup>86</sup> are not proportionally represented in certain categories?

A close examination of the numbers – a look at what is flowing through the pipeline – reveals the impact and effect of racism, past and present, on those minorities attending law school and entering the legal profession. According to the 2000 U.S. Census the total population of the United States was at that time a little over 281,000,000. Of that number, 35,306,000 were identified as Hispanic/Latino or 12.5 % of the population. African-Americans total slightly less at almost 34,000,000 or 12.1% of the United States population. Asians total a little over 10,000,000 at 3.6 % of the population.<sup>87</sup> Lastly, American Indian/Alaskan Natives total slightly over

<sup>85</sup> “Well-below,” as used herein, refers to those who score more than 10 points below the median of students admitted to that law school on a test that has a score scale of 120-180. The median score for all test takers is roughly 153 and there is a ten-point difference representing one standard deviation in the score achieved. For further information, see *supra* notes 55-56 and accompanying text.

<sup>86</sup> Under the current OMB guidelines Hispanics can be of any race. See *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, OFFICE OF MGMT. & BUDGET (Oct. 30, 1987), [http://www.whitehouse.gov/omb/fedreg\\_1997standards/](http://www.whitehouse.gov/omb/fedreg_1997standards/). “The revised standards will have five minimum categories for data on race: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. There will be two categories for data on ethnicity: ‘Hispanic or Latino’ and ‘Not Hispanic or Latino.’” See *id.* Hence, Hispanics more closely resemble an ethnic rather than a racial group, and are bound by language and culture rather than grosser morphological traits. Elsewhere, I have argued that Hispanics occupy a unique position in the racial hierarchy of the United States:

As currently constructed, the term Hispanic is an ethnic rubric under which people of all racial types can be classified. Unlike whites or blacks, Hispanic as a racial category is meaningless because an Hispanic can be of any race. Hence, being identified as Hispanic imparts no racial identification (and, relatedly, no racial stereotypes). To a large extent, the designation Hispanic represents a fluid and rather large ethnic group consisting of many subgroups or types. These subgroups or types are linked rather loosely to each other, and they are grouped not by reference to a racial division, but by a common language group or heritage.

Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based*, 84 CAL. L. REV. 887, 892-93 (1996) (internal citations omitted).

<sup>87</sup> “Asian” is defined in the 2000 Census as follows:

2,000,000 and comprise 0.7% of the United States' population as of 2000.<sup>88</sup> Addressing the end of the pipeline, the latest available data (which may slightly understate the numbers of minorities in the legal profession) documents that the total number of all minorities in the legal profession is 56,504 of 747,077 lawyers or 7.56% of all lawyers in 1990.<sup>89</sup> Of that number, 25, 670 (3.44%) of all lawyers were African-American; 18,612 (2.49%) were Hispanic; 10, 720 (1.43%) were Asian; and 1,502 (0.20%) were Native American.<sup>90</sup>

The numbers, then, are quite telling. Although minorities, as a whole, comprise almost 30% of the U.S. population they total less than 8% of the lawyers practicing law today. Every single minority group (in this instance, including Asian Americans) is severely underrepresented in the legal profession based on these numbers. Furthermore, given the attractiveness of a legal career for minorities, there should be no shortage of interest in law and the legal profession as a career option for all minority students based on the percentage of graduating college students who choose to pursue law as their first (and usually last) professional degree.<sup>91</sup> However, the legal profession attracts a disproportionately low number of underrepresented minorities rather than a disproportionately high number. That puzzle or conundrum is the issue that I turn to in the next part with a primary focus on the admission process by which applicants apply to law school, receive one of three responses—admit, reject, or wait-list— and if admitted to one or more law schools, make a decision to matriculate, not matriculate, or defer.

The relevant pool of candidates for law school admission consists of those who have or who will shortly have a bachelor's degree from an accredited university or college.<sup>92</sup> Using statistics provided by Dr. Wilder's

Asian—A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam. It includes "Asian Indian," "Chinese," "Filipino," "Korean," "Japanese," "Vietnamese," and "Other Asian."

See *Profiles of General Demographic Characteristics 2000*, U.S.CENSUS BUREAU, A-3 (May 2001), <http://www.census.gov/prod/cen2000/dp1/2kh00.pdf>.

<sup>88</sup> *Id.* at 1 tbl. DP-1.

<sup>89</sup> See Gita Z. Wilder, *The Road to Law School and Beyond: Examining Challenges to Racial and Ethnic Diversity in the Legal Profession*, LAW SCHOOL ADMISSIONS COUNCIL (2003) 4, <http://www.lsac.org/lsacresources/research/rr/rr-02-01.asp> (citing the U.S. Census Bureau data from 1999).

<sup>90</sup> *Id.*

<sup>91</sup> See *infra* notes 98-99 and accompanying text.

<sup>92</sup> Of course, that pool is determined by the number of High School graduates who then choose to but are able to attend college. Here, the pipeline is also severely affected by substantial losses of minority students. From high school graduation to college, we lose considerable numbers of minority students—in higher proportions than their white counterparts. For example, 64% of white high school

report and focusing on degrees that were awarded in 1999-2000, 22.5% of bachelor's degrees were awarded to members of minority groups, including particularly 9.0% to African-Americans, 6.3% to Hispanics, 6.5 % to Asians,<sup>93</sup> and 0.7% to American Indians.<sup>94</sup> Examining these numbers as a whole we see the first significant leakage in the pipeline, which is not addressed in this Part of the Article: the disproportionately low numbers of underrepresented minority students (with the exception of Asians and Native Americans) who attend college and receive a bachelors degree of some type.<sup>95</sup> Given the assumptions regarding race and intellectual ability made in this Article, one would assume that 30% of the bachelor's degrees awarded would be awarded to members of minority groups as opposed to the 22.5% detailed above if the college age eligible population mirrors their respective percentages in larger society as reported in the Census data.<sup>96</sup> This leakage is indeed quite serious and, if corrected, could provide law schools with a significant number of underrepresented minority applicants and matriculants.<sup>97</sup>

graduates in 2001 immediately enrolled in college. For that same year, 55% of black students attended college right after high school. See Am. Bar Ass'n Presidential Advisory Council on Diversity in the Profession, *Pre-Conference Report, The Critical Need to Further Diversify the Legal Academy & the Legal Profession*, AM. BAR ASS'N 2 (Oct. 2005), <http://apps.americanbar.org/op/pipelineconf/acdreport.pdf> [hereinafter *Pre-Conference Report*].

<sup>93</sup> Wilder, *supra* note 89, at 15. Here, for the first time, we encounter the overrepresentation of Asians in the subject pool. Asians comprise slightly more than 3% of the U.S. population but more than twice that percentage have a bachelor's degree. As discussed further, *infra*, I attribute this overrepresentation to a number of factors, including, most prominently, the effect of stereotypes on the behavior of members of racial groups.

<sup>94</sup> *Id.* Consistent with their percentage in the U.S. population. *Id.* at 3.

<sup>95</sup> Even those minorities attending college are disproportionately represented among those who fail to complete college in a timely fashion. Another leaky portion of the pipeline is college matriculation through graduation. A 2005 report from the National Center for Education Statistics found that only 38.5% of black (non-Hispanic) students at 4-year colleges graduated "on time." Hispanic students graduated at a higher rate, 43.5%, but Asian/Pacific Islander students had the highest college graduation rates at 63%, while white (non-Hispanic) had a 57.3 college graduation rate. See *Pre-Conference Report, supra* note 92, at 3.

<sup>96</sup> See *supra* note 20.

<sup>97</sup> The factors that caused this leakage and actions recommended to correct this leakage are beyond the scope of this Article. However, many of the presenters at the Pipeline Conference referenced above focused exactly on this issue and proposed some very possible remedies. See *supra* note 92 and accompanying text. The Pre-Conference Report prepared for the Pipeline Conference expressly recognized the leakage that occurs before college, which ultimately impacts law school admissions and matriculation:

Children as young as three and four years of age already experience disparate problems as students in pre-kindergarten programs. One study reported that African-Americans attending state-funded pre-kindergarten were almost twice as likely to be expelled as Latino or white children, and boys of all colors and ethnicities were expelled at a rate more than 4.5 times that of girls.

High School is another point in the pipeline for which documentation of a differentiation exists for minorities. A 2004 report from The Civil Rights Project at Harvard University found that white high school students had a 74.9% graduation rate, compared to a 50.2% high school graduation rate for blacks. At 51.1%, graduation rates for American Indian high school

What is interesting and positive for those who are interested in increasing the diversity of minority students in law school is that although only 22.5 percent of bachelor's degrees are awarded to these minorities, 27.6% of the LSAT test-takers during the 1999-2000 period were minorities (11.5% of the LSAT test takers were African Americans, 8.4% were Hispanic, 6.9% were Asians and 0.8% were American Indians/Alaska Native).<sup>98</sup> Consequently, law and the legal profession remain popular destinations for minority students, and disproportionately so, if measured by those interested in taking the LSAT.<sup>99</sup> As a result, we start with a positive scenario—law attracts more minority students to it than it does similarly situated white students. Hence, there should be a disproportionate increase in the numbers of minority students attending and graduating from law schools.

It goes without saying that not all LSAT test takers choose to apply to a law school and that state of affairs is true for minority and non-minority test takers. A review of the data reveals that the 11.5% of all LSAT test-takers were African American in the 1999-2000 testing year, which totals 9,473. Of that number, 7,305 or 77.1% chose to apply to at least one law school. As a result, it should be obvious that 22.9% or 2,168 African American test takers chose not to apply to any law school. At first glance, that seems to present a serious leak in the pipeline—the loss of over 2,000 potential students who evinced enough interest in law as a possible career to plunk down good money and to spend a significant amount of time and energy to take the LSAT.

However, a close review of the data set reveals that for all groups the average rate of non-application (those who took the test and did not apply to any law school) is 21%. Although whites did not apply at a rate of

students were slightly above blacks, while Hispanic students were at 53.2%. Asian/Pacific Islander students had the highest high school graduation rate, at 76.8%.

*Pre-Conference Report*, *supra* note 92, at 2.

<sup>98</sup> Wilder, *supra* note 89, at 15.

<sup>99</sup> *Id.* at 16.

More recently, almost one-third (32.5%) of LSAT examinees in 1999-2000 were members of minority groups, compared with 22.5% of those who received bachelor's degrees in that year. By way of contrast, non-Hispanic whites represented 70% of the LSAT-takers in 1994-1995 but received 81% of the bachelor's degrees awarded that year. With the exception of American Indians, larger proportions of members of each of the minority groups applied to law school than received bachelor's degrees.

*Id.* It appears, then, that college graduates who are members of minority groups are proportionately more likely than their white counterparts to consider attending law school. At the same time, the representation of minority group members among LSAT-takers in relation to their proportional representation in the larger U.S. population varies by group. Hispanics continue to be underrepresented, African Americans approach the proportions they represent of the total population, and Asians are over-represented. *Id.* at 16 (citations omitted).

slightly higher than 20%, the 21% non-application rate for the entire groups masks a range of non-application of 18-25% among the minority groups.<sup>100</sup> And, although I am not a psychometrician, I believe the differential rate of non-application among various sub-groups is statistically insignificant.

Hence, my take at this point in the pipeline is that the leakage of underrepresented minority students is not unacceptable or related at all to the racial identity of the applicant. It is unrealistic to assume or base decisions on a model in which every test taker will apply for admission to law school in the year that they take the LSAT. The LSAT test is given and taken so that individuals can assess their interest and aptitude for law and a career in the legal profession. It stands to reason that a significant number of these test takers, at the portal to a legal career, will determine for one reason or another not to pursue that career option *at that time*. Given that the numbers who choose not to make at least one application to a law school during the year in question are remarkably similar based on race-ethnicity, I draw no inference or conclusion that members of underrepresented minority groups are disproportionately affected at this point in the pipeline. Hence, no corrective or other steps need be taken at this point to encourage members of underrepresented minority groups to apply.

On the other hand, there is significant and **disproportionate** leakage in the pipeline from the pool of those who apply to law school and fail to be admitted to a law school, thereby precluding matriculation. Here the numbers are quite revealing and merit close inquiry.

More than 74,500 individuals applied to ABA-approved law schools for admission in fall 2000. Roughly 69% of them were accepted . . . [H]owever, the overall acceptance rates were not the same for members of different racial-ethnic minority groups. Moreover, with the exception of Asians and those who identified themselves as of "other" race-ethnicity, all minority groups identified by the data were accepted at lower rates than were whites. Fewer than half (43.7%) of the black applicants were admitted to at least one of the law schools to which they had applied in 1999-2000, compared with 65.1% of the white applicants. Hispanic applicants were admitted at a rate of 54%, although the rates for the three individual groups ranged from 36% of Puerto Ricans to 65% of Chicanos.<sup>101</sup>

I believe the reasons for the disproportionate leakage are complex and

<sup>100</sup> Wilder, *supra* note 89, at 17 tbl. 12.

<sup>101</sup> *Id.* at 17.

multiple. There is a significant correlation between acceptance by a law school and the applicant's academic credentials – that is, the stronger or higher the applicant's LSAT scores and undergraduate grades (UGPA), the better the chances of receiving a favorable admission decision. Simply put, and all other things being equal, the higher the LSAT score, the better the chances of being accepted into a law school.<sup>102</sup>

Just as clearly, the score-scale differential has likely created differential acceptance rates among the various groups.<sup>103</sup>

Nonetheless, the impact of differential rates of acceptance among different racial-ethnic groups on the composition of the admitted class may be seen in the comparison between the “% of applied” and “% of admitted” columns of Table 13. Whereas 65% of law school applicants in 2000 were white, whites comprised 72% of the admitted pool. Black and Latino applicants are most seriously affected by the differential rates of acceptance. Where 11.4% of the applicant group was black, blacks represented only 7.4% of the admitted pool. Hispanics made up 8.3% of the applicant pool and 6.7% of the admitted group. The proportional representation of Asians, on the other hand, was identical in the applicant pool and among admitted applicants. In short, there are substantial losses at the stage of admission to law school among certain racial-ethnic

<sup>102</sup> This is perhaps too simplistic in that it ignores the impact of the applicant's undergraduate grade point average (UGPA) in the process. Indeed, all things being equal, I posit that a law school faced with two candidates with identical LSAT score and otherwise similarly situated (e.g., caliber of undergraduate school, rigor of major, similar level of extracurricular activities, community involvement, etc.) will, if forced to make a choice on which applicant to admit, admit the applicant with the higher UGPA. Many schools, over 100 at last count, have an admissions index which “weights” the UGPA and the LSAT at various levels to produce a number for all applicants that can then be compared or ranked based on that number. For example, an index formula, which is a complex mathematical computation weighting the two variables may produce a number between 40 and 60 with a 60 representing an applicant with a 4.0 UGPA and a 180 LSAT (or perfect) score and a 40 may represent an applicant with a 2.0 UGPA and 120 LSAT (the lowest) score. An applicant can then be given a number between 40 and 60 based on their credentials and rank ordered based on the number. Presumptively a 56 is a better, i.e., stronger applicant, than a 55 and a 55 is a stronger applicant than a 54 and so on and so on. The index is selected and produced because it is believed to have a higher correlation in predicting first year law school grades. For a discussion of the use of an index in the admissions process and the impact of correlation, see Johnson, *Destruction*, *supra* note 49, at 344-45.

<sup>103</sup> Wilder, *supra* note 89, at 18.

The situation is more complicated, however, than the overall rates suggest. Acceptance into law school is highly correlated with applicant's academic credentials; that is, their LSAT score and undergraduate grade-point averages (UGPA's). Rates of acceptance for the various racial-ethnic subgroups are related to the respective distributions of their credentials; which are not identical . . . . When the groups are matched with respect to test scores and UGPA, the comparative acceptance rates look quite different. While the rates of acceptance rates for candidates with high test scores and UGPAs are quite similar, more of the black and Hispanic candidates than white candidates are clustered in the low end of the score and grade distribution.

*Id.*

groups, a finding that merits further study.<sup>104</sup>

The problem is complicated, however, by a second variable: law school selectivity. Not all law schools are alike with respect to the quality of the students they attract, admit and matriculate to their law school. Without overstating the obvious, certain schools are more selective than other schools and that selectivity often correlates quite well to academic credentials of the matriculating students.

For example, *U.S. News* uses “Acceptance Rate” as one of its metrics in evaluating law schools (which is the percentage of applicants accepted that applied during that admission cycle). Yale University Law School, which is ranked number one by *U.S. News* in its 2010 Edition, had a 2008 acceptance rate of 8% and a 25-75 percentile LSAT score of 169-177.<sup>105</sup> The school ranked second by *U.S. News* in its 2010 Edition, Harvard Law School, has an acceptance rate of 12% for the same period and a 25-75 percentile LSAT of 170-176. Given the range of LSAT scores of accepted students, it is fair to surmise that applicants who score below a certain number on the LSAT have very little chance of gaining acceptance at these law schools. Furthermore, applicants have access to information about their realistic chances of being admitted and should be reasonably aware of those chances.<sup>106</sup>

The third and final variable in this equation is the applicant’s choice of where to apply given the information that is available and discussed above.<sup>107</sup> One of the advantages of the law school admission application

<sup>104</sup> *Id.*

<sup>105</sup> U.S. NEWS & WORLD REPORT, 2010 EDITION AMERICA’S BEST GRADUATE SCHOOLS 22 (2010).

<sup>106</sup> Today a potential applicant can go online and enter his or her LSAT and UGPA and select any or all ABA-approved law schools and receive data on the chances of being admitted to that law school with the expressed academic credentials. See *UGPA/LSAT Search*, LAW SCH. ADMISSIONS COUNCIL, [https://officialguide.lsac.org/release/OfficialGuide\\_Default.aspx](https://officialguide.lsac.org/release/OfficialGuide_Default.aspx) (last visited Oct. 25, 2013) (enter in a GPA and an LSAT score into the appropriate boxes). I note in passing that the site has been “rigged” so that no matter what academic variables are input, the applicant has a 0-5% chance of being admitted to a certain law school which is obviously not true beyond 0% in certain cases. By that I mean, if you input your LSAT score as 120 and your UGPA as 2.0 you will have a 0-5% chance of getting into Yale Law School. I would hazard a guess that the true odds are indeed 0%. This current search engine has been modified and softened from the previous engine which gave the applicant an exact percentage of the chances of getting into a certain school with the requisite academic credentials. That engine, which would inform the applicant that she had hypothetically a 62% chance of being admitted to the University of Minnesota Law School with an LSAT of 165 and a 3.6 UGPA was modified because it was deemed to provide too much data or information to the applicant and was unduly influencing applicants’ decision making process regarding where to apply. I know this because I was involved in the work-group on Alternative Testing Scores of the LSAC that debated and recommended this change.

<sup>107</sup> A radical departure from the current admission process or system could conceivably employ a centralized admission process pursuant to which the applicant would make one application to one centralized “admissions bureau” or entity and that entity would screen and evaluate the applicants and match them with appropriate law schools for entry—perhaps even making the admission decision for

process is that it is a highly decentralized process pursuant to which any applicant can choose to apply to any law school, irrespective of the applicant's academic qualifications, as long as that individual takes the LSAT, completes the application process, and pays the application fee (indeed, through the fee waiver process an indigent applicant need not pay the application fee as long as the applicant can demonstrate his or her need).<sup>108</sup> As a result, applicants can choose to apply to as many or as few schools as they prefer and the only possible limiting factor for the applicant is cost and inconvenience.<sup>109</sup> Unfortunately, the data demonstrates that applicants do not necessarily apply to a law school at which they have a legitimate chance of admission.

Using my experiences as the Dean of the University of Minnesota Law School and a long-time faculty member of the University of Virginia as examples, it is clear to me that members of underrepresented minority groups misapply to law schools creating much of the leakage at this stage of the pipeline. African-Americans, for example, with an average score that is one standard deviation below that of whites and Asian applicants,<sup>110</sup> should apply to schools that they have a chance of being admitted to rather than applying solely to the best or most prestigious school nationally or in the region. At Virginia, for example, the Law School would receive over 200 applications from members of underrepresented groups with LSAT scores below 150 who had little or no chance of being admitted no matter what their other accomplishments. The same was true at Minnesota (although the number of applications from this class of applicants was about half that at Virginia). If these students applied only to schools of similar caliber or applied to no other law schools, that student, it is fair to surmise, would not be admitted to any law school. If that student, however,

one or more of these law schools. Those familiar with the process by which medical residents are placed in pursuant to the National Resident Matching Program will recognize the similarity between my proposal and the Electronic Residency Application Service which is used by the Association of American Medical Colleges to place all medical residents among the AAMC member schools. See *ERAS Support Services at ECFMG*, EDUC. COMM'N FOR FOREIGN MED. GRADUATES (June 11, 2012), <http://www.ecfmg.org/eras/>.

<sup>108</sup> See, e.g., *Fee Waivers for the LSAT and The Credential Assembly Service*, LAW SCH. ADMISSIONS COUNCIL, <http://www.lsac.org/jd/lsat/fee-waivers.asp> (last visited Oct. 25, 2013).

<sup>109</sup> When I was Chair of the LSAC, I was astounded to learn that every year several individuals apply to over 100 law schools which, assuming an average application fee of \$60.00, totals over \$6,000. Indeed, one year I was Chair, I was informed that a single individual had applied to over 150 law schools in that individual's quest to become a lawyer. According to the Law School Admission Council data, there were 98,700 applicants to law school in 2004-05 who made 552,400 applications to ABA approved schools for an average of 5.6 applications per applicant to an ABA approved school. See *LSAC Volume Summary*, LAW SCH. ADMISSIONS COUNCIL, [http://www.lsac.org/docs/default-source/data-\(lsac-resources\)-docs/lsac-volume-summary.pdf](http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/lsac-volume-summary.pdf) (last visited Oct. 25, 2013).

<sup>110</sup> See *supra* note 85.



applied to the three other schools in Minneapolis with a 149 LSAT, that student would have an excellent chance of being admitted at the following schools: Hamline, William Mitchell, and the University of St. Thomas.<sup>111</sup>

Failing to receive a favorable result from any law school is an unfortunate end which is, I believe, a function of two factors: 1) poor advice and choices regarding which law schools to apply to and 2) an over-emphasis by law schools in their admission process in using the LSAT score as part of the admissions process leading to the crucial admit/deny decision. As to the former, I cannot statistically document that African-Americans are advised to apply to law schools to which they have no chance of gaining admission or that receiving correct advice from pre-law advisors, these applicants ignore that advice and choose to apply to law schools where their chances of gaining admission are nil. I can, however, document that African-Americans with similar credentials to whites are admitted at the same rate as whites at the high end of LSAT attainment. It is those African-Americans and other underrepresented minorities with lower scores who are disproportionately not being admitted to law schools because they are applying to the wrong schools.<sup>112</sup>

Consequently, if the goal is to increase diversity, the first step that should be taken is educational. In some respects, I believe affirmative action is both a benefit and a hurdle in this area. I believe affirmative action must continue to be used in law school admissions as part of the holistic approach or the evaluation of the whole person in admissions.<sup>113</sup> Yet, given the misapplications that I have personally experienced as a member of two law schools' admissions committees, I contend that certain applicants erroneously believe that affirmative action means that a member of an underrepresented group can or will be admitted to a law school irrespective of that applicant's qualifications solely or predominantly because that applicant is a member of an underrepresented group.<sup>114</sup> Hence, I believe members of underrepresented groups are applying to law schools to which they have literally no chance of being admitted, and not applying, instead, to schools where they have a reasonable prospect of gaining a favorable admission decision. That is what is creating leakage.

<sup>111</sup> The ABA's 2010 Official Guide to U.S. Law School reports the following 75<sup>th</sup> and 25<sup>th</sup> percentile for these three schools as: Hamline University School of Law – 156-150; University of St. Thomas School of Law – 160-154; and William Mitchell College of Law – 157-150. See U.S. NEWS & WORLD REPORT, *supra* note 105, at 26.

<sup>112</sup> See *supra* note 85.

<sup>113</sup> See *supra* note 76.

<sup>114</sup> Which, as discussed immediately below, is not the definition of affirmative action or how affirmative action is lawfully deployed in the admission process.

The policy of affirmative action has created unrealistic expectations in the applicant pool and perhaps in certain pre-law advisors as well.<sup>115</sup> Here, education is the key and appropriate remedial response. Consequently, African-American and other underrepresented minority applicants to law school with a LSAT score of 165 may have a shot at being admitted to Yale Law School, especially members of underrepresented minority groups, but students—all students – with a 150 LSAT score do not. And that is the way that affirmative action is supposed to operate – to use soft variables to provide impetus to admit students who are otherwise qualified to be admitted even if their numbers are not as objectively strong as other (read identical) students who are not beneficiaries of affirmative action.

The reality is that in admissions, the admissions decision, although strongly influenced by the objective indices – UGPA and LSAT – creates a pool of admissible applicants who possess a range of scores and UGPAs. Just as admissions is not strictly or solely a numerical determination (never has been, never will be) i.e., produce a certain number on the LSAT and UGPA and the applicant is automatically admitted irrespective of other variables, the admissions decision-maker does not ignore, in totality, the objective indices to admit a student based solely on the soft variables. That would negate the function of the objective variables, which are the most uniform and probative evidence of the quality of the applicant.

The last stage of the admissions pipeline that needs to be addressed is the leakage that occurs with the admitted applicants who choose, for whatever reason, not to matriculate at any law school. Recall that we started with 9,473 African-American test takers or 11.5 % of all test takers in this particular admissions cycle. Of that number, 7,305 (77.1% of the test-takers) made the decision to apply to at least one law school. Then, fewer than half of those, 43.7% of the applicant pool of 8,503 (this number differs from the 7,305 noted above because it includes test takers who had taken the LSAT in previous administrations and are applying to Law School at that time) applicants in the fall of 2000 were admitted. That equals 3,718 African-Americans who were admitted (comprising 7.4% of the admitted pool, although they were 11.4 percent of the applicant pool) compared to 65.1% of the white applicants (they disproportionately comprise 72.2% of the admitted pool), Asians who were 7.1 % of the applicant pool, were admitted at the rate of 69.7% (the highest rate of any ethnic group) and

<sup>115</sup> Here I agree with Professor Sander and the primary thesis of his article, *see supra* note 11, that affirmative action is employed in almost every law school as a result of the “cascade effect” created by affirmative action’s use by selective or elite schools.

comprised 7.1% of the percent admitted.

Those admitted African Americans who enrolled in a law school totaled 3,096 out of that 3,718 or 83.3% of all admitted African Americans eventually enrolled in a law school in the fall. That compares quite favorably with the rates for whites and Asian (82.3% and 80.1%, respectively). Indeed, Chicano's and Hispanics enrolled 83.9% and 82.1% of their admitted applicants and Native Americans weren't far behind enrolling 80.9% of their admitted applicants. My take on this is that there is no disproportionate leakage for underrepresented minority groups at this stage such that the decision to matriculate at a law school after receiving a favorable admission decision does not constitute a bottleneck in the pipeline. The lack of disproportionate impact at this stage only serves to emphasize the point made above that once members of underrepresented minority groups are admitted to a law school they will attend, thereby proportionately increasing the number of possible minority attorneys in the pipeline. Once admitted to a law school, the rate of matriculation is fairly uniform across racial groups.

Hence, the admissions decision is critical and, as demonstrated above,<sup>116</sup> that decision has been influenced (warped) by the inclusion of the median LSAT score in the rankings resulting in fewer African-Americans admissions and matriculation to law schools.<sup>117</sup> Diversity is sacrificed in the search for a higher ranking notwithstanding the almost universal agreement that achieving diversity is a positive goal that law schools should individually and collectively embrace. Now that the genie is out of the bottle and the correlation between rankings and median LSAT score is observable and persists, the real question is what can be done to counteract that negative impact. What about including diversity as a positive component in the rankings by including the Index as a variable with the same weight as the median LSAT score? Could that possibly have a similar effect on law school behavior?

#### CONCLUSION: INCLUDING THE INDEX: THE POSITIVE USE OF THE RANKINGS

It is undeniable that the existence and influence of the rankings has had a powerful effect on law school and applicant behavior. Law schools have attempted to increase their median LSAT score in an effort to achieve a

<sup>116</sup> See *supra* notes 101-06 and accompanying text.

<sup>117</sup> See *supra* notes 107-112 and accompanying text.

higher ranking. An unintended side-effect of that goal is a lessening of diversity in the most recent law school classes making the debate over affirmative action largely superfluous. African American law students, responding to the influence of the rankings and believing that affirmative action is aggressively deployed by these same law schools, have misapplied to law schools at which they have no chance of being admitted resulting in a decrease of admitted and matriculating African-American students. This twin causative effect has had the depressing result of marginalizing meaningful diversity as an achievable goal for law schools.

The Diversity Index promulgated by *U.S. News* represents a positive step in measuring that diversity and acknowledging the law schools that are the most diverse and least diverse. Although the methodology may be debatable,<sup>118</sup> the Index has focused attention on the correct issue, which law schools are best at achieving diversity by measuring which schools matriculate the most diverse class. The problem with the current iteration of the Index is that although it measures diversity and appears to give diversity some positive weight it simultaneously undercuts that positive weight by its placement as a separate index that is not included in the rankings. Almost by definition if you rank something and employ various factors or variables like median LSAT in producing your rankings, the ranking entity is making the claim that those variables are important. If those variables are unimportant then the rankings are meaningless or less meaningful. Consequently, by not including some evaluative factor or metric in the ranking you are making the case that the omitted factor or metric is less important as those that are used for producing or compiling the rankings.

And, that is the current state of affairs. *U.S. News* has taken a positive step through the production of the Index. Of that there can be no doubt. Yet that step has not gone far enough. As demonstrated by the use of the median LSAT in the rankings, the existence of the rankings and the factors that go into its computation have had a tremendous impact (albeit negative) on law school and student behavior as it pertains to achieving diversity in law school student populations. *U.S. News* can and should take a step to reverse that negative impact on law schools and diversity by including the

<sup>118</sup> I am not claiming that it is debatable but am willing to assume so for the sake of argument. Although I do find it somewhat odd that the top five diverse schools are the University of Hawaii, Texas Southern University, Florida International University, University of District of Columbia, and Florida A&M, which are three predominantly African American schools, one school located in probably the most diverse population in the United States, and the other school, Florida International University, which has as its stated mission and reason for founding the production of Hispanic lawyers.

index as an equally weighted variable in the rankings. By doing so, schools will be able to achieve the same benefits of cost and certainty even if correlation is not attained (if only that were true, that is, the most diverse schools are the highest ranked schools). It would be a step in the right direction and reduce the criticism that *U.S. News* receives for warping the law schools' commitment to diversity by including the LSAT score as one of its weighted factors.

The reasons provided by Mr. Morse for their failure to include the Index in the rankings do not add up. As a result, there are only two reasonable alternatives: discontinue the rankings in total, which I wholeheartedly support but which is unrealistic given the profit and attention generated by the rankings, or include the Index in the rankings. Mr. Morse, it is your call!