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Looking through the Class and What Alice Found There: A Frustrated Analysis of Law School Admissions Policies and Practices.

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LOOKING THROUGH THE CLASS AND WHAT ALICE FOUND THERE¹: A FRUSTRATED ANALYSIS OF LAW SCHOOL ADMISSIONS POLICIES AND PRACTICES

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I. Introduction.....	62
II. Discussion	63
A. A Modest Request.....	63
B. FERPA	64
C. Less is Not More, But It's Something	72

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They came first for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for me, and by that time no one was left to speak up.

Id. Cf. RICHARD J. PELTZ, TIME FOR A TOP-TIER LAW SCHOOL: A RESEARCH PAPER FOR THE ADVANCE ARKANSAS INSTITUTE 15, 27-28 (Feb. 3, 2011), available at <http://www.advancearkansas.org/storage/Peltz02-2011.pdf> (discussing infringement on academic freedom). Professor Richard Peltz is referred to as Richard Peltz-Steele in this Article for those publications and interviews that occurred after he changed his name upon marriage.

1. LEWIS CARROLL, THROUGH THE LOOKING GLASS, AND WHAT ALICE FOUND THERE (Florence Milner ed., Rand McNally & Co. 1917) (1871).

D. Disparate Opinions	80
i. The Unresponsive Response	82
ii. Unrest at Home	87
E. Factors Correlating with the Suspect List.....	89
i. Admissions Practices	89
ii. In Search of a Strong Support System.....	98
III. Conclusion	105

I. INTRODUCTION

*Humpty Dumpty had a great fall.*²

I am a law professor at one of only two law schools in the state of Arkansas—the University of Arkansas at Little Rock School of Law (“Arkansas Law–Little Rock”).³ As a law professor, I am a bit of an idealist. I cherish the value of higher education and cling to the notion that educators are dedicated to the concepts of knowledge, improvement, and truth. In this Article, I describe the events that have worked to undermine my belief that these truths are self-evident throughout the academy. In particular, I discuss my thwarted attempts, as a member of the Admissions and Readmissions Committees at my school, to review the admissions files of students who were unable to succeed in law school. This attempt to learn from our and their mistakes was met with resistance, in contravention of good policy and the law.

Moreover, the administration’s actions that prevented me from reviewing relevant admissions files camouflaged the existing policy of admitting a subset of applicants with very low LSAT scores, while failing to provide adequate support services to ensure that some of these vulnerable students have a reasonable chance of success. The tragic result is that at-risk students are admitted to law school believing that they can succeed, when, in fact, absent an effective systemic academic success program, many will understandably and predictably fail to graduate. However, these unsuccessful law students don’t walk away with nothing to show for their significant efforts; they are often saddled with debt, regrets, and missed professional and personal opportunities.

2. *Id.* at 92.

3. The other school, also public, is the University-system described flagship—the University of Arkansas at Fayetteville. See, e.g., *Position Announcement: Dean, School of Law University of Arkansas*, UNIV. OF ARK. SCH. OF LAW, <http://law.uark.edu/dean-search/position.html> (last visited June 23, 2011) (referring to both law schools). “The School of Law, the older of the state’s two law schools (the other residing in Little Rock) is located on the flagship campus of the University of Arkansas system in Fayetteville.” *Id.*

II. DISCUSSION

A. *A Modest Request*

*“That’s all,” said Humpty Dumpty. “Goodbye.”*⁴

Arkansas Law–Little Rock has the following rules for students who do not perform well: A student will be automatically dismissed from the school if “after completing two semesters of work at this school . . . the student’s cumulative GPA is less than 2.00 in all courses taken at this school.”⁵ The Academic Rules provide that:

A student dismissed for academic deficiency . . . may petition in writing for readmission . . . if either [t]he student’s cumulative GPA is 1.80 or higher; or . . . the student has completed only two semesters of law school work at this school and has earned at least a 2.25 GPA in either semester.⁶

Similarly, if a student falls below a 1.5 GPA in the first semester, the student will be dismissed. That student may apply for readmission if he or she hadn’t fallen below a 1.3 GPA.⁷ In considering whether to change some of these standards during the summer of 2010, the members of the Readmissions Committee (the committee that considers whether failing students should be given a second chance) were notified that the administration had compiled the records of all students whose GPAs fell below 2.0 in their first semester during the period of 2003-2007 (the “Suspect List”), as well as their subsequent failure rate. Almost all of these students failed to graduate, as the Suspect List chart below shows.

As a member of the Admissions and Readmissions Committees—the only member of both—I asked the law school administration for the Law School Data Assembly Service (LSDAS) forms for each student on the Suspect List. The LSDAS forms are the basic tools used by law-schools in the admissions (and readmissions) process.⁸ In making my request, I

4. CARROLL, *supra* note 1, at 106.

5. [ARKANSAS LAW–LITTLE ROCK] ACADEMIC RULES 12 (2009), available at http://ualr.edu/law/files/2011/06/SCAN1891_000.pdf.

6. *Id.*

7. *Id.*

8. LSDAS, UNIV. OF NOTRE DAME, <http://www.nd.edu/~prelaw/lstdas.html> (last visited June 4, 2011) (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*).

The Law School Data Assembly Service assembles data derived from candidates’ transcripts and LSATs. The LSDAS places grades from institutions with varying grade point systems on the same scale to allow the law schools to evaluate all students on a more or less equivalent basis. The Service combines information from all transcripts you send, so credits that may not be computed in your current undergraduate GPA will be calculated in the LSDAS report of your GPA. LSAT scores earned in the last five years will be reported, as well as the averages of those reported. At the request of

relied on the basic premise that we cannot make decisions about admissions and readmissions policy without first investigating who failed to perform under our current standards. Moreover, examining the admissions files of the subset of students who did not graduate is essential for learning whether (and, if so, how) the school failed the students in the admission or education process.

That is not to say that students may not have failed themselves. There are several possible causes of failure linked to admission. It could be that the school admitted students: (1) without the ability to succeed at any law school; (2) with the ability to succeed at Arkansas Law–Little Rock, but who weren't given the tools and/or training to succeed; (3) who could have succeeded at another school but were poorly matched to Arkansas Law–Little Rock; or (4) without the proper drive, notwithstanding the ability and means to succeed. Institutions of higher education have a strong obligation to ensure that they minimize—if not eliminate—categories (1) through (3)—particularly when the schools take significant sums of money from these students and the public (which is the case at a state funded institution). These schools also have some obligation to assist in minimizing (4).

B. FERPA

*The moon was shining sulkily,
Because she thought the sun
Had got no business to be there
After the day was done—
"It's very rude of him," she said,
"To come and spoil the fun!"⁹*

Although I regularly review admissions and readmissions files, the administration¹⁰ said that I could not examine the requested admissions files for those students on the Suspect List because this information is

a law school the LSDAS analysis may also include an index score derived from the GPA, the LSAT score(s), and the undergraduate school(s) attended.

Almost all ABA accredited law schools require you to register with LSDAS. *Id.*

9. CARROLL, *supra* note 1, at 61.

10. The limits of this term are not always well defined. Compare [ARKANSAS LAW–LITTLE ROCK] ORGANIZATIONAL CHART 15 (2010), available at <http://ualr.edu/administration/uploads/2010/09/AdminOrgUALR.pdf> (presenting the organizational chart of the law school), with Salary Schedule for faculty of Arkansas Law–Little Rock (June 4, 2011) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (stating titles and salaries of all law school faculty and staff). Three assistant Deans (as identified on the organizational chart) are listed as "Research Associates" in the budget information provided to the state legislature.

“private,” even to me—a member of the faculty on both the Admissions and Readmissions Committees.

The Family Educational Rights and Privacy Act (FERPA) provides student records privacy guidelines for academic institutions seeking federal funding.¹¹ The Family Policy Compliance Office of the Department of Education, which “manages FERPA compliance and provides policy guidance” on FERPA states that “[e]ducation records may be released [*to the public*] without consent if all personally identifying information has been removed.”¹² Once this occurs, the information falls outside of FERPA for the disclosure of student information to the public.¹³

The Department of Education recently promulgated regulations clarifying that the mere possibility that a student could be identified from released information is not enough to prevent its release *to the public* under FERPA; rather, in order for FERPA to apply, the records must be:

[L]inked or linkable to a *specific student* that would allow a reasonable person in the school community . . . to identify *the student* with *reasonable certainty*; or [] [the i]nformation [is] requested by a person who the educational . . . institution reasonably believes *knows* the identity of *the student* to whom the education record relates.¹⁴

Critically, the requirements of *specific student* and *reasonable certainty* to preclude disclosure are not satisfied if the requestor could merely guess at the possible identity or could narrow the possibilities down to a few potential students.¹⁵ Indeed, FERPA specifically allows for the release of redacted information to public organizations that conduct research for educational organizations for the purpose of improving instruction.¹⁶

Importantly and perhaps obviously, however, the standard applicable to the public does not govern faculty and administrators’ access to student information. School officials seeking access to students’ files must meet a much lower standard—that of a “legitimate educational inter-

11. 20 U.S.C. § 1232g (2006).

12. Letter from LeRoy S. Rooker, Director, FPCO, to Matthew J. Pepper, Policy Analyst, Tenn. Dep’t of Educ. (Nov. 18, 2004), *available at* http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/nashville_tn2004.html (last visited June 4, 2011).

13. *Id.*

14. 34 C.F.R. § 99.3 (2009) (alteration in original) (emphasis added).

15. Richard J. Peltz, *From the Ivory Tower to the Glass House: Access to “De-Identified” Public University Admission Records to Study Affirmative Action*, 25 HARV. BLACK-LETTER L.J. 181, 194–95.

16. *See, e.g.,* JAY BEQUETTE & ADRAI NOBLES KIMBROUGH, *LAWFULLY MANAGING STUDENT RECORDS WITHOUT VIOLATING PRIVACY RIGHTS* 16 (2006). Incidentally, Adrai Nobles Kimbrough currently works for the University Counsel referenced below.

est”¹⁷: “The Family Educational Rights and Privacy Act (FERPA) and the [relevant Freedom of Information Act (FOIA)] permit education records otherwise shielded from open records disclosure [i.e., FOIA,] to be made available to teachers with a legitimate educational interest in them.”¹⁸

Defining the difference in the accessibility of educational records by faculty versus the public at large has been litigated in *Medley v. Board of Education of Shelby County*¹⁹—one of the few cases construing FERPA’s reference to “legitimate educational interest.”²⁰ *Medley* was a school-teacher.²¹ After students in her classroom complained of mistreatment, she consented to the school installing cameras in her classroom to monitor her teaching.²² She later made a Freedom of Information (open records) Act—request for the videotapes “to use to evaluate [her] performance, as a teacher, as well as the management of [her] classroom.”²³ In a letter from the school’s counsel, the school denied *Medley*’s request.²⁴ The school asserted that the tapes were “education records,” therefore, protected from release to her by FERPA.²⁵ *Medley* filed suit.²⁶ The Attorney General issued an opinion agreeing with the school.²⁷ The trial court agreed with the Attorney General’s opinion.²⁸ On appeal, the appellate court reversed. In highlighting that the trial court “disregarded *Medley*’s status as a teacher and her purported interest in viewing the videotapes.”²⁹ The appellate court stated:

We believe the rationale of the Attorney General and the circuit court in denying *Medley*’s request is flawed. Although we agree the videotapes in question are, in fact, “education records,” we do not believe *Medley*’s request should be considered as made by “a member of the public.” Rather, *Medley*’s request should be judged in light of her position as a teacher.³⁰

17. *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (last visited June 23, 2011) (emphasis added).

18. *Medley v. Bd. of Educ.*, 168 S.W.3d 398, 401 (Ky. Ct. App. 2004).

19. 168 S.W.3d 398 (Ky. Ct. App. 2004).

20. *Id.* at 401.

21. *Id.*

22. *Id.*

23. *Id.* (alteration in original).

24. *Medley*, 168 S.W.3d at 401.

25. *Id.*

26. *Id.*

27. *Id.* at 401–02.

28. *Id.* at 402.

29. *Medley v. Bd. of Educ.*, 168 S.W.3d 398, 402 (Ky. Ct. App. 2004).

30. *Id.* at 404.

Additionally, the court placed on the *school* the burden of justifying the failure to produce the requested material: “the circuit court impliedly found Medley’s request was not made pursuant to a legitimate educational interest. . . . [The school] and the board did not fulfill *their* burden of proof by establishing that Medley’s interest [as an educator] was not legitimate.”³¹

Finally, the court dismissed the school board’s pallid effort to bypass the legitimate role of the judiciary by claiming that the school was the sole arbiter of the meaning of legitimate educational interest:

The Board argues, “Medley’s efforts to convert the permissive educator access provisions of FERPA and KFERPA into mandatory Open Records Act access does indeed raise the prospect of the undermining of the executive authority of the school administration by way of judicial override of such authority.” We note that a school superintendent has the power to exercise general supervision over the schools in his district. However, the outcome of this case does not turn on the superintendent’s authority. It is instead a matter of statutory interpretation, a task clearly within the province of this Court. Our elucidation of the statute in question in no way usurps the authority of Mooneyhan or the Shelby County Board of Education. Therefore, the Board’s argument is flawed.³²

Cognizant of the difference between the afore-described open-records-act and legitimate-educational-interest standards, I suggested that the administration redact the names of the students from the LSDAS forms before they sent (or re-sent³³) them to me. “De-identifying” these records takes them out of privacy consideration even for release to the *public*.³⁴ Thus, with this modification to my request, I singularly became entitled to the information as both a school official and a member of the public.

Notwithstanding my offer to receive the files with the identifying information redacted, the administration again denied my request. The administration did concede that during the admissions process I routinely review the types of files that I requested, stating: “Although as a member of the Admissions Committee you are allowed to review LSDAS information of those who apply for admission, you have an educational need to review that information because you must decide whether or not some-

31. *Id.* at 405 (emphasis added) (remanding the case to determine if Medley had a legitimate educational interest).

32. *Id.* at 406 (footnote omitted).

33. “Re-sent” because I saw at least some of these forms in the admissions and readmissions process already.

34. Peltz, *supra* note 15, at 193.

one should be admitted to our law school.”³⁵ The administration went on to assert, however, that reviewing these same files to systematically evaluate our admissions policies was impermissible: “The LSDAS information of students who attain a 2.00 GPA or less during their first semester in law school is not relevant to whether or not other students should be admitted. Consequently, release of this information to you would violate FERPA. It will not be released to you.”³⁶

To the contrary, however, the information that I requested is relevant, indeed important, to any faculty concerned with admissions and readmissions standards and policies—as well as the general welfare of his school. Consider what the President of the American Association of Law Schools stated (prior to his presidency): “[O]ne of the four important tenets of academic freedom is the freedom to select who will be admitted to study. This important foundation of higher education is . . . particularly appropriate and crucial for post baccalaureate professional studies and graduate programs.”³⁷

The quality of the students admitted bears directly on factors such as how we train our students and how successful they may become. For example, the quality of admitted students directly relates to the school’s bar passage rate.³⁸ One study analyzing the bar passage rate of a cohort

35. E-mail from A. Felicia Epps, Associate Dean for Academic Affairs, Arkansas Law–Little Rock to John M.A. DiPippa, Dean, Arkansas Law–Little Rock and author (July 14, 2010, 07:19 CST) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

36. *Id.*

37. Michael A. Olivas, *Higher Education Admissions and the Search for One Important Thing*, 21 U. ARK. LITTLE ROCK L. REV. 993, 1006 (1999) (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

38. *Best Value Law Schools*, NAT’L JURIST (Oct. 16, 2009, 10:25 AM), <http://www.nationaljurist.com/content/best-value-law-schools>. The ABA evaluates the bar passage rate as part of its law school accreditation process. AM. BAR ASS’N, 2010-2011 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 17 (2010-2011 ed.), available at http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011_standards/2010-2011abastandards_pdf_files/chapter3.authcheckdam.pdf; see also RANKO SHIRAKI OLIVER, REPORT TO THE 2007-2008 ASSESSMENT COMMITTEE OF [ARKANSAS LAW–LITTLE ROCK] (Mar. 27, 2009), available at <http://ualr.edu/law/files/2011/04/additional0809.pdf> (reporting on current student assessment techniques and suggested changes).

A study released in 1998 by the Law School Admission Council (LSAC) concluded that “[b]oth law school gradepoint average (LGPA) and Law School Admission Test (LSAT) score were the strongest predictors of bar examination passage for all groups studied.” A study conducted by the NCBE of applicants to the New York bar determined that “performance on the bar exam was strongly correlated with performance in law school, as measured by law school grade point average (LGPA)” A study conducted using data from all 2001-2005 graduates of the Saint Louis University School of Law who took the Missouri bar examination as their first bar examination “confirmed an association between bar examination passage and final law school class

of law school students with incoming credentials below a 2.8 UGPA and 140 LSAT showed a passage rate of only thirty percent.³⁹ “And [this study considered that] . . . since [these students] were admitted to a law school, [they] probably had signs of academic promise that were thought to offset their low academic numbers.”⁴⁰ While these numbers may not be fully applicable outside of the cohort examined, they provide a good rough estimate.

Indeed, the July 2010 in-state bar-passage rate at Arkansas Law–Little Rock suggests the need for attention: A total of 228 examinees sat for the Arkansas Bar Exam with 149 (65.4%) passing. For Arkansas Law–Little Rock, a total of ninety-five examinees took the test with fifty-three (55.8%) passing; Arkansas Law–Little Rock first-time takers totaled seventy-eight, and fifty (64.1%) passed.⁴¹ For the University of Arkansas at Fayetteville School of Law, eighty-nine examinees took the test and sixty-six passed (74.2%); Fayetteville first time takers totaled eighty-two, and sixty-four (78%) passed.⁴² By way of out-of-state comparison, University of Missouri at Columbia School of Law (also known as “Mizzou”) “first-time takers of the Summer 2007 Missouri Bar Examination passed that exam at a rate of 96.5%, while all [eleven] Mizzou graduates taking the Kansas Bar Examination for the first time that same summer also were successful.”⁴³

rank,” with one-hundred percent of those in the top quartile passing the bar examination on their first attempt and only 49.5% of those in the fourth quartile passing on their first attempt. Two studies conducted at the Bowen School of Law have confirmed a link between academic performance and bar passage. In a study conducted by Arkansas Bar Foundation Professor of Law Lynn Foster examining bar exam applications who took the Arkansas Bar Exam [in] July 1998 to February 2000, the “highest correlation” was “between number of hours below a C and failing the bar exam.” Another study, conducted by the 2004-2005 Long Range Planning Committee when chaired by Professor Richard J. Peltz, determined that first year GPA, GPA in bar courses, and number of hours below a C “each explains, or predicts, between twenty and twenty-five percent of bar performance.”

OLIVER, *supra* at 24 n.24 (citations omitted).

39. RICHARD SANDER & JANE YAKOWITZ, REPORTING OR EMOTING? 4 (2010), *available at* <http://www.seaphe.org/pdf/100204-nyt-response.pdf>.

40. *Id.*

41. RICHARD J. PELTZ, TIME FOR A TOP-TIER LAW SCHOOL: A RESEARCH PAPER FOR THE ADVANCE ARKANSAS INSTITUTE 15, (Feb. 3, 2011), *available at* <http://www.advancearkansas.org/storage/Peltz02-2011.pdf>.

42. *Id.*

43. *Welcome to MU Law*, UNIV. OF MO. SCH. OF LAW, <http://law.missouri.edu/about/> (last updated July 26, 2011).

The results for the Arkansas bar exam in February showed definite improvement, although far fewer graduates took this exam.⁴⁴ 148 applicants took the exam, and approximately ninety-six passed.⁴⁵ The school's administration indicated that the percentage passers are as follows: for the thirty-three Arkansas Law–Little Rock first time takers, the pass rate was 81.8%; for the sixty-seven Arkansas Law–Little Rock overall takers, the pass rate was 65.7%; for all takers pass rate: 64.9%.⁴⁶ Thus, Arkansas Law–Little Rock brought its score up to the state average from ten points below. This is a significant and laudable improvement—putting aside for the moment the previously described reasons that February results tend to be more erratic (either way) given the sample size and composition.

Even if this improvement holds through one or more July exams, however, these scores remain approximately ten points below the July passage rate from the University of Arkansas at Fayetteville School of Law and historical scores from Arkansas Law–Little Rock itself.⁴⁷ According to a 2007–08 report from the law school, Arkansas Law–Little Rock's "bar passage rate for first time takers for the five most recently completed calendar years is approximately 78%, and the bar passage rate has been higher than 75% for four of those five years."⁴⁸ Moreover, the report recognized that:

[L]aw schools satisfy their bar passage requirements if they meet either of the following standards:

- 1) For the five most recently completed calendar years, at least 75 percent of the graduates sitting for the bar examination passed, or in at least three of those five years, at least 75 percent of the graduates passed a bar examination; or

44. Most students graduate in May and take the bar exam in July. Those taking the February exam either graduated in December, failed the July bar, or simply put off taking the exam for another reason. As such, the results tend to be more anomalous.

45. *February Bar Exam Results Compare UA, UALR*, ARK. BUSINESS, June 6, 2011, available at <http://www.arkansasbusiness.com/article.aspx?aID=127157.54928.139281&k=February+2011+Arkansas>. Though ninety-two passers are shown, the calculations of the percentage of passers based on the total number of exam takers provided by the administration puts the total number of passers at ninety-six.

46. *Id.*

47. Only thirty-seven students from University of Arkansas Fayetteville sat for the February exam, thereby increasing the significance of each student's score. *Id.* Total passage rate for UA was forty-nine percent, first time takers has a sixty percent pass rate. *Id.* Forty-four individuals from outside of Arkansas sat for the exam and achieved a seventy-seven percent passage rate. *Id.*

48. OLIVER, *supra* note 38, at 25.

2) In three of the most recent five calendar years, the school's first time pass rate is no more than 15 percent below the statewide average for graduates of ABA-approved law schools.⁴⁹

In the report, the law school focused on satisfying the second prong, which appears to be more easily met.⁵⁰ However, the first prong is more objective, and the requirement is modest enough that the school should set that as its goal.

For the not-insignificant number of Arkansas (and other law) students who never pass the bar, generally “[f]ive to ten-years out of law school, they lag well behind lawyers on every measure—earnings, employment stability, even marriage and divorce rates.”⁵¹ An examination of the data that I requested might inform Arkansas Law–Little Rock on how to improve this unfortunate situation through an adjustment of admissions standards, academic support, teaching methods, or any combination of the above.

The dramatic effects, however, are not only felt by the at-risk students. The undergraduate GPAs and LSAT scores of incoming students, along with the school's bar passage rate, make up a full twenty-five percent of the *U.S. News & World Report* ranking for law schools.⁵² So, regularly admitting students who don't perform well in law school and on the bar exam, has the systemic effect of holding back such schools from elevating in the rankings. The costs can be dramatic. Both employers and future law school applicants consider school rank. A low *U.S. News* ranking results in a vicious cycle of attracting less-well-credentialed students and diminishing employment opportunities for all upon graduation. Thus, the

49. *Id.* (citing AM. BAR ASS'N, 2010-2011 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 17 (2010-2011 ed.), available at http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011_standards/2010-2011abastandards_pdf_files/chapter3_authcheckdam.pdf).

50. *Id.* at 25–26. Additionally, “the bar passage statistics are factored in to the *U.S. News & World Report* law school rankings, constituting approximately two-percent of a law school's overall ranking.” *Id.* at 25.

51. Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3, 4 (2010). With that said, however, according to one member of Arkansas Law-Little Rock's administration, the school's “performance in the [post-graduation] employment categories [of *U.S. News & World Report*'s law school rankings] is abysmal, the lowest of any of our rankings and firmly in the fourth-tier range. This is especially damaging for a law school in a capital city, where presumably the opportunity to work during school leads to better placements.” OLIVER, *supra* note 38, at 39 (discussing performance in the section containing June 5, 2008 memorandum from Associate Dean for Information and Technology Services and Law Library Director, June Stewart, to Ranko Oliver, regarding LESSEE 2007 Means Comparison Report).

52. David Segal, *Law Students Lose the Grant Game as Schools Win*, N. Y. TIMES, Apr. 30, 2011, http://www.nytimes.com/2011/05/01/business/law-school-grants.html?_r=1&emc=eta1&pagewanted=all.

entire student body pays for the decision to admit students who won't succeed.

Another way to evaluate the administration's assertion that I shouldn't receive the information that I requested is to examine the U.S. Department of Justice's definition of an educator's "legitimate educational interest," justifying disclosure.⁵³ The DOJ states that an educator's legitimate educational interest is satisfied if the teacher or other school official properly uses the information in order "to fulfill his or her professional responsibility."⁵⁴ As it turns out, this professional responsibility is described on Arkansas Law–Little Rock's website: "[Arkansas Law–Little Rock] and its faculty continuously assess student progress and alumni success through a variety of formal and informal activities (outlined in the annual assessment reports). This assessment leads to continuous improvement in teaching, curriculum design, and student services."⁵⁵ This stated commitment to engaging in ongoing assessment includes determining whether students who fail out of the law program (1) should never have been admitted, or (2) should have been given additional attention and training to ensure their success.

C. *Less is Not More, But It's Something*

*"Who's been repeating all that hard stuff to you?"
"I read it in a book," said Alice.⁵⁶*

Although the administration denied my request, it also suggested that I invite the Chair of the Readmissions Committee to request the same material. He did so, although he took no position on the FERPA issue—stating that he was not well versed in this area of the law. While this did not cause the administration to provide me with the material that I requested, the administration did then present me with the information reflected in the following chart, which contains the LSAT scores, undergraduate GPAs, and Index Scores (combined UGPAs and LSAT scores) of the students on the Suspect List. The administration stated

53. *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (last visited June 23, 2011) (emphasis added).

54. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, *SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS 4* (1997), available at <http://www.ncjrs.gov/pdffiles/163705.pdf>.

55. *Accreditation and Assessment*, UNIV. OF ARK. AT LITTLE ROCK–WILLIAM H. BOWEN SCH. OF LAW, <http://ualr.edu/law/academics/accreditation-and-assessment/> (last visited June 23, 2011).

56. CARROLL, *supra* note 1, at 103.

that this is the only information from the requested LSDAS reports that can be shared without revealing the identity of the students involved.

Suspect List: Students with GPA's Below 2.0 in Their First Semester (2003-2007)⁵⁷

UGPA	LSAT	Index	1st Semester	1st Semester GPA	Status	Current GPA	Final GPA	Status Date	Comments
2.46	156	51	2007	0.60	Dismissed		.67	Spring 2008	
3.74	148	53	2005	1.10	Withdrew		1.10	Spring 2006	
3.46	145	42	2005	1.10	Withdrew		1.10	Spring 2006	
3.04	145	40	2007	1.25	Withdrew		1.25	Spring 2008	
3.38	152	55	2003	1.43	Dismissed		1.69	Spring 2004	
2.24	144	34	2007	1.45	Dismissed		1.50	Spring 2008	
3.03	145	38	2006	1.45	Withdrew		1.45	Spring 2007	
2.26	153	45	2006	1.50	Dismissed		1.66	Spring 2007	
3.27	150	51	2003	1.55	Dismissed		1.55	Spring 2004	Re-admitted, Dismissed after Fall 2004
3.56	150	54	2003	1.58	Dismissed		1.76	Spring 2004	
3.18	153	54	2005	1.58	Dismissed		1.90	Spring 2006	
3.28	148	49	2005	1.60	Dismissed		1.80	Spring 2006	
3.07	143	41	2005	1.61	Dismissed		1.77	Spring 2006	
3.65	150	55	2007	1.65	Student	2.09	2.22		
3.31	155	55	2004	1.66	Dismissed		1.66	Spring 2005	Re-admitted, Dismissed after Spring 2004
3.35	144	44	2006	1.66	Dismissed		2.38	Spring 2007	Re-admitted, Graduated Spring 2010
2.3	154		2003	1.70	Withdrew		1.70	Spring 2004	
3.29	152	54	2003	1.71	Dismissed		1.86	Spring 2004	
3.5	140	42	2005	1.72	Withdrew		1.72	Spring 2006	
2.46	157	51	2003	1.72	Dismissed		1.77	Spring 2005	
2.29	159	53	2004	1.75	Dismissed		1.89	Spring 2005	
2.89	153	51	2007	1.76	Student	2.29	2.69	Summer 2010	Graduated Summer 2010
3.19	146	45	2003	1.76	Dismissed		1.92	Spring 2004	
3.08	147	45	2006	1.78	Student	2.49	2.58		Graduated Spring 2009

57. The data in this table was provided directly to the author by the administration of Arkansas Law–Little Rock in the format provided (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

UGPA	LSAT	Index	1st Semester	1st Semester GPA	Status	Current GPA	Final GPA	Status Date	Comments
3.84	152	57	2004	1.86	Withdrew		1.86	Spring 2005	
3.18	140	37	2006	1.87	Student	2.23	2.41		Graduated Spring 2010
3.53	150	54	2004	1.91	Dismissed		1.81	Spring 2005	
3.71	142	45	2006	1.93	Student	2.35	2.44		Graduated Spring 2009
2.82	147	42	2007	1.93	Dismissed		.96	Spring 2008	
3.37	149	51	2003	1.95	Withdrew		1.95	Spring 2004	
2.61	140	32	2005	1.95	Dismissed		1.97	Spring 2006	Re-admitted, Dismissed after Spring 2007
3.66	149	50	2005	1.95	Dismissed		1.98	Spring 2006	
3.03	141	37	2005	1.95	Dismissed		1.96	Spring 2006	Re-admitted, Dismissed after Fall 2006
3.21	158	61	2006	1.95	Dismissed		1.90	Spring 2007	
2.83	156	58	2007	1.96	Student	2.23	2.53		Graduated Spring 2010
3.48	145	46	2006	2.00	Student	2.66	2.83		Graduated Spring 2010
3.6	156	62	2007	2.00	Student	2.19	2.45		Withdrew Spring 2010

The chart shows thirty-seven students on the Suspect List. Only seven (19%) graduated. Four of the students (11%) were admitted with LSAT scores at or below the ABA's cutoff for failing the LSAT—141.⁵⁸ And the undergraduate GPAs ranged from 2.24 to 3.84.

These numbers are concerning. LSAT scores are good predictors of first year success: “Research summarizing . . . validity studies consistently indicate[s] that LSAT scores are strong predictors of first-year law school performance, and that this prediction is improved when LSAT scores are used in combination with UGPAs.”⁵⁹ This is true across cohorts.⁶⁰ In-

58. Robert Zelnick, *Forced Fairness*, HOOPER DIGEST (Oct. 9, 2009), <http://www.hoover.org/publications/hoover-digest/article/5559>.

59. ARLENE AMODEO ET AL., LAW SCHOOL ADMISSION COUNCIL, PREDICTIVE VALIDITY OF ACCOMMODATED LSAT SCORES FOR THE 2002–2006 ENTERING LAW SCHOOL CLASSES 2 (2009), available at <http://www.lsac.org/LSACResources/Research/TR/TR-09-01.pdf>. “[A]cademic indices based on the LSAT and undergraduate grades can be shown to be far more effective in predicting law school performance (and, for that matter, success on bar examinations) than any other factor that has been systematically tested.” Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 412 (2004). As one dean of another law school stated: “Like all law schools, we use LSAT scores and undergraduate GPAs as major factors in admissions. Unlike U.S.

deed, at Arkansas Law–Little Rock, there is roughly a 33% correlation between the LSAT and first-year grades, nearly as high a correlation between the UGPA and first-year law school grades, and well above a 40% correlation between the combined LSAT/UGPA, i.e., the Index Score, and first year grades.⁶¹

These numbers are better understood through the following explanation:

A validity coefficient . . . of []50[%] is regarded in testing and industry circles as extremely valuable; even one of []30[%] is considered useful. That is because a validity coefficient of []50[%] is likely to translate into a better than 75[%] chance that an applicant in the top 20 percentiles will be among the top 50[%] of performers on the job

News, we do not use these numbers as the sole determinants of student qualifications.” Robert M. Ackerman, *Is Law School Worth it? A Dean Looks Behind the Numbers*, NAT’L JURIST (Jan. 31, 2011, 8:36 AM), <http://www.nationaljurist.com/content/critical-issues/law-school-worth-it-dean-looks-behind-numbers>. A University of Michigan professor found that the SATs actually are more predictive for African-Americans than Whites, because of social factors unrelated to intelligence. ROBERT ZELNICK, *BACKFIRE: A REPORTER’S LOOK AT AFFIRMATIVE ACTION 177* (1996).

60. See LYNNE L. NORTON ET AL., LAW SCHOOL ADMISSION COUNCIL, ANALYSIS OF DIFFERENTIAL PREDICTION OF LAW SCHOOL PERFORMANCE BY RACIAL/ETHNIC SUBGROUPS BASED ON 2005–2007 ENTERING LAW SCHOOL CLASSES 1 (2009), available at <http://www.lsac.org/LSACResources/Research/TR/TR-09-02.pdf>

In the law school admission process, it is essential that the criteria used for admission are fair to all subgroups in the applicant population. One method used to evaluate the fairness of the admission process is to compare the predicted and actual first-year averages (FYAs) within individual law schools for various subgroups of the applicant population. The current study was designed to address questions of differential prediction of law school grades for various racial/ethnic subgroups.

The sample used in this study was drawn from the 2005, 2006, and 2007 entering law school classes, using data that were available from the Law School Admission Council (LSAC)-sponsored correlation studies. The study examined results for three racial/ethnic minority subgroups and the nonminority (White) subgroup. . . .

The results of the analyses indicate that FYA tended to be, on average, slightly *overpredicted* (i.e., predicted FYAs *exceeded* actual FYAs) for all three of the racial/ethnic minority subgroups studied here, with Black law students exhibiting the most overprediction and Asian American law students exhibiting the least overprediction. The use of a combination of both LSAT scores and UGPAs provided the least amount of overprediction for racial/ethnic minority subgroups on the school level compared to the use of either single predictor alone. [Therefore], these results do *not* support the concern that the LSAT score or the traditional combination of LSAT score and UGPA may contribute to unfair admission decisions for the racial/ethnic subgroups studied here.

Id. (emphasis added).

61. Information on file with *The Scholar: St. Mary’s Law Review on Minority Issues*.

while one in the bottom 20 percentiles may have only about a 20[%] chance of being among the top 50[%].

Another way of understanding the probabilities . . . [is i]f a gambler tried to predict the outcome of a coin toss by tossing another coin first, the first coin would be right half the time and wrong half the time for a validity correlation of 0. But if a “magic” coin were invented that produced a .30 correlation with the second coin, the person owning the “magic” coin would win 65 percent of the flips. If the validity coefficient were []50[%], the lucky owner would win 75[%] of flips. That is both good gambling and good business.⁶²

Further, analysis of the data showed that these Arkansas Law–Little Rock students who entered with LSAT scores of 150 or lower had almost a 40% chance of being in the bottom quartile of first-year GPAs and less than a 25% chance of being in the top quartile of first-year GPAs, while students who entered with LSAT scores of 157 or higher had only a 5% chance of being in the bottom quartile of first-year GPAs and a 50% chance of being in the top quartile of first-year GPAs.⁶³ Thus, students with low LSAT or Index Scores were—and will be—overrepresented in the bottom-quartile of first-year law school GPAs, and students with high Index Scores were—and will be—overrepresented in the top-quartile of first-year GPAs.

Previous research about Arkansas Law–Little Rock students showed that those entering with an Index Score at or below forty-eight simply were more likely to fail the bar exam than pass it.⁶⁴ Indeed, this statistic is based on students who *graduated* from law school; therefore, if those students who failed out were also considered as unable to pass the bar (due to their failure to complete law school), the likelihood of failing the bar for this group would be even higher. At least sixteen students (43%)—almost half—on the Suspect List had an Index Score at or below forty-eight. Even considering students with Index Scores up to, and including, fifty-eight—the research shows—at best, a roughly even distribution of bar passage.⁶⁵ Virtually all—at least thirty-five students (95%)—on the Suspect List had Index Scores at or below fifty-eight.⁶⁶ Finally, there was approximately a 700% greater chance that students with an Index Score at or below thirty-eight would fail rather than pass the bar

62. ZELNICK, *supra* note 59, at 85.

63. Information on file with *The Scholar: St. Mary's Law Review on Minority Issues*.

64. Interview with Richard J. Peltz-Steele, Faculty and co-author of Report and Recommendations of the Long-Range Planning Committee on the Preparation of [Arkansas Law–Little Rock] Law Students for the Arkansas Bar Exam, Arkansas Law–Little Rock (Nov. 2010). One student on the Suspect List has no stated index score. *Id.*

65. *Id.*

66. *Id.*

exam (again, for those who graduated law school), and at least five (14%) on the Suspect List had such a score.⁶⁷

As the literature justifies, we rely heavily—albeit, not exclusively—on scores, yet Arkansas Law–Little Rock has admitted some students with remarkably low LSAT (and Index) scores. I share the belief that the LSAT is designed to serve as a screening device. If we accept students with very low scores, without a significantly compelling reason to discount or disregard those scores, then the exam fails to serve its purpose as a filter and we create the possibility of significant future negative consequences. Indeed, I believe that those at the very bottom of the LSAT score index that also have poor undergraduate grades (*i.e.*, those with very low index scores) should for the most part not be admitted to law school at all. The American Bar Association (ABA) agrees; its minimum acceptable LSAT score is 141—scores “below which[,] the ABA urges rejection.”⁶⁸

Some, however, believe that scores are merely a shuffling device—designed to determine the distribution of applicants among available schools. Even if this is true, however, then a third tier school, such as Arkansas Law–Little Rock, still should not be accepting those at the very bottom unless there is an otherwise compelling reason to do so. That’s not to say that there aren’t some valid explanations. There are numerous reasons students may have artificially depressed scores that don’t reflect these students’ future potential. For example: a traumatic event affecting his or her LSAT exam; now-resolved medical issues when in college; or an environment or history temporarily interfering with his or her performance. Indeed, the latter is one explanation proffered for the use of affirmative action.⁶⁹

These reasons for overlooking the scores, however, often come with a price. Students whose indicators are affected by extreme circumstance typically require greater investment from the school to address the non-merit causes of their disparate scores. As discussed below, schools must

67. *Id.*

68. Zelnick, *supra* note 59.

69. See *Teaching With Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, ARCHIVES.GOV, <http://www.archives.gov/education/lessons/civil-rights-act/> (last visited June 10, 2011) (citing WEST ENCYCLOPEDIA OF AMERICAN LAW, “affirmative action ‘refers to both mandatory and voluntary programs intended to affirm the civil rights of designated classes of individuals by taking positive action to prevent them’ from discrimination”); *cf.* *Affirmative Action*, UNIV. OF KAN. MED. CTR. (KUMC) EQUAL OPPORTUNITY OFFICE, <http://www.kumc.edu/eoo/aff.html#history> (last visited Feb. 9, 2011) (describing the large amount of discrimination that racial/ethnic minorities and women have experienced in regard to housing, education, and employment in the United States, which formed the basis for affirmative action).

do more than just admit the student in order to eliminate the effects of the previous performance deficits.

Moreover, it also needs to be emphasized that admitting applicants with poor scores under these circumstances inevitably poses the very real cost of enrolling some students whose low scores do, in fact, reflect their actual abilities—causing harm to both these students—who have little chance of success, the other students and graduates—whose school is damaged by increased failure, and the institution—whose academic reputation is tarnished.⁷⁰ Schools must recognize that this cost is tangible, and that it will not be offset fully even if they make the morally requisite decision to invest extra resources in at-risk students—or not admit them. But admitting them without addressing their circumstances is the most costly and unfair of all of the options.

As can be seen, while the data that I received was very informative, quite a bit remained beyond my reach. Take, for example, that the chart shows that twenty-six of those on the Suspect List (70%) had UGPAs at or *above* a 3.0. While that sounds good—and it, indeed, may be—we do not know from which schools these grades were earned. The LSDAS forms I requested have this and other highly significant and useful non-identifying information, which would further elucidate the data, such as:

- The aforementioned school from which the student earned her UGPA (e.g., Harvard or correspondence college);
- The mean GPA at the student's undergraduate institution;
- The number of undergraduate institutions the student attended (i.e., is the student a peripatetic pupil?);
- The courses that the student took (e.g., basket-weaving or particle physics);
- The age of the student;
- The sex of the student,;
- The race of the student; and

70. See U.S. COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS 4 (2007), available at <http://www.usccr.gov/pubs/AALSreport.pdf> (evaluating the effect that admittance based on racial preference has on the academic performance of African-American law students). According to Richard Sander, a professor at the University of California at Los Angeles Law School, because low LSAT scores are high indicators of subsequent law school failure, affirmative action has an unintended, negative effect on African-American students who are admitted based on racial preference. *Id.* Sander posits that academic mismatch, which often occurs when students with below average LSAT scores are admitted into law schools, plays a significant role in explaining the racial disparities in bar passage rates and academic performance. *Id.* In contrast, Richard O. Lempert, a professor at the University of Michigan Law School, asserts that LSAT scores are not indicative of a law student's future success, income, or job satisfaction, regardless of race. *Id.*

- The trend of the student's undergraduate grade point average.

I'm not alone in my belief that this additional data is important. The Law School Admission Council (LSAC), the very organization that provides the LSDAS forms that I requested, states:

Do not rely on the grade-point average reported by the Credential Assembly Service without examining necessary additional information.

Decisions should not be based on cumulative averages as they appear on the Credential Assembly Service Law School Report alone. The following information is found on the Credential Assembly Service Law School Report and accompanying student transcripts and should be considered when interpreting grade-point averages:

- the undergraduate institution at which the averages were earned, and (when known) the colleges or departments within the institution;
- the distribution of grades at the institution, and the applicant's approximate rank in that distribution;
- the applicant's performance from year to year; and
- the types of courses in which the applicant excelled or did poorly.⁷¹

Arkansas Law–Little Rock has manifested the same belief, stating that the school employs a “‘holistic’ application review process, [which makes] it . . . impossible to predict chances of admission based on numerical profiles alone.”⁷² Equally, the administration has stated that indicators beyond index scores serve a greater and growing position in predicting and determining student success.⁷³ If that's the case, the withheld applicants' files that I sought to review should reflect these other indicators. Yet several questions remain unanswered. What other factors from this “holistic review” correlate with admission? Were we justified in how we weighed these other factors, given what we now know about the lack of success of those students on the Suspect List?⁷⁴ Can we isolate any of the other indicators on the LSDAS forms I requested—such as the school that the student attended, the courses the student took, the age of the

71. LAW SCH. ADMISSION COUNCIL, CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES 1 (rev. Dec. 2005), available at <http://www.lsac.org/LSACResources/Publications/PDFs/CautionaryPolicies.pdf> (emphasis added).

72. *Admissions FAQs: Undergraduate Degree*, UNIV. OF ARK. AT LITTLE ROCK–WILLIAM H. BOWEN SCH. OF LAW, <http://ualr.edu/law/admissions-faqs/undergraduate-degree/> (last visited June 23, 2011).

73. Information on file with *The Scholar: St. Mary's Law Review on Minority Issues*.

74. See Sander, *supra* note 59, at 421 (“No other predictor tested for admissions purposes (e.g., interviews) has been able to explain more than [five percent] of individual variance in school performance.”).

student, the sex of the student, the race of the student, and/or the trend of the student's undergraduate grade point average—to determine whether the credit given to them in the admissions process causes us to enroll students who won't succeed?

Alternatively, is there a problem with the evaluators (people like me) in the admissions process? I know that I am better now than I used to be in evaluating applicants, and I know that I could be even better with more understanding of the factors that correlate with success and failure. Most importantly, what do we need to do differently to avoid the problem of admitting students unable to graduate?⁷⁵ These questions must be confronted and answered.

D. *Disparate Opinions*

*Well then, the books are something like our books,
only the words go the wrong way.*⁷⁶

I stated my continued interest in the additional information on the LSDAS forms that was not released to me, and on September 1, 2010, the administration stated that it decided to get an opinion from University Counsel about the documents that I sought.⁷⁷

On September 29, 2010, I contacted Bernie Ciepak, a compliance officer at the United States Department of Education, Family Policy Compliance Office, which administers FERPA. “The Office provides technical assistance on FERPA to education agencies and institutions, State and local officials, and parents.”⁷⁸ He informed me that my request to look at the additional information from the Suspect List members' LSDAS forms was permissible under FERPA.⁷⁹

On October 30, 2010, the Chair of the Readmissions Committee stated that he intended to put on the faculty agenda the proposed change to the school's Readmission Committee procedure that prompted my request

75. To be clear, I am not advocating that we merely pass all students. Rather, I suggest that we should not admit students who we should know will fail out, and we should properly support those we do admit.

76. CARROLL, *supra* note 1, at 17.

77. E-mail from A. Felicia Epps, Associate Dean for Academic Affairs, Arkansas Law–Little Rock to John M.A. DiPippa, Dean, Arkansas Law–Little Rock, and author (Sept. 1, 2010, 11:21 CST) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

78. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS 13 (1997).

79. Telephone Interview with Bernie Ciepak, Family Policy Compliance Officer, U.S. Dep't of Educ. (Sept. 29, 2010).

for the records in the first place.⁸⁰ On the same day the faculty was voting on this proposal—November 8, 2010—the administration forwarded to me a letter from University Counsel, Jeffrey Bell, which stated in relevant part:

You [the administration] have asked my opinion as to whether certain information contained [i]n Law School Reports may be turned over in response to a request under the Arkansas Freedom of Information Act (FOIA). In particular, those Reports contain a large amount of information which, if identifiable to a particular student, would in my opinion constitute educational records exempt under the Federal Education Right to Privacy Act (FERPA). For example, the Reports contain a Transcript Analysis that includes a particular student's grade point average in undergraduate school, LSAT scores, and other academic information that would clearly constitute an educational record under FERPA. In my opinion, the only way in which you could turn over these Reports to a requester under the FOIA would be to delete any and all information on the Reports that, when viewed individually or as a whole, could result in the recipient being able to identify a particular student who is the subject of a particular Report. Given the fact that there is such a small pool of students at the school in certain ethnic and other subgroups,⁸¹ this would include redacting information on a student's race, ethnicity, national origin and similar data. Otherwise, a requestor might be able to glean the identity of a particular student because of the small pool from which to draw from on campus.⁸²

Unfortunately, the school's counsel did not address my inquiry. Rather, he loosely sought to interpret *public citizen* rights under FOIA, not *educator* rights under FERPA. And, as discussed below, his analysis was wanting.

80. E-mail from author to Philip Oliver, Professor, Arkansas Law–Little Rock, and to John M.A. DiPippa, Dean, Arkansas Law–Little Rock (Oct. 30, 2010) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

81. According to a November 3, 2010 law school newsletter, “[Arkansas Law–Little Rock] *always* attracts a diverse group of students. This year is no different for our incoming class. About [twenty-four percent] of the first-year class is composed of students of color.” *Who's in the Entering Class of 2010?*, ALUMNI NEWS (Arkansas Law–Little Rock), Nov. 3, 2010, available at <http://createsend.com/tr-D711B7C854707DE1> (emphasis added). These numbers don't portend even accidental disclosure of any students' identity by releasing the requested documents.

82. Letter from Jeffrey A. Bell, Senior Associate General Counsel, Univ. of Ark. at Little Rock, to John M.A. DiPippa, Dean, Arkansas Law–Little Rock (Nov. 5, 2010) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

i. The Unresponsive Response

*I told them once, I told them twice:
They would not listen to advice.*⁸³

The University Counsel's letter did not respond to my request for records in my capacity as an educator, and, did not consider my request for redacted documents under FERPA. In order to address the first issue, I sent a response to both University Counsel and the administration stating:

There seems to be some confusion. I did not make a request [as a member of the public] under FOIA at all. As I made clear on several occasions, I made the request as an educator with a legitimate educational interest. As a member of the admissions and readmissions committees, this information is necessary to ensure that we are properly and best admitting, readmitting, and/or training/supporting our students. When I explained this, [the Associate Dean for Academic Affairs] stated that I could not look at the admissions files due to FERPA. I disagreed, but also volunteered that the files could also be name-redacted if that was of any moment. After some discussion, I was told that Jeff [Bell, Senior Associate General Counsel,] would be providing an opinion on this question. (Incidentally, I had suggested that I speak to University Counsel. Perhaps this error could have been avoided if my suggestion was not rejected.) In any event, as stated, I request this information as an educator who is a member of the Admissions and Readmissions Committees with a legitimate educational interest. If Jeff [Bell, Senior Associate General Counsel,] could opine on that question, I would be most appreciative.⁸⁴

As discussed five years ago in *Medley v. Board of Education of Shelby County*, the court held exactly the same as I argued: “[D]enying [the teacher’s] request is flawed. Although . . . the videotapes . . . are, in fact, ‘education records,’ we do not believe [the teacher’s] request should be considered as made by ‘a member of the public[]’ [under FOIA]. Rather, [the teacher’s] request should be judged in light of her position as a teacher.”⁸⁵

83. CARROLL, *supra* note 1, at 85.

84. E-mail from author to John M.A. DiPippa, Dean, Arkansas Law–Little Rock, to Philip Oliver, Professor, Arkansas Law–Little Rock, and to Jeffrey A. Bell, Senior Associate General Counsel, Univ. of Ark. at Little Rock (Nov. 8, 2010, 07:13 CST) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). Mr. Bell was not on the e-mail forwarding his letter to me.

85. *Medley v. Bd. of Educ.*, 168 S.W.3d 398, 404 (Ky. Ct. App. 2004).

Further, in a case paralleling many of the events discussed herein—but regarding a request made by the member of the *public*—a federal district court ruled that FERPA did *not* allow the school to withhold the release of admissions data.⁸⁶ That case involved the Illinois FOIA, however, not the Arkansas FOIA—which has different exceptions. While, therefore, that case would not apply directly here, the history is nonetheless interesting.

In *Chicago Tribune Co. v. Univ. of Illinois Board of Trustees*,⁸⁷ the Tribune newspaper requested, under Illinois' Freedom of Information Act, information from the University of Illinois regarding students who were given special consideration in the admissions process.⁸⁸ As has become commonplace, the school denied the Tribune's request, asserting FERPA: "University President Joseph White responded [to the Tribune's appeal to him of the University's denial of the FOIA request] and reiterated the University's position that FERPA prevented the University from releasing the records."⁸⁹ The University stated in a letter to the Tribune that it was relying on the "FOIA . . . exemptions . . . prevent[ing] the release of '[i]nformation specifically prohibited from disclosure by federal

86. *Chicago Tribune Co. v. Univ. of Ill. Bd. of Trs.*, No. 10 C 0568, 2011 WL 982531, at *4 (N.D. Ill. Mar. 7, 2011). *See also* *Tombrello v. USX Corp.*, 763 F. Supp. 541, 545 (N.D. Ala. 1991) ("The statute addresses the conditions under which an institution becomes ineligible for funds. It does not prohibit a request for or release of student records."); *Bauer v. Kincaid*, 759 F. Supp. 575, 589 (W.D. Mo. 1991) ("FERPA is not a law which prohibits disclosure of educational records. It is a provision which imposes a penalty for the disclosure of educational records."); *Red & Black Publ'g Co., v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993) (elucidating that the court had "serious questions whether [FERPA] even applies to the exemptions argued by the defendants since [FERPA] does not prohibit disclosure of records. Rather, as noted by the trial court, [FERPA] provides for the withholding of federal funds for institutions that have a policy or practice of permitting the release of educational records."); *Student Bar Ass'n v. Byrd*, 239 S.E.2d 415, 419 (N.C. 1977) (reiterating that FERPA allows for the dissemination of such information).

[FERPA] does not forbid such disclosure of information concerning a student and, therefore, does not forbid opening to the public a faculty meeting at which such matters are discussed. [FERPA] simply cuts off Federal funds, otherwise available to an educational institution which has a policy or practice of permitting the release of such information. Thus, if the [public access] Law applies to a meeting of the faculty of the School of Law at which such matters are discussed, the right of [public access] . . . would continue. Only the availability of Federal funds in aid of the institution would be affected. Of course, a violation of [FERPA] could well result, not only in termination of any otherwise available Federal financial aid to the School of Law but also in the termination of any such aid to the entire University.

Student Bar Ass'n, 239 S.E.2d at 419.

87. No. 10 C 0568, 2011 WL 982531 (N.D. Ill. Mar. 7, 2011).

88. *Chicago Tribune*, No. 10 C 0568, 2011 WL 982531, at *1.

89. *Id.* at *2.

or State law or rules and regulations adopted under federal or state law.”⁹⁰ The University representative continued:

In addition, and for your convenience and consideration, I note that based upon the language of your request, we would anticipate that additional exemptions of the Illinois FOIA likely would apply if all the responsive records were gathered and reviewed. For example, we would expect that responsive documents would contain information exempt from disclosure pursuant to several provisions of the Act, including the following: section 7(1)(b)(i) (“files and personal information maintained with respect to . . . students . . . receiving . . . educational . . . services . . . from . . . public bodies”); section 7(1)(b) (unwarranted invasion of personal privacy); and section 7(1)(f) (drafts/predecisional deliberative communications).⁹¹

The federal court disagreed and ruled that:

FERPA, enacted pursuant to Congress’ power under the Spending Clause, does not forbid [state] officials from taking any action. Rather, FERPA sets conditions on the receipt of federal funds, and it imposes requirements on the Secretary of Education to enforce the spending conditions by withholding funds in appropriate situations. Under the Spending Clause, Congress can set conditions on expenditures, even though it might be powerless to compel a state to comply under the enumerated powers in Article I. [A state] could choose to reject federal education money, and the conditions of FERPA along with it, *so it cannot be said that FERPA prevents [a state] from doing anything*.⁹²

Indeed, the *Univ. of Illinois* decision is just the latest in a series of cases rejecting the invocation of FERPA by state schools to preclude disclosure under state FOIAs.⁹³ One of the several courts addressing this issue articulated the law well:

[FERPA] does not forbid such disclosure of information concerning a student and, therefore, does not forbid opening to the public a

90. *Id.*

91. *Id.* at *1 (footnote omitted).

92. *Id.* at *3 (emphasis added). The University of Illinois has sought a stay of the order. Paul Wood, *UI Asks for Hold on Tribune FOIA Ruling*, THE NEWS-GAZETTE (Ill.), Apr. 13, 2011, <http://www.news-gazette.com/news/courts-police-and-fire/2011-04-13/ui-asks-hold-tribune-foia-ruling.html>.

93. *E.g.*, *Tombrello v. USX Corp.*, 763 F. Supp. 541, 545 (N.D. Ala. 1991); *Bauer v. Kincaid*, 759 F. Supp. 575, 589 (W.D. Mo. 1991); *Red & Black Publ’g Co., v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993); *Student Bar Ass’n v. Byrd*, 239 S.E.2d 415, 419 (N.C. 1977). *But see* *U.S. v. Miami Univ.*, 294 F.3d 797, 809 (6th Cir. 2002) (holding contrary to other courts).

faculty meeting at which such matters are discussed. [FERPA] simply cuts off Federal funds, otherwise available to an educational institution which has a policy or practice of permitting the release of such information. Thus, if the [public access] Law applies to a meeting of the faculty of the School of Law at which such matters are discussed, the right of [public access] . . . would continue. Only the availability of Federal funds in aid of the institution would be affected. Of course, a violation of [FERPA] could well result, not only in termination of any otherwise available Federal financial aid to the School of Law but also in the termination of any such aid to the entire University.⁹⁴

These decisions demonstrate that many courts have set forth an ordering principle, where at least in theory, the disclosure requirements of FOIAs take precedence over FERPA. Putting aside the specific holding in these cases, which are not directly apposite in Arkansas, those cases and mine both highlight the attempts by school officials more generally to excessively restrict access to requested information.

Indeed, a recent sequence of events prompted a spokesperson for the Illinois Attorney General's Office to find that the University of Illinois-Springfield's invocation of FERPA against FOIA was improper, and stated that "[Illinois's new FOIA law] is a very good example of the move to change the culture of [governmental] secrecy Prior to the enactment of the new FOIA laws . . . this information would have never been made public."⁹⁵ Indeed, in Illinois and many other jurisdictions, public access officers at the offices of the attorney general provide opinions to parties in disputes about access rights in an effort stave off litigation.⁹⁶ Unfortunately, these efforts also often prove ineffective against university intransigence:

The attorney general's Office of Public Access Counselor has repeatedly disagreed with the [U]niversity [of Illinois] about whether records should be public in cases ranging from the university's search for a new president to a sports scandal at the Springfield campus.

"The University of Illinois steadfastly refuses to comply fully and completely with (Freedom of Information Act) laws and to supply the public with documents it knows are public," Ann Spillane, Madi-

94. *Student Bar Ass'n*, 239 S.E.2d at 419.

95. Bruce Rushton, *UIS Continues to Resist Disclosure of Coaches' Conduct*, THE STATE JOURNAL-REGISTER (Springfield, Ill.), Mar. 17, 2011, <http://www.sj-r.com/top-stories/x1777814658/UIS-continues-to-resist-disclosure-of-coaches-conduct>.

96. *Id.*

gan's chief of staff, said last week. She said the U. of I. is among the agencies that "repeatedly disobey the law."⁹⁷

Moreover, "[t]he long history of well-documented excesses has led to calls for [Federal] FERPA reform. . . . U.S. Sen. Sherrod Brown, D-Ohio, wrote to the Department of Education urging the agency to issue rules clarifying and narrowing the [proper] scope of FERPA secrecy."⁹⁸ The freshman senator from Ohio wrote "'[i]t is important that the public have confidence in the integrity of our higher education.'"⁹⁹ Unfortunately, "[a]s of September 2010, neither the Department nor Congress has moved to narrow or clarify FERPA, and the abuses continue."¹⁰⁰

But this discussion of FERPA is somewhat superfluous here, as my request was for *redacted* information. When faced with a Freedom of Information Act request, even where the law allows a school to shield documents pursuant to FERPA, that school must de-identify and produce those records.¹⁰¹ Moreover, notwithstanding University Counsel's claim—that there could be one student with a racial identifier unique amongst the approximately 600 students making up the pool from which the Suspect List was drawn—is virtually impossible, even in this fantastic circumstance, the school would simply combine that student into the next

97. Jodi S. Cohen & David Kidwell, *Attorney General Aide: U. of I. Flouting Law*, CHICAGO TRIB., Apr. 2, 2011, <http://www.chicagotribune.com/news/education/ct-met-foia-attorney-general-universi20110402,0,7461991.story>. When I attended the 24th Annual Media and the Law Seminar, sponsored by Kansas University Law School, May 6, 2011, Dr. John Miller, President, Central Connecticut State University, when speaking on the panel entitled *Confidential Public Information: When FERPA and the First Amendment Clash on Campus*, stated that while he believes generally in disclosure, if he concluded that the requestor was seeking the information for the wrong reasons, he would simply delay the release for as long as he could. However, that is not the law:

FOIA does not permit judges [and certainly anyone else] to determine which disclosure requests are in the public interest and which are not. FOIA says that any person may obtain information. Either all requestors have access, or none do. The special needs of one, or the lesser needs of another, do not matter. . . . [T]he *only* public interest cognizable under FOIA is the interest of the citizenry in obtaining information about the activities of its government. . . . [While we once considered whether] the requestor proposed a "legitimate" use for the information . . . this analysis is no longer valid. In determining the public interest in disclosure, we may consider only whether the core purpose of FOIA, letting the citizenry know what its government is up to, will be served by release.

U.S. Dept. of Navy v. Federal Labor Relations Auth., 975 F.2d 348, 355 (7th Cir. 1992) (citations omitted) (emphasis in the original) (internal quotations omitted).

98. STUDENT PRESS LAW CENTER (SPLC), WHITE PAPER: FERPA AND ACCESS TO PUBLIC RECORDS 6 (n.d.), available at http://www.splc.org/pdf/ferpa_wp.pdf.

99. *Id.* (quoting U.S. Senator Sherrod Brown, D-Ohio, calling for FERPA reform).

100. *Id.*

101. Peltz, *supra* note 15, at 189–90.

smallest cohort and produce the requested information in the redacted form.¹⁰² Meanwhile, I never received a response to my letter to University Counsel. Nor have I received the additional information I requested.

ii. Unrest at Home

*Well, that's your fault, for keeping your eyes open—if you'd shut them tight up, it wouldn't have happened. Now don't make any more excuses, but listen!*¹⁰³

In his letter, University Counsel drew attention to, as he stated, the “race, ethnicity, national origin and similar data” of the students on the Suspect List.¹⁰⁴ This reminded me of an article—and the events surrounding it—written by my colleague at Arkansas Law–Little Rock, Professor Richard Peltz-Steele.¹⁰⁵ Peltz-Steele’s article, penned under his unmarried name of Peltz, discussed access to race-based admission data, and came after a series of relatively recent events, including letters between Eric Spencer Buchanan—President, W. Harold Flowers Law Society, an African-American attorney organization—and the then Dean of the law school.¹⁰⁶ In a letter entitled “African-American Representation at [Arkansas Law–Little Rock],” Buchanan wrote, “I understand that over the past four years no more than four African[-]American males have graduated from [Arkansas Law–Little Rock].”¹⁰⁷ After also critiquing the minority hiring practices of the law school,¹⁰⁸ Buchanan described a subset of the very data into which I inquired, which he apparently obtained on his own through W. Harold Flowers Law Society:

This situation is reprehensible, indefensible and insulting. I respectfully request that you address and resolve these issues immediately.

Furthermore, it is distressing to discover the plight of African[-]American females admitted in 2005. It is my understanding that nine full-time African-American students were admitted in 2005, of whom six are female and three are male. Only two of those [six] females advanced to the second year 2L status. Three were readmitted [through the Readmissions Committee process], but, [were] re-

102. *Id.*

103. CARROLL, *supra* note 1, at 15.

104. Letter from Jeffrey A. Bell, *supra* note 81.

105. Peltz, *supra* note 15, at 181.

106. *Id.* at 185 n.23.

107. Letter from Eric Spencer Buchanan, President, W. Harold Flowers Law Society, to Charles Goldner, Dean, Arkansas Law–Little Rock (Oct. 18, 2006) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

108. *Id.*

quired to repeat the entire first year. One was flatly denied readmission.¹⁰⁹

Buchanan's letter flatly asserted that the cause of these failures of minority students was discrimination.¹¹⁰ Peltz-Steele—armed with the data from Buchanan—sought to investigate the validity of Buchanan's charges. Along these lines, Peltz-Steele explored Freedom of Information (FOIA) requests by a former top honors student at Arkansas Law–Little Rock also for de-identified admissions data.¹¹¹ The student abandoned her FOIA requests when an undisclosed member of the law school faculty contacted her employer—in an attempt to interfere with her access rights—and falsely asserted to the requester's employer that the requester's *legal* use of the access statute disrupted the law school's operation.¹¹² When asked by several faculty members about this improper behavior, “[t]he dean of the law school reported in a faculty meeting that neither he nor the academic associate dean made [n]or authorized the communication, so he concluded that no further investigation was warranted.”¹¹³ This response sidestepped the issue and foreclosed any further inquiry into the issue.

After the student-requester was forced to give up pursuing her request, Peltz-Steele asked the administration for the same admissions data, which inquired into, *inter alia*, race-correlated admissions standards.¹¹⁴ “The dean denied the request, asserting that a faculty member *not* on the Admissions Committee lacks any legitimate pedagogical interest in admis-

109. *Id.*

110. *Id.* In the letter, Buchanan wrote:

Dean, I had hoped that this kind of discriminatory mistreatment of African-Americans would not exist at your school, particularly, at a time when, the law school at Fayetteville has approximately 70 students of color between 1L and 2L classes.

I urge you to address this situation and fashion a remedy immediately. I would propose that those African-American females be allowed to advance to 2L courses at the beginning of the second semester, where such classes are not continued from the first semester, and, at no expense to them, they be allowed to take classes in the summer, so that they may advance to their rightful status.

I wish to meet with you and [the Associate Dean for Admissions] on these issues. Please know that members of W. Harold Flowers Law Society have authorized me to approach you in this fashion. . . . [W]e do not take lightly attempts to thwart the advancement of African[-]Americans in the field of law.

Id.

111. Peltz, *supra* note 15, at 185 n.24 (discussing how the identity of the requester—while discoverable from the FOIA requests—was withheld due to the potential for further acts of retaliation against her). The same is being done here.

112. *Id.* at 187.

113. *Id.* at 187 n.35.

114. *Id.*

sions records.”¹¹⁵ This was the correct standard for an employee rather than a member of the public—educational interest—although the interpretation that faculty not on the Admissions Committee don’t have such an interest is debatable. More importantly, though, the logic of the statement clearly is that a member of the Admissions Committee—like me—is entitled to review the requested information.

E. *Factors Correlating with the Suspect List*

i. Admissions Practices

*“Would you tell me, please,”
said Alice, “what that means?”*¹¹⁶

Combining the descriptive and empirical evidence from Peltz’s paper, Buchanan’s hard data, and the University Counsel’s letter highlighting the “race, ethnicity, national origin, and similar data” of those on the Suspect List, it suggests that affirmative action policies play a factor in evaluating students’ presence on the Suspect List. This notion is augmented by the national data on race and law school admissions, as shown below.

Affirmative action policies that admit minority students with lower LSAT scores and undergraduate GPAs often develop as a result of having population-based target admission rates for demographic cohorts.¹¹⁷ While some schools may establish such goals pursuant to traditional corrective notions of affirmative action, other schools may be chasing such ends simply to comply with the American Bar Association’s recent requirement “calling for law schools to show they are taking ‘concrete action’ to diversify both their students and faculty in order to win ABA

115. *Id.* (emphasis added); OLIVER, *supra* note 38, at 4 (“Professor Peltz was denied access to Law School admissions records to analyze the relevant data, as Dean Goldner determined that his purpose was not ‘educational’ within the meaning of federal privacy law.”).

116. CARROLL, *supra* note 1, at 99.

117. *See* ZELNICK, *supra* note 59, at 353 (indicating the difficulties associated with minority preferences, whether it is in academia or the workforce).

In 1991, Speaker [Willie] Brown [in California] pushed his Education Equity Act through the state legislature, requiring state universities and colleges to admit and graduate classes of students that mirrored the racial and ethnic composition of the state’s high school graduating classes. . . . Governor [Pete] Wilson promptly vetoed the bill, and it never became law.

Id.

[I]n the fall of 2001, roughly 3400 [B]lacks were enrolled in the first-year classes of accredited law schools in the United States, constituting about 7.7% of total first-year enrollment. This is very close to the proportion of [B]lacks (8.9% in 2001) among college graduates—the pool eligible to apply to law schools [but far less than their proportion in the overall population].

Sander, *supra* note 59, at 374.

accreditation.”¹¹⁸ Regardless of the cause, those goals are challenging for Arkansas Law–Little Rock, *inter alia*, because it must compete for a limited number of in-state (see below) minority applicants against Fayetteville’s powerful flagship law school.¹¹⁹ The unguided pursuit of such policies, regrettably, can have unintended negative consequences both on those implementing it and, more importantly, on those for whom the policies were designed to benefit.

For example, in pursuing this goal at Arkansas Law–Little Rock, an administrator wrote the Dean, “PLEASE don’t put someone on [the Admissions Committee] who lacks common sense (you know who they are) or doesn’t believe in affirmative action.”¹²⁰ In addition to stating that individuals with her disfavored political/philosophical belief should be unilaterally excluded from Admissions Committee assignments by the administration, this administrator also urged that the demographic composition of the Admissions Committee should be similarly controlled: the memo complained that “there’s only one person of color, although [name redacted] is a [N]ative American. . . . [Also, i]t would be nice to have a

118. *Ed Department Takes Aim at ABA’s Diversity Requirement*, DIVERSE ISSUES IN HIGHER EDUC. (Jan. 9, 2007), <http://diverseeducation.com/article/6847/>. Cf. ABA/LSAC, POST-CONFERENCE REPORT, EMBRACING THE OPPORTUNITIES FOR INCREASING DIVERSITY INTO THE LEGAL PROFESSION: COLLABORATING TO EXPAND THE PIPELINE (LET’S GET REAL) 15, 20 (2005), available at <http://www.lsac.org/LSACResources/Publications/PDFs/PipelinePostReport.pdf> [hereinafter ABA/LSAC]. The ABA embodies a somewhat schizophrenic approach to admissions: requiring greater admission of minorities, while maintaining a minimum LSAT-score requirement.

The existence of a de-facto LSAT cut-off score [of 141] for accreditation purposes . . . has a disparate impact on African[-]American students, who have mean LSAT scores of approximately 143–144. As a result, nearly half of all African[-]American law school applicants are effectively precluded from attending law school based on their LSAT scores.

John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN’S L. REV. 167, 176 (2006).

119. See *supra* note 3.

120. See Peltz, *supra* note 15, at 185 n.23 (citing memorandum, also on file with *The Scholar: St. Mary’s Law Review on Minority Issues*). The comment is even more curious, because it’s not clear how the administration would be able to make this determination. I know of only one faculty member who spoke publicly against affirmative action, and this was when the school’s Black Law Students Association requested him to take the “con” position in a debate on the issue. Perhaps some proxy was used. For example, I recall that one faculty member bemoaned that I was labeled with a “Scarlet R” for having once worked for a Republican United States Senator while serving on the staff of the United States Senate Judiciary Committee. Moreover, other than statements that the school supports affirmative action, I know of no stated definition of our program or guidance on how it should be implemented.

male.”¹²¹ The notion that political beliefs should be the basis to exclude faculty from membership on important decision-making bodies is troubling.¹²² Do we not teach in law school that lawyers and judges should be able to manage their personal beliefs so as to fairly interpret and apply the law?

Moreover, in addition to target minority goals, like many state law schools, Arkansas Law–Little Rock has a mandate to reserve the vast majority of its seats for Arkansas residents. As described below, the consequence of these two intersecting policies contributes to the phenomenon that minorities are sometimes—although clearly *not* always—admitted with objective admissions scores towards the bottom of the class.¹²³ Indeed, a former admissions officer at Arkansas Law-Little

121. Memorandum from Lynn C. Foster, Acting Assoc. Dean for Academic Affairs, Arkansas Law–Little Rock, to John M.A. DiPippa, then-Acting Dean, Arkansas Law–Little Rock (n.d.) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

122. See Robert Steinbuch, *Bonding Justice*, 80 MISS. L. J. 377, 385 (2010) (reviewing GEORGE FLETCHER, *THE BOND* (2009)). “[Supreme Court Nominee Sonya Sotomayor] will follow what she thinks is the law on that, and her personal beliefs will not interfere with that analysis because my view of her is that she does not allow her personal beliefs to interfere with her analysis of legal issues.” *Id.* at 385 n.9 (citing Michael Saul, *Supreme Court Nominee Sonia Sotomayor ‘Open,’ Will Follow Law on Abortion Issue, Says Friend*, N.Y. DAILY NEWS, May 29, 2009, http://www.nydailynews.com/news/politics/2009/05/29/2009-05-29_supreme_court.html); Michael A. Wolff, Missouri Chief Justice, *Law Matters: What Do Judges Believe . . . Really?*, YOUR MISSOURI COURTS (Feb. 27, 2006), <http://www.courts.mo.gov/page.jsp?id=1080> (promulgating the notion that a judge’s role in deciding a case is not to insert his or her ideals, but rather to follow the law).

Court opinions are not personal beliefs.

. . . .

Supreme Court opinions are directed at one result: resolving a legal dispute. They do not necessarily reflect any judge’s personal views about the subject matter, nor are they pronouncements of political policy. . . . Different judges may differ on what a legal provision means or what legal principle controls a case

. . . .

Judges, as other citizens, have personal beliefs. When citizens come to courts to serve as jurors, we instruct them to set aside their persons [sic] beliefs and decide cases based on the law and the facts. The same is true for judges, who take an oath to do just that.

Id.

123. Sander, *supra* note 59, at 478–79.

Black students as a whole are at a substantial academic disadvantage when they attend schools that used preferences to admit them. As a consequence, they perform poorly as a group throughout law school. . . . [C]lose to half of [B]lack students end up in the bottom tenth of their classes. . . . [N]one of [this is] attributable to race per se[, but rather, preferences].

The clustering of [B]lack students near the bottom of the grade distribution produces substantially higher attrition rates. . . . [A]gain, virtually all of the [B]lack-

Rock stated that after ranking students based on scores, the school would skip over non-minority applicants in an effort to increase minority representation.¹²⁴

The national law school data supports the existence of this phenomenon. By way of example, for the 2007 entering class, the University of Missouri at Columbia admitted applicants identified as White with an index of combined LSAT scores and undergraduate GPAs ranging from forty-nine to eighty-four.¹²⁵ The index for identified African-Americans who were admitted ranged from forty-five to sixty-five, while the index score for identified American Indians and Alaskans who were admitted ranged from fifty to seventy-three.¹²⁶ In comparison, the index score that combined LSAT scores and undergraduate GPAs for identified Asians and Pacific Islanders who were admitted ranged from fifty-three to seventy-five and forty-six to sixty eight for identified Hispanics and Latinos.¹²⁷

The conclusion that schools will admit some minorities with lower LSAT scores and undergraduate GPAs when the school is seeking classes with greater population-proportional demographics, particularly when coupled with an in-state mandate, is not very surprising.¹²⁸ The score

[W]hite gap seems attributable to preferences; virtually none of it seems attributable to race or to any correlate of race (such as income).

Id.

124. Interview with Richard Peltz-Steele, Faculty, Arkansas Law–Little Rock (Nov. 2010). See Eric Hoover, *Application Inflation: When Is Enough Enough?*, N.Y. TIMES, Nov. 5, 2010, <http://www.nytimes.com/2010/11/07/education/edlife/07HOOVER-t.html?scp=1&sq=application%20inflation%20when%20is%20enough%20enough&st=cse> (critiquing school inflation of admissions information).

Georgetown buys names of students with PSAT scores equivalent to 1270 on the SAT critical reading and math sections, and grade-point averages of A- or better. There are only so many students with these attributes to go around—about 44,000 a year, out of 1.5 million test takers. Georgetown lowers that threshold to search for another 5,000 or so under-represented minority students.

Id.

125. UNIV. OF MISSOURI-COLUMBIA, 2006–2007 ADMISSIONS DATA 2–15 (n.d.) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). UMC law school is geographically close to Arkansas Law–Little Rock, but significantly higher ranked.

126. *Id.*

127. *Id.*

128. Cf. Floyd Weatherspoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 80 MISS. L. J. 259, 260 (2010) (drawing attention to “[t]he number of African-American males entering the legal profession remain[ing] stagnant.”).

In *Grutter v. Bollinger*, the University of Michigan Law School used race, among other factors, in making admission decisions for entrance into the law school. The law school’s admission policy sought to ensure diversity among its students. The Supreme Court held that the University of Michigan’s program was narrowly tailored and fur-

disparity often results in part from the fact that as a cohort, some minority groups do not seek placement in law schools at or near population-proportional rates.¹²⁹ Assume, by way of a simple example, that you have two groups in the relevant population: Minority and Other. The Minority group is 3000 strong, and the Other is 7000. (The Minority group in this hypothetical very roughly mimics the proportions in the population of African-Americans and Hispanics combined.) Then assume that 700 Other apply to law school, while only thirty apply from the Minority group. (Of course, this example is grossly exaggerated.) Now assume that the law school class is 100 large. Thus, the admissions officials would have to admit all of the minorities to obtain a class representing the population of minorities, but the admissions officials could selectively reject nine of the Other applicants for every one that they admit. Therefore, the admissions officials could be highly selective regarding which of the Other applicants they admit, but not selective at all regarding the Minorities—given the hypothetical distribution presented here.

While this hypothetical distribution is not realistic, the idea behind it is. For example, African-Americans and Hispanics applied to University of California undergraduate schools at a rate far lower than their representation in the population—indeed, by about half.¹³⁰ As the following chart

thered “a compelling state interest in obtaining the educational benefits that flow from a diverse student body.”

. . . However, after more than seventy years of state and federal litigation involving admission policies, the number of African[-]American males attending law school and entering the legal profession remains low and continues to stagnate.

Id. at 268 (citations omitted).

129. *Id.* at 283–84.

The number of bachelor’s degrees awarded to African[-]American students continues to increase, but at a snail’s pace. The U.S. Census Bureau reports that from 1990 to 2006, the percentage of African[-]Americans receiving bachelor’s degrees increased from 5.8% to 9.6%. However, the U.S. Census also reports that only [sixteen percent] of African[-]American males over twenty-five years old have a bachelor’s degree.

. . . . There are a number of barriers that African[-]American males face in attending college. Among those barriers include a lack of motivation to attend college and an understanding of the value of obtaining a college education. A lack of mentors, parental support, and financial resources also contribute to the relatively low enrollment of African[-]American males in college. Unless the number of African[-]American males enrolled in college increases substantially, the number of African[-]American males attending law school will likely decline or remain stagnant.

Id. at 283–85 (citations omitted).

130. OFFICE FOR CIVIL RIGHTS EVALUATION, U.S. COMM’N ON CIVIL RIGHTS, BEYOND PERCENTAGE PLANS: THE CHALLENGE OF EQUAL OPPORTUNITY IN HIGHER EDUCATION, DRAFT STAFF REPORT 20–21 (2002); compare Hoover, *supra* note 124 (discussing Georgetown University’s ten percent undergraduate admission rate for Black applicants)

demonstrates, while the percentage of minorities that applied to law school exceeded their undergraduate application rates, the cohort that applied to law school is smaller than their representation in the population.¹³¹ One dean at a public law school made this policy clear to me when he said “the claim that we don’t have minimum standards for minorities is nonsense—we do; however, they are lower than those for non-minorities.”¹³²

LSAC Gender & Ethnicity Data¹³³

Gender/ Ethnicity	% of U.S. Population 2008	% of Bachelor Degrees conferred 2006-07	ABA Applicants Fall 2008	% of ABA Matriculations 2008	% of J.D. Degrees 2007-08	% of Lawyers 2008
Male	49.3%	42.6%	50.3%	52.8%	52.9%	65.6%
Female	50.7%	57.4%	48.9%	47.1%	47.1%	34.4%
White	66.6%	72.2%	63.5%	69.9%	70.8%	88.7%
Black	12.4%	9.6%	11.3%	7.3%	6.2%	4.6%
Hispanic	15.7%	7.5%	9.3%	8.2%	6.8%	3.8%
Asian/Pacific Islander	4.6%	6.9%	8.6%	8.3%	7.9%	2.9%
American Indian/AK Native	0.8%	0.8%	0.9%	0.8%	0.8%	N/A

and Office of Undergraduate Admissions: First Year Students Profile and Admission Statistics, GEORGETOWN UNIV., http://uadmissions.georgetown.edu/applying_firstyear_sdprofile.cfm (last visited May 22, 2011) (discussing that in 2009–2010, Georgetown’s incoming undergraduate class was nine percent African American) with U.S.A. QuickFacts, U.S. CENSUS BUREAU, (Nov. 4, 2010, 1:51 PM), <http://quickfacts.census.gov/qfd/states/00000.html> (last visited June 23, 2011) (showing the United States’ African-American population at thirteen percent). See also Hoover, *supra* note 124 (pointing out discrepancies even in highly-ranked schools with strong minority representation).

Take . . . Princeton, whose freshman class this year is 37 percent minority students, 17 percent athletes, 13 percent legacies and 11 percent international students. “Among very, very good schools, a huge percentage of the class is not in play on academic grounds,” [William M. Shain, an educational consultant and former admissions dean at three private colleges] says. “How much can you improve the class when you’re only working with half or less?”

Id.

131. LAW SCH. ADMISSION COUNCIL, APPLICANTS BY GENDER AND ETHNICITY, *available at* <http://www.lsac.org/LSACResources/Data/PDFs/US-and-legal-percentages-by-gender-ethnicity.pdf> (last visited Feb. 15, 2011).

132. This statement was made in confidence. So, the identity of the declarant will not be disclosed.

133. LAW SCH. ADMISSION COUNCIL, *supra* note 131.

The following chart shows that these rates—with the exception of the Hispanic/Latino category (which increased)—have held basically constant for the last decade.¹³⁴

Matriculation by Ethnicity: 2000-2009¹³⁵

Matriculation Group	Fall 2000	Fall 2001	Fall 2002	Fall 2003	Fall 2004	Fall 2005	Fall 2006	Fall 2007	Fall 2008	Fall 2009
American Indian/Alaska Native	0.8%	0.7%	0.7%	0.7%	0.8%	0.7%	0.7%	0.8%	0.8%	0.7%
Asian/Pacific Islander	7.0%	7.0%	7.5%	8.0%	8.4%	8.2%	8.0%	8.2%	8.3%	8.1%
Black/African American	7.5%	7.3%	6.7%	6.6%	6.8%	6.5%	7.2%	7.1%	7.3%	7.2%
Caucasian/White	72.5%	73.2%	72.6%	70.8%	69.9%	71.4%	71.1%	70.3%	69.9%	70.4%
Chicano/Mexican American	1.7%	1.6%	1.5%	1.5%	1.4%	1.4%	1.3%	1.3%	1.4%	1.3%
Hispanic/Latino	3.6%	3.5%	3.3%	3.8%	3.9%	4.3%	4.5%	4.9%	5.1%	5.3%
Puerto Rican	1.4%	1.9%	1.6%	1.7%	1.7%	1.7%	1.6%	1.7%	1.7%	1.6%
Other	3.7%	3.9%	4.1%	4.4%	4.4%	4.6%	4.6%	4.8%	4.7%	4.7%
No Ethnic ID	2.0%	0.9%	1.9%	2.5%	2.7%	1.2%	1.0%	1.0%	0.7%	0.8%

Furthermore, the afore-referenced admissions data regarding the 2007 class at the University of Missouri at Columbia (UMC) School of Law show that the UMC law school would have admitted 21% fewer African-Americans had it employed for them the same effective minimum index score that applied to Whites, and the entering class at UMC would have had 29% fewer African-Americans under those circumstances.¹³⁶

134. *Matriculants by Ethnicity*, LAW SCH. ADMISSION COUNCIL, <http://www.lsac.org/LSACResources/Data/matrics-by-ethnicity.asp> (last visited Feb. 15, 2011). Even with various recruitment programs, minority representation at law schools does not match population distributions. Weatherspoon, *supra* note 128, at 283–84 (“The enrollment of African[-]American students in law schools has been stagnant with only marginal increases during the past fifteen years. The number of African[-]American applicants to law school declined for three consecutive years: 2005, 2006, and 2007.”) (citations omitted).

135. *Matriculants by Ethnicity*, *supra* note 134.

136. UNIV. OF MISSOURI-COLUMBIA, 2006–2007 ADMISSIONS DATA 2 (n.d.) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). See also SANDER & YAKOWITZ, *supra* note 39 (discussing statistics of minority law school applicants in New York).

[Similarly,] Black applicants to the University at Buffalo Law School are about three and a half times as likely to be admitted as white applicants with the same LSAT and undergraduate GPA, and Hispanics are about three times as likely. These preferences are equivalent to 6.5 LSAT points or .8 undergraduate GPA points for [B]lack applicants, and 5.6 LSAT points or .7 undergraduate GPA points for Hispanic applicants. At Ohio State Law School the preferences are much more aggressive. Black and Hispanic applicants are 24 times and 11 times, respectively, more likely to be admitted

Bar passage rates of minority law school graduates further evidences this issue. Generally, the data show that “[B]lack and Hispanic law school graduates are at least twice as likely as [W]hite graduates to” never pass a bar exam.¹³⁷ However,

the bar passage study data confirms what bar exam validation studies had found before: that race does not play a statistically significant role in bar passage when LSAT scores, undergraduate GPA, and law school GPA are controlled. . . . [M]inority J.D.s are not more likely to become never-passers *because* they’re minorities; rather, they are more likely to become never-passers because their LSAT, undergraduate GPA, and law school grades are lower on average than those of [W]hite law school graduates.¹³⁸

than whites with the same credentials. This translates to about 12 LSAT points for [B]lacks, and 9 LSAT points for Hispanics.

The average minority admissions preference, taken over our entire sample of about 40 law schools, is equivalent to 9.3 LSAT points for [B]lack applicants, and 4.8 LSAT points for Hispanic applicants.

Id.

137. Yakowitz, *supra* note 51, at 19; *see also* Weatherspoon, *supra* note 128 at 291–92 (illustrating disparities that exist even with the use of standardized testing).

Today, a number of studies expose a substantial gap in the passage rate on state bar exams between [W]hite and African[-]American bar testers. A seminal LSAC study confirmed the bar passage gap.

. . . [I]n *Richardson v. McFadden* the court . . . upheld the constitutionality of the bar exam as applied to African[-]American applicants. Also, in the 1970s, a number of states adopted a multistate bar examination to standardize the bar exam among the states. Some thought that standardizing the test would reduce the disparity in the passage rate between African[-]American and White bar exam takers. Thirty years later, the disparity still exists, even with the standardized multistate bar exam.

Weatherspoon, *supra* note 128 at 191–92 (citations omitted).

138. Yakowitz, *supra* note 51, at 20. *See also* Weatherspoon, *supra* note 128 at 281, 289–90 (pointing out specific discrepancies between African-American male applicants and their White counterparts).

The deplorable status of African[-]American males in public schools directly correlates to their admission and success in college and ultimately law school. Unless there are dramatic institutional changes in public school systems, unresolved problems will clog the legal education pipelines and inhibit the growth and development of African[-]Americans who aspire to enter the legal profession.

. . . .

African[-]American applicants to law school tend to have lower LSAT scores and grade point averages than white applicants. The average LSAT score for African[-]American students is 142, whereas the average score for white students is 152. The mean LSAT score for African[-]American males “remained relatively constant” at 142 during the years 1995-2002. Lack of preparation and test anxiety, among other factors, may cause minorities to have low scores. Lower grade point averages between African[-]American students and [W]hite students may also impact LSAT scores. The

While I have described likely reasons to see a disproportionate grouping of objective admissions scores and law school grades for targets of affirmative action, I am confident that these policies are not the *only* factors correlating with students on the Suspect List. Legacy, politics, unknown factors, and an element of randomness, *inter alia*, likely have some explanatory power as well. Indeed, the purpose of my unrequited inquiry to the school about the students on the Suspect List was for the purpose of more specifically determining through empirical analysis the predictive value of each of these factors. The tragedy is that however much each of these policies and factors correlate with students failing out of law school, like many of the students on the Suspect List, the legal academy has certainly failed these students.

A student who gains special admission to a more elite school on partly nonacademic grounds is likely to struggle more, whether that student is a beneficiary of a racial preference, an athlete, or a “legacy” admit. If the struggling leads to lower grades and less learning, then a variety of bad outcomes may result, such as higher attrition rates, lower pass rates on the bar, and problems in the job market. The question is how large these effects are, and whether their consequences outweigh any benefits.¹³⁹ By not analyzing the data that I requested to answer this quandary, we harm the very students we seek to help.

average grade point average (GPA) for African[-]American students is 2.74, whereas [W]hite students average 2.9.

Lower LSAT scores of African[-]American males may also be caused in part by the failure of the public education system to provide educational resources and instructions on taking standardized exams. If the public education system disproportionately excludes African[-]American males from advanced high school and college courses throughout their educational experience, they will be negatively impacted when faced with the grueling LSAT exam.

Weatherspoon, *supra* note 128 at 289–90 (citations omitted).

139. Sander, *supra* note 59, at 370.

To be more specific, affirmative action has two separate negative effects on [B]lack graduation rates. The first result—our main focus in this discussion—is the boosting of [B]lacks from schools where they would have had average grades (and graduated) to schools where they often have very poor grades. For [B]lacks as a whole, this phenomenon adds four to five points to the [B]lack attrition rate. The second result follows from the cascade effect. Lower-tier schools admit [B]lacks who would not be admitted to any school in the absence of preferences. These are the students with very low index scores (low 400s and below), who have very high attrition rates. . . . This second phenomenon adds . . . to the overall [B]lack attrition rate. Together, these results account for the eleven-point gap between [W]hite and [B]lack attrition rates [T]hese mechanisms merely foreshadow a much larger effect: the consequences of racial preferences for [B]lack performance on bar exams.

Id. at 441–42.

ii. In Search of a Strong Support System

*“We must support you, you know.”*¹⁴⁰

Unfortunately, by admitting at-risk students without subsequently supporting them, law schools address in the short term the ABA’s requirements on minority representation—while not actually serving these students. If schools decide to admit at-risk students, these institutions must recognize that affirmative action programs cannot stop at the door of the law school. Any legitimate affirmative admissions program that considers the potentially score-limiting effect of hardship must be coupled with an appropriate and effective support system to ensure those beneficiaries whose scores were artificially depressed a reasonable opportunity to succeed.¹⁴¹ But this is not an inexpensive endeavor, and schools are sometimes more interested in the aspiration than the implementation.

As President Lyndon B. Johnson said in a 1965 address at Howard University: “You do not take a person who for years has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, ‘You are free to compete with all the others,’”¹⁴² This idea is further reflected in the comments of an affirmative action scholar and advocate who wrote:

Admission into law school does not guarantee completion. The rigor of law school causes the attrition of law students, and some law schools [like Arkansas Law–Little Rock] weed out students during

140. CARROLL, *supra* note 1, at 160.

141. Weatherspoon, *supra* note 128 (“Many law schools have developed aggressive recruitment programs to attract African[-]American males to attend law school. Law schools have also developed academic support programs for those students who attend.”). An examination of the cause of the disparities demonstrates that their effect cannot be eviscerated with the stroke of a pen on an admissions letter. See ZELNICK, *supra* note 59, at 274 (outlining still-significant discrepancies between Whites and minorities).

[Early 1990s data showed that] Black households are 2.54 times as likely as [W]hite households to have a reporting householder who lacks a high school degree. They are 6.47 times as likely to have children classified as being in poverty, and those that have children are 3.55 times as likely to earn less than \$25,000 per year. Blacks are 2.06 times as likely as [W]hites to be unemployed. Their households with children are 3.21 times as likely to be headed by a single parent. The [B]lack teenage fertility rate is four times that of [W]hite teenagers. Single [B]lack women are five times as likely as single [W]hites to give birth to a child. Black children are 5.25 times as likely as white children to be born after inadequate prenatal care and their rate of infant mortality is 2.42 times that for [W]hites.

A leading expert witness testified that these horrific societal disparities are sufficient to explain all but a small fraction of the academic difference in academic performance between whites and blacks.

Id.

142. ZELNICK, *supra* note 59.

the first year based on the student's failure to maintain a certain GPA. Consequently, law schools may disproportionately dismiss African[-]American students.

To address the attrition problem generally, [some] law schools now require or highly recommend that students participate in school-sponsored academic success programs to assist those who enter law school with slightly lower grade point averages or LSAT scores. The academic success program is designed to enhance the academic status of participants. It has been determined that these programs have been successful in lowering the attrition rate of African[-]American students, especially those who may have entered law school with a lower LSAT score than other students admitted.¹⁴³

Indeed, the ABA and LSAC agree:

[S]chools [admitting those with low LSAT scores should] provide sufficient academic assistance . . . hereby bettering the students' chances for a successful academic outcome and first time passage of the bar exam. Only those law schools that fail to meet the academic and bar preparation needs of their students, resulting in high attrition rates and low bar passage rates, are at risk of losing their accreditation status.¹⁴⁴

Moreover, even when schools have support systems to address the needs of at-risk students, these institutions must recognize that some students with objectively low admissions scores will simply be unable to succeed. We do no service for the taxpayers of a relatively poor state, with an unsatisfactory distribution of lawyers, by admitting students with an insufficient chance of becoming lawyers (due to a lack of a support system or ability). The needless expense and missed opportunities for both failing students and taxpayers are significant.¹⁴⁵

143. Weatherspoon, *supra* note 128.

144. ABA/LSAC, *supra* note 117, at 20.

145. See Cheryl L. Auster, Comment, *Promising a Better Future But Delivering Debt: Understanding the Financial and Social Impact of For-Profit Colleges and the Effect of the New Program Integrity Rules*, 13 SCHOLAR 631, 667-68 (2011) (discussing for-profit colleges and their frequent use of federal funding).

High levels of student debt have been shown to impact the *student and the public* in three main ways. These are: (1) the financial burden on the individual; (2) the expense of loan subsidies to taxpayers; and (3) the negative effect of defaults on the individual and the taxpayer. Simply put, an individual facing the burden of a large debt does not have disposable income, and therefore, the individual is less likely to make purchases or save.

Id. (emphasis added) (citations omitted).

Arkansas Law–Little Rock describes its efforts to address the academic success of students as follows:

The . . . School of Law is committed to academic success for each of its students. We have demonstrated our commitment by creating a full-time Assistant Dean for Academic Support position to work with students to promote their academic success.

Academic Support begins before your first class session. In the week prior to law school, first-year students participate in an intensive week-long orientation program composed of practice class sessions, workshops on the fundamentals of academic success, and panel discussions by former and current students offering practical advice on getting through law school. You will be placed in small groups under the leadership of second and third year law students who will serve as mentors. These [student] mentoring groups will meet throughout the first semester and reinforce the principles of the orientation program. There will also be workshops during the first year that will focus on various aspects of academic success. Finally, students in academic trouble after the first semester are assigned [student] mentors on a one-on-one basis to assist them with improving their study skills.

The Law School's commitment to academic success continues with academic advising throughout law school—the Assistant Dean for Academic Support meets individually with students to develop study plans for those who feel overwhelmed, to advise students in developing course outlines and preparing for exams, and to offer guidance to students selecting from the array of course offerings so that students will excel in their selected area of practice.

Finally, the [Law] School eases your transition from law student to lawyer by offering a unique pass/fail course designed to prepare you for the rigors of preparing for and taking the bar examination.¹⁴⁶

While this undoubtedly represents a positive development from the school's historical activities, it, nonetheless, lacks some of the focus found in other schools with exemplary programs. Southern Law School, for example, has a Department of Academic Success Programs with four staff members. They describe their program as follows:

146. *Academic Success*, ARKANSAS LAW–LITTLE ROCK, <http://ualr.edu/law/academics/academic-success/> (last visited June 11, 2011). The “assistant dean of students who is responsible for student bar preparation . . . [was] hired [] a year after graduating from the Little Rock law school and passing the bar” PELTZ, *supra* note 40, at n.56.

DEPARTMENT OF ACADEMIC SUPPORT PROGRAMS

One of the most comprehensive Academic Support Programs in the country is administered by Southern University Law Center. Through its Department of Academic Support Programs, the law school offers an extensive four week Summer Pre Law Program during the month of July. Both the Academic Assistance Program and the Academic Skills Enhancement Program is offered in the fall and spring. An Academic Counseling component and Disability Services for Testing is also available throughout the academic year.

.....

SUMMER PRE LAW PROGRAM (*July*)

... Through instruction in three substantive courses (Torts, Contracts, and Basic Civil Procedure), students are introduced to legal skills, emphasizing legal writing, and legal analysis through a skills orientation component of the program. Participation is selective. Because most students welcome any assistance offered to help them succeed in law school, students do not object to being invited to attend the summer program. Every indication is that students who complete the pre law program are considerably more confident, perhaps the most important ingredient in exam success beyond learning applicable law.

THE ACADEMIC ASSISTANCE PROGRAM (*Fall and Spring*)

The weekly sessions are mandatory for all students enrolled in first-year courses and helps students understand doctrines and develop or refine their study and analytical skills. The program consists of weekly sessions of two-hours each during both the fall and spring semesters where emphasis is placed on study techniques, analytical skills, and exam writing. Each session or seminar is designed to help students become independent learners. The substantive law is used as a tool for teaching students how to read and analyze cases, how to brief cases, how to organize their notes and briefs, how to outline, how to prepare for exams, how to analyze exam questions, how to organize exam answers, and finally how to write exam answers.

.....

ACADEMIC ENHANCEMENT SKILLS PROGRAM (*Fall and Spring*)

... The hands-on skill sessions uses progressive exercises to demystify the exam writing process and reinforces the practical skills learned in academic assistance workshops. The self-directed format allows students to advance at their own pace as they gain confidence in their study and exam taking skills. Participation is mandatory for students with academic probation status and voluntary for others. Participants receive individual assessments and tutorials from the academic counselors.

ACADEMIC COUNSELING/ADVISING COMPONENT

.....

Academic Counselors provide tutorials for at-risk students, advise students of law school expectations, motivate students in the pursuit of their legal studies, assist students in their development of effective study strategies, time management skills and examination techniques, and proctor special accommodation exams. Academic Counselors are available for both the day and evening divisions.¹⁴⁷

The depth of Southern's program is relatively unique and partially a function of Southern's status as a historically black college (HBC) dedicated to its specialized mission, which includes providing opportunities to at-risk students.¹⁴⁸ With that said, however, many schools require prior experience as a director or assistant director of a bar preparation program before heading up such a department, unlike Arkansas Law-Little Rock.¹⁴⁹

147. *Academic Support Programs and Academic Counseling*, S. UNIV. LAW CTR., <http://www.sulc.edu/administration/academic-support/asp.htm> (last visited June 11, 2011) (listing an Associate Vice Chancellor, two Academic Counselors, and an Administrative Assistant as the staff of Department of Academic Support Programs). The Associate Vice Chancellor has over twenty-five years of professional service, provided oral and written testimony before the U.S. Senate, served on a congressional commission, published in Southern University Law Review and has coauthored an international publication. *SULC Faculty: Berryl Gordon-Thompson*, S. UNIV. LAW CTR., <http://www.sulc.edu/faculty/bthompson.htm> (last visited June 11, 2011). The school lists the following as workshops and programs that are administered by the Associate Vice Chancellor for Academic Support Programs as: "Summer Pre Law, Academic Assistance, Academic Success Skills, Academic Enhancement Writing, Academic Counseling & Advising, Exam Taking Skills, Time Management, Legal Methods and Disability Services." *Id.*

148. *History and Mission of SU Law Center*, S. UNIV. LAW CTR., <http://www.sulc.edu/about/history.htm> (last visited June 11, 2011). See also *Our Law Center Mission*, S. UNIV. LAW CTR., <http://www.sulc.edu/about/about.htm> (last visited June 19, 2011) (indicating the overall goals the SULC has in educating students).

The mission and tradition of the Southern University Law Center is to provide access and opportunity to a diverse group of students from underrepresented racial, ethnic, and socio-economic groups to obtain a high quality legal education with special emphasis on the Louisiana civil law. Additionally, our mission is to train a cadre of lawyers equipped with the skills necessary for the practice of law and for positions of leadership in society.

Id.; *Facts and Figures*, S. UNIV. LAW CTR., <http://www.sulc.edu/about/factsandfigs.htm> (last visited June 11, 2011) ("The Law Center has contributed to the education of more than [ninety] percent of the African[-]American attorneys in the State of Louisiana.").

149. Assistant Dean of Bar Preparation & Academic Success, CHRON. OF HIGHER EDUC., <http://jobs.chronicle.com/jobs/0000677087-01> (Apr. 18, 2011) (requiring three years of experience as a director or assistant director of a bar preparation program before heading such a department at Barry Law School in Florida); *Bar Exam Counselor*, HIGHEREDJOBS, <http://www.higheredjobs.com/faculty/details.cfm?JobCode=175510990&>

The admission of students with low prediction indicators, coupled with the absence of systemic academic assistance programs at many law schools designed to effectively address admitted at-risk students, help explain the results outlined by the ABA and LSAC:

- Law students of color have a higher attrition rate than [W]hite law students.
- In 1998, the percentage of students of color remaining in law school by their second year was 86.8% compared to 93.6% of [W]hite students. In 1998, the percentage of students of color remaining in law school by their third year was 84.7% compared to 91.2% of [W]hite students.

. . . .

- Bar exam passage rates for students of color are generally lower than [W]hites.
- A 1998 report found that African-Americans have the lowest bar passage rate, at 77.6%. Asians pass the bar exam at a rate of 91.9%, while [W]hite students have a 96.7% passage rate.¹⁵⁰

The negatives associated with the contribution to these statistics by students at Arkansas Law–Little Rock is compounded by my inability to obtain the critical data in my effort to improve this situation. Openness and faculty input is a required ingredient for the recipe for collaboration, collegiality, and academic improvement. Such an approach not only respects the unique views of faculty members, it incorporates the core academic notion that the faculty collectively governs the institution. Sadly, this ideal is receding due to “disturbing . . . internal threats . . . apparently to strengthen the hand of school administrators.”¹⁵¹

Moreover, lawsuits asserting that—along with Congressional interest into whether—educational institutions are committing fraud when they admit students who are likely to fail, while readily accepting their tuition

Title=Bar%20Exam%20Counselor (last visited June 11, 2011) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (preferring two years of experience in preparing students for the bar exam—including “at risk” students—before heading such a department at Golden Gate University Law School in California). Arkansas Law–Little Rock has had two assistant deans charged with addressing bar passage in the last five years, neither with prior experience either heading, or working in, a bar preparation program.

150. ABA/LSAC, *supra* note 118, at 15 (footnotes omitted).

151. Michael A. Olivas, Univ. of Houston Law Center, Presidential Address before the House of Representatives at the AALS Ann. Mtg.: Academic Freedom and Academic Duty (Jan. 7, 2011), available at http://www.aals.org/services_newsletter_presMarch11.php (offering transcript of the Presidential Address of Michael A. Olivas, President of the Association of American Law Schools (AALS), before the House of Representatives at the AALS Annual Meeting on Jan. 7, 2011).

and other financial payments, have gained traction in recent years.¹⁵² For example, “suits against [a college] under the federal False Claims Act have been made public in the last few years, all making accusations that the company used deceptive practices in its quest for profits, including enrolling unqualified students and paying recruiters for each student enrolled, a practice forbidden by federal law.”¹⁵³ Although the majority of these suits generally have been against for-profit intuitions, a former student at Thomas Jefferson School of Law—a private, non-profit institution—sued her alma mater on a similar theory¹⁵⁴ Such suits are predicated on the notion that it is wrong to knowingly collect tuition from students who have no realistic probability of succeeding, regardless of the institutions for-profit/non-profit status. And if we admit students with low scores and do not address the particular reasons for their depressed indicators, or accept students that simply are unable to succeed, we have committed that very harm.

152. See generally Auster, *supra* note 145 at 632–34.

153. Tamar Lewin, *Scrutiny Takes Toll on For-Profit College Company*, N.Y. TIMES, Nov. 9, 2010, http://www.nytimes.com/2010/11/10/education/10kaplan.html?_r=1&page_wanted=all.

[T]he company was concerned most with getting students’ financial aid, and that [the school’s] fast-growing revenues were based on recruiting students whose chances of succeeding were low.

.....

... [A] former [] instructor and administrator who is one of the Miami whistle-blowers, recalled a PowerPoint presentation showing African-American women who were raising two children by themselves as the company’s primary target.

Such women, [the former instructor and administrator] said, were considered most likely to drop out before completing the program, leaving [the school] with the aid money and no need to provide more services.

Id. See also Press Release, U.S. Dep’t Of Educ., Proposed Rule Links Federal Student Aid to Loan Repayment Rates and Debt-to-Earnings Levels for Career College Graduates (July 23, 2010), available at <http://www.ed.gov/news/press-releases/proposed-rule-links-federal-student-aid-loan-repayment-rates-and-debt-earnings> (describing proposed legislation to ensure career colleges’ efficacy in preparation of students enrolled in their programs).

154. Martha Neil, *Honors Grad Working as Doc Reviewer Sues Law School, Says She Was Misled by US News Stats*, ABA JOURNAL, May 27, 2011, http://www.abajournal.com/news/article/honors_grad_working_as_doc_reviewer_sues_law_school_says_she_was_misled_by_/. This pending suit was brought by a 2008 honors graduate stating that the law school actively misrepresented her post-law school job prospects. *Id.* Of course, the case at this stage remains undecided, but it does illustrate that non-profit law schools may become subjected to the same legal scrutiny as for-profit schools.

III. CONCLUSION

*You woke me out of oh! such a nice dream!
And you've been along with me, Kitty—
all through the Looking-glass world.
Did you know it, dear?*¹⁵⁵

By chance, I was thrust into the issue of why students fail out of law school when presented with a piece of the data as a member of the Readmissions Committee at my law school. In an effort to do my job and to do good, I sought additional information that would have allowed me and my school to address systematically the cause of law students' failure to graduate. My efforts were frustrated through the inapposite invocation of FERPA—thwarting a thorough examination of policies that cost the school, the students, and the taxpayers of Arkansas. I nonetheless remain an idealist, and I will continue to seek answers and pursue improvements. However, as long as we continue to admit students unlikely to succeed without addressing why we admit them and why they don't pass, we fail ourselves at least as much as we fail them.

155. CARROLL, *supra* note 1, at 166.