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Not For Free: Exploring the Collateral Costs of Diversity in Legal Education

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Not For Free: Exploring the Collateral Costs of Diversity in Legal Education

*SpearIt**

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I. INTRODUCTION TO THE UNSEEN

This essay examines some of the institutional costs of achieving a more diverse law student body. In recent decades, there has been growing support for diversity initiatives in education, and the legal academy is no exception. Yet for most law schools, diversity remains an elusive goal, some of which is the result of problems with anticipating the needs of diverse students and being able to deliver. These are some of the unseen or hidden costs associated with achieving greater diversity. Both law schools and the legal profession remain relatively stratified by race, which is an ongoing legacy of legal education's origins as a project dominated by white male elites predominantly serving white male clients.¹ Today's law schools still lack in diversity, but major developments are increasingly changing student demographics. Perhaps the first push toward diversification of law schools came after the 1920s, when women won suffrage and began to enroll in law school in increasing numbers. Advocacy efforts over the next century would produce many breakthroughs, including in the present,

* The author presented this essay at the 2017 AALS Annual Meeting at a session entitled, "The Socioeconomics of Law School Pedagogy," which was thoughtfully organized by Michael P Malloy, along with works that appear in this volume. Special thanks to Dannye Holley, Docia Rudley, Thomas Kleven, and Angela A. Allen-Bell for their valuable comments and suggestions.

1. See generally CYNTHIA FUCHS EPSTEIN, *WOMEN IN THE LAW* (2nd ed. 1983).

where an unprecedented three women sit on the Supreme Court. With the creation of The Historically Black College/University (“HBCU”) law schools, which enrolled significant numbers of African American students, Civil Rights legislation and court cases in the 1950s and 1960s paved the way for a growing number of ethnic minorities to apply to law school and for a female explosion of matriculants. Today’s diversity initiatives seek to create classrooms with profiles based on a range of intellect and experience as a means to enhance learning for all students. As such, diversity may be understood as supporting the marketplace of ideas concept by seeking to create an environment where study and problem solving draw from a broad range of knowledge and experience. Law schools are also enrolling individuals with lower credentials to assuage the sting of lower enrollment. Maintaining and servicing diverse student bodies inevitably incurs downstream costs. This essay attempts to offer a snapshot of some the administrative, pedagogical, and regulative costs involved, and provide commentary on how law schools might meet these challenges.

The basic argument is that law schools desiring to achieve greater diversity, or who are achieving greater diversity by default, must be prepared to meet the collateral costs involved. As used here, the term “cost” has both a literal and a non-literal meaning since monetary and other resources are required to address the multiple layers of complexity. The essay builds on the premise that diversity is not only a good in and of itself, but also a good in terms of advancing equal opportunity and social justice,² which, arguably, may be critical for some law schools’ survival.³ It begins with *A Scarce Resource in Legal Education and Trending Views: Diversity Matters*, which provides a historical backdrop of legal education and diversity initiatives in the law school setting.⁴ In *Collateral Costs & Making Payment*, this essay explores some of the institutional costs that are owed to increased diversity.⁵ The last section, *Bottom Line: Support & Resources for Success*, concludes that initiatives that seek diversity as a permanent fixture must be conscious of these costs, and more importantly, be committed to meeting them with resources and funding.⁶ As history tells, women did not become a critical mass on the highest court overnight—it took decades of support and pushing to shatter many ceilings. Genuine institutional support made these feats possible, and the same will be critical for future success. The work concludes with some recommendations aimed at maintaining the current level of diversity.

2. J.T. Manhire, *Beyond the U.S. News Index: A Better Measure of Law School Diversity*, 101 IOWA L. REV. BULL. 1, 2, 6 (2015–16).

3. Aaron N. Taylor, *Diversity as a Law School Survival Strategy*, 59 ST. LOUIS U.L.J. 321, 325 (2015) (exploring the “extent to which law schools have used students of color, particularly black and Hispanic students, to bolster enrollments and lessen the effects of the downturn”).

4. *Infra* Parts II–III.

5. *Infra* Part IV.

6. *Infra* Part V.

II. A SCARCE RESOURCE IN LEGAL EDUCATION

*When we talk about increasing diversity in the profession, we are addressing a history of laws, practices, and employment decisions that excluded broad sectors from participation in society's political, economic, and social activities and benefits of this society.*⁷

Lack of diversity in law schools is a reality that stretches back to the beginning stages of legal apprenticeships.⁸ When formal legal institutions in America started in the late 1700s, there was only one prototype law student. This individual was white, male, Christian, and more often than not, wealthy. From this profile emerged law schools as they are now known, which would supply the country with licensed lawyers, legal professionals, and a demographic status quo.⁹

For well over a century men almost exclusively dominated legal studies, as students, teachers, and all legal positions of power. The dominant paradigm would open up some by 1920, when women attained the right to vote and were admitted to every state bar.¹⁰ Although women had attended and graduated from law school in the previous century, these new developments gave some impetus for change. These shifts were the first foundational efforts to make the study of law equally accessible to men and women.

The increase of women over the next several decades would be slow. Indeed in the in 1969–70 academic year, just over six percent of degree candidates in law school were women.¹¹ However, after the passage of the Civil Rights Act of 1964, there occurred a “quiet revolution”¹² in legal education, and by 1979, women would account for over 30 percent of law students.¹³ Today the revolution continues, where women are poised to outnumber men in law school.¹⁴

7. ABA PRESIDENTIAL INITIATIVE COMMISSION ON DIVERSITY, *DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS* 9 (2010).

8. Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y 11 (2003).

9. *Id.* at 11–12 (“Legal education has traditionally been a white male affair, to which women and people of color have only recently gained entry.”)

10. Cynthia Grant Bowman, *Women in the Legal Profession From the 1920s to the 1970s: What Can We Learn From Their Experience About Law and Social Change?*, 61 ME. L. REV. 1, 3 (2009).

11. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 234 (1983).

12. Jason P. Nance & Paul Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 282 (2014).

13. *Id.* at 283.

14. Debra Cassens Weiss, *Women Could Be Majority of Law Students in 2017; These Schools have 100-plus Female Majorities*, ABA JOURNAL (last visited Jan. 14, 2017), available at http://www.abajournal.com/news/article/women_could_be_majority_of_law_students_in_2017_these_schools_have_100_plus (on file with *The University of the Pacific Law Review*).

This hardly means that there is parity between men and women in the legal profession, but the shift is significant.¹⁵

Another development in legal education that effectively diversified the academy as a whole came with the advent of the HBCU. Legal literacy for African Americans and their communities began with the creation of HBCUs. These types of schools were put in place in large part to address American segregation and are responsible for providing a sizeable portion of the country's non-white practicing attorneys. For example, in 1947 in response to prohibition on blacks attending white law schools in Texas, what was to become the Thurgood Marshall School of Law opened.¹⁶ Despite representing only 5 percent of the state's total law school enrollment, the Thurgood Marshall School of Law produced 43 percent of the newly licensed African-American attorneys in Texas from 2008–2012.¹⁷ In a self-study to the American Association of Law Schools, the school indicated that its graduates accounted for 17 percent of African-American lawyers in the United States.¹⁸

In subsequent decades, most law schools continued to accept a growing number of females, although they tended to come from the same socioeconomic circumstances as their male counterparts.¹⁹ This environment was co-educational, but largely homogeneous with respect to race, religion, and social class.²⁰ The literal complexion of legal education began to change, however, in the aftermath of Civil Rights struggles in the 1950s and 1960s.²¹

For a range of minorities, these struggles created a path to legal education, and as a result, law schools are arguably more diverse now than ever.²² Today's institutions admit individuals of all races, nationalities, genders, classes, religions, and political persuasions.²³ Even though law schools are arguably at a highpoint in the history of diversity, enrollment still lags when it comes to reflecting the composition of the American people.²⁴ Laws schools may be at an internal high when it comes to diversity, but that reality is tempered by the fact

15. Nance & Madsen, *supra* note 12, at 283 (“there is also substantial evidence that women are not fully integrated at all levels of the legal profession, and that progress may be slowing or even reversing.”).

16. See Mike Stetz, *Most Diverse Law Schools*, 24 NAT'L JURIST 2, 24, 28 (2014).

17. *Id.*

18. *Id.* at 17.

19. Nance & Madsen, *supra* note 12, at 271, 282.

20. See generally Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry Into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y. U. L. REV. 829 (1995).

21. Nance & Madsen, *supra* note 12.

22. Stetz, *supra* note 16, at 25 (citing that a decline in White and Asian enrollment has led to more Blacks and Hispanics entering law schools, that the number of law schools with a black population at or higher than the national average increased from 11 to 18 in the previous two years, and that three more schools had faculties with 20 percent or more minorities).

23. E.g., *Admissions*, TEXAS SOUTHERN UNIVERSITY THURGOOD MARSHALL SCHOOL OF LAW, <http://www.tsulaw.edu/admissions/> (last visited Feb. 12, 2017) (on file with *The University of the Pacific Law Review*).

24. *Infra* Part III.B.

that law schools at large have had difficulty achieving more diverse student bodies.

In addition to these developments, diversity efforts have received an unexpected boost in the wake of recent downturns in the legal job market.²⁵ The souring market has led to a declining number of applications to law school.²⁶ As a result, law schools have been forced to reach deeper into the applicant pool and pull out students whose index scores diverge from previous admission norms.²⁷ It must be recognized that, as more students are admitted to fill empty seats across the country, law schools must be prepared to provide additional academic support to assist the success of students who fall outside the old status quo. Increasing the enrollment of students that may not have been admitted in a previous era is independent of racial diversity and represents a broader shift in orientation among law schools. Whether indices embody slides in lower Law School Admission Test (LSAT) scores or undergraduate grade-point averages (UGPA), both require academic support to pass the bar.

Relatedly, the American Bar Association (ABA) Section 316 mandates that law schools that fall out of compliance with bar passage requirements must be able “to address bar passage, particularly the law school’s academic rigor and the demonstrated value and effectiveness of its academic support and bar preparation programs.”²⁸ It should be noted, however, that neither commentators nor the ABA has made an attempt to define precisely what “academic support” entails. The ABA also has not attempted to collect and report data that could be used to forge a definition of “appropriate academic support” for purposes of fulfilling the rule, or that would provide a basis for comparing achievement of “appropriate academic support.” Moving to change this rule despite basic gaps in understanding of how the rule works seems hasty and reactionary. More likely, the move will force some schools like Thurgood Marshall to veer from its mission of serving to expand opportunities for the underserved in the legal profession and to prepare a diverse group of students for leadership in the legal profession, business, and government.²⁹

25. See Natalie Kitroeff, *Law School Applications Set to Hit 15-Year Low*, BLOOMBERG (Mar. 19, 2015, 8:38 AM), <https://www.bloomberg.com/news/articles/2015-03-19/law-school-applications-will-hit-their-lowest-point-in-15-years> (on file with *The University of the Pacific Law Review*) (suggesting that lowering law school admission requirements provides a greater opportunity for diversity).

26. *Id.*

27. Stetz, *supra* note 16, at 24.

28. *ABA Standards and Rules of Procedure for Approval of Law Schools*, AM. B. ASS’N 25 (2016–17).

29. *Admissions*, TEXAS SOUTHERN UNIVERSITY THURGOOD MARSHALL SCHOOL OF LAW, <http://www.tsulaw.edu/admissions/> (last visited Feb. 12, 2017) (on file with *The University of the Pacific Law Review*).

III. TRENDING VIEWS: DIVERSITY MATTERS

*“[D]iversity in the legal profession is a function of general social forces that limit the number of women and minorities from being eligible to pursue a law degree, and forces specific to the legal profession that encourage or discourage participation in the legal profession in a distinct way.”*³⁰

American institutions increasingly embrace diversity as a guiding principle, particularly as a benefit to learning and problem solving.³¹ As an example, the National Jurist evaluates the best law schools for diversity. It ranks them based on six categories: percentage of minority faculty; percentage of black students; percentage of Hispanic students; percentage of American Indian students; and percentage of Caucasian students.³² Under this scheme, the magazine is mislabeling racial diversity as a survey of “diversity.”³³ Although the ranking considers racial diversity, which is one aspect of diversity, it does not consider diversity characteristics such as experience, economic class, gender, religion, nationality, and the desire to work in the public sector.³⁴ This section examines diversity efforts in higher education and how the Supreme Court has shaped them. This focus on racial considerations serves as segue to discussions of other dimensions of diversity relevant to the law school setting. Accordingly, this discussion focuses on race in the courts and other aspects of diversity that law schools are trying to enhance.

This procession underscores diversity as something that cuts across various lines beyond race. For example, diversity itself is not synonymous with Spanish surnames or skin color; it also includes intellectual³⁵ and work experience, family situation, life obstacles, and overcoming adversity, which collectively contribute to educational diversity.³⁶ Even intellectual diversity is not self-evident, and may

30. Nance & Madsen, *supra* note 12, at 300.

31. *Handbook on Diversity and the Law: Navigating A Complex Landscape to Foster Greater Faculty and Student Diversity in Higher Education*, AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE 12 (2010), available at https://www.aaas.org/sites/default/files/migrate/uploads/Law_Ch1to6.pdf (on file with *The University of the Pacific Law Review*) (“The national imperative to enhance diversity of institutions invested in STEM fields, is best understood in the context of the broader diversity interests that have come to characterize higher education and workforce aims.”).

32. See Stetz, *supra* note 16 (ranking Texas Southern University, Thurgood Marshall School of Law number one in diversity).

33. *Id.* at 25.

34. See generally *id.*

35. See, e.g., George W. Dent Jr., *Toward Improved Intellectual Diversity in Law Schools*, 37 HARV J. L. & PUB. POL’Y. 165, 165 (2014) (arguing that law schools lack intellectual diversity due to a lack of ideologically conservative professors).

36. Adam Lamparello & Cynthia Swann, *The New Affirmative Action After Fisher v. University of Texas: Defining Educational Diversity Through the Sixth Amendment’s Cross-Section Requirement*, 69 S.M.U. L. REV. 387, 391–92 (2016) (outlining six scholarly “constructs of diversity” including: diversity of personal

include the rigor and quality of intellect in learning and the quest for truth.³⁷ The same is true for race, which, on its own, is merely a metric for racial diversity and may make little contribution to learning. Hence, as a primer to the statistics and data points that follow, it is worth keeping in mind that diversity is a complex concept that must be approached with caution and recognized that most accounts focus on race or sex of students.

The value of diversity is the subject of debate in higher education.³⁸ Indeed, there have been a number of studies that question whether greater diversity makes a difference.³⁹ Yet the notion that diversity makes a positive difference is embraced at a number of levels.⁴⁰ For example, the Supreme Court has protected diversity initiatives in education as a compelling state interest, underscoring the educational benefits of a diverse student body.⁴¹ Some schools have implemented mandatory diversity training for faculty and staff while others offer undergraduate degrees in Critical Diversity Studies.⁴²

background, diversity of family background; diversity of experience; diversity of perspective; diversity of educational expectations, and diversity of career goals and aspirations).

37. Michael Stokes Paulsen, *The Uneasy Case for Intellectual Diversity*, 37 HARV J. L. & PUB. POL'Y. 145, 146–47 (2014) (Intellectual diversity is “secondary and instrumental [to] . . . intellectual rigor and quality, and the search for intellectual ‘Truth,’ (with a capital T) are the true prime values, and that these values are not necessarily furthered by the quest for ‘diverse views’”).

38. See Stetz, *supra* note 16, at 25–26 (suggesting that diversity within law schools is vitally important).

39. See generally WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) (finding that diversity benefits African Americans, colleges and universities, and American society).

40. *Raising the Bar: An Analysis of African American and Hispanic/Latino Diversity in the Legal Profession*, MICROSOFT CORP., http://www.americanbar.org/content/dam/aba/administrative/diversity/Microsoft_Raising_the_Bar_FINAL.ppt (last visited Feb. 12, 2017) (on file with *The University of the Pacific Law Review*); Nicole E. Negowetti, *Implicit Bias and the Legal Profession’s “Diversity Crisis”: A Call for Self-Reflection*, 15 NEV. L. J. 930, 933 (2015) (examining how implicit bias increases disparities in diversity and thwarts diversity efforts); Meera E. Deo, *The Promise of Grutter: Diverse Interaction at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 63 (2011) (“[T]here are sufficient numbers of students of color on the University of Michigan Law School campus to yield diverse interactions and that positive interracial student exchanges are occurring.”); SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007) (arguing that diverse groups outperform homogenous groups); *Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms*, AM. COUNCIL ON EDUC. & AM. ASS’N OF U. PROFESSORS 4 (2000), available at <https://www.aaup.org/NR/rdonlyres/97003B7B-055F-4318-B14A-5336321FB742/0/DIVREP.PDF> (on file with *The University of the Pacific Law Review*) (among the findings: “white students suffer no adverse effects from classroom diversity”; “faculty members strongly believe that racially and ethnically diverse classrooms enrich the educational experience of white students”; “diversity is judged to have great educational value and is inextricably bound to the college’s mission”); DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 172 (Gary Orfield, ed. 2001) (“[L]arge majorities have experienced powerful educational experiences from interaction with students of other races. Although the plurality of students believe that not enough has been done to realize this potential fully, there are many contacts and friendships that have formed across racial and ethnic lines. White students appear to have a particularly enriching experience, since they are by far the most likely to have grown up with little interracial contact”).

41. *E.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

42. *Critical Diversity Studies*, U. OF SAN FRANCISCO, <https://www.usfca.edu/arts-sciences/undergraduate-programs/critical-diversity-studies> (last visited Feb. 14, 2017) (on file with *The University of the Pacific Law Review*).

A. Affirmative Action in Higher Education

Initiatives to provide greater educational opportunities to minorities date at least as far back as the 1960s. The term “affirmative action” traces back to a 1961 executive order issued by President John F. Kennedy, which mandated that projects financed with federal funds take “affirmative action” to ensure racially fair hiring.⁴³ Three years later, the Civil Rights Act prohibited discrimination based on race, color, religion, or national origin.⁴⁴ In the years that followed, public institutions developed initiatives to diversify college campuses across the country.⁴⁵

The Supreme Court’s jurisprudence generally supports affirmative action as a constitutionally valid principle as long as it is administered in a flexible approach, where race is one of multiple factors in the admission process.⁴⁶ Challenges to diversity efforts in higher education are grounded on the Equal Protection Clause of the Fourteenth Amendment, among other causes of action.⁴⁷ In the 1978 landmark case, *Regents of the University of California v. Bakke*, the Court affirmed that increasing racial student diversity was a legitimate factor for school admissions, and applying a strict scrutiny standard, held that the school’s quota methodology was not a legitimate way of achieving that goal thus violating equal protection.⁴⁸ In this case, although handing the school a defeat, the Court affirmed its conviction that diversity was a learning benefit that contributed to the “robust exchange of ideas.”⁴⁹

The *Bakke* decision was subject to sustained attack.⁵⁰ The first successful challenge to *Bakke* occurred at the appellate court level in *Hopwood v. Texas* (1996), where the 5th Circuit struck down the school’s admission program, holding that the “law school may not use race as a factor in law school admissions.”⁵¹ In its opinion, the court found that the law school presented “no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allow[ed] it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body.”⁵² The ruling stood as a rebuke to *Bakke*.⁵³ Following form, a few years later in *Johnson v. Board of Regents of the University of Georgia*, the

43. Proclamation No. 10925, 26 Fed. Reg. 1,997 (Mar. 6, 1961).

44. 42 U.S.C.A. § 2000e-2 (West 2017).

45. E.g., *Regents of the Univ. of Cal.*, 438 U.S. at 265.

46. See generally *id.*

47. E.g., *id.* at 266.

48. *Id.* at 320.

49. *Id.* at 312.

50. *Infra* Part III.A.

51. *Hopwood v. State of Tex.*, 78 F.3d 932, 935 (5th Cir. 1996).

52. *Id.* at 934.

53. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265(1978).

Eleventh Circuit held that the admissions program Georgia had adopted was not tailored narrowly enough to withstand strict scrutiny.⁵⁴ Together, the cases seemed to put affirmative action on the shakiest legs it had ever known.

Indeed, the aftermath of these rulings began to change the legal landscape of affirmative action. These decisions emboldened some states shortly after to enact propositions and initiatives to ban race as a factor for college admission.⁵⁵ There were also conflicting rulings by federal courts about the merits of diversity.⁵⁶ In 2000, a federal judge ruled in *Gratz v. Bollinger* that using race as a factor in admissions was constitutional.⁵⁷ The rationale harkened to the core of *Bakke*'s rationale for allowing race as a consideration, namely, that preference is given to children of alum, athletes, and other groups deemed beneficial to the school, and that affirmative action serves a compelling interest due to the benefits derived from a diverse student body.⁵⁸ In the following year, *Grutter v. Bollinger* involved a challenge to a law school's affirmative action policies.⁵⁹ In that case, the law school claimed that diversity among the student body provided pedagogical benefits to students.⁶⁰ The Court agreed with the school and upheld its admission process.⁶¹ The opinion, authored by Justice Sandra Day O'Connor, held that the Constitution "does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."⁶² Moreover, the opinion noted that "student body diversity promotes learning outcomes . . . 'better prepares student for an increasingly diverse workforce and society, and better prepares them as professionals.'"⁶³

The most critical recent developments have had mixed results for diversity proponents. In 2013, the Court held in *Fisher v. the University of Texas*, that the University could continue using race as a factor for admissions, but ordered the school to reexamine its existing affirmative action program.⁶⁴ A year later, a federal appeals court upheld the school's policy.⁶⁵ That same year, in *Schuette v.*

54. *Johnson v. Board of Regents of Univ. of Ga.*, 263 F.3d 1234, 1254 (11th Cir. 2001) (holding that the University of Georgia's admission policy was not narrowly tailored to achieve the university's interest of student body diversity, and therefore failed the strict scrutiny test).

55. Halley Potter, *What Can We Learn from States That Ban Affirmative Action?*, THE CENTURY FOUNDATION (Jun. 26, 2014), <https://tcf.org/content/commentary/what-can-we-learn-from-states-that-ban-affirmative-action/> (on file with *The University of the Pacific Law Review*).

56. See *Gratz v. Bollinger*, 539 U.S. 244, 297 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003).

57. *Gratz*, 539 U.S. at 297.

58. *Id.* at 277–78.

59. *Grutter*, 539 U.S. at 306.

60. *Id.* at 328.

61. *Id.*

62. *Id.* at 343.

63. *Id.* at 330.

64. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013).

65. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 660 (2014).

Coalition to Defend Affirmative Action, the Court upheld a constitutional amendment that banned public universities from implementing race-sensitive admissions policy.⁶⁶ Although this case was adjudicated on the basis of upholding the state's amendment process, the practical effect allowed the striking of affirmative action by legislative fiat.⁶⁷ This case demonstrated that state legislation could single-handedly render affirmative action an obsolete policy.⁶⁸ Finally, the legal drama of *Fisher* concluded in 2016 when the Court held by a 4-3 decision that affirmative action programs are protected by the equal protection clause and upheld the school's admission policy.⁶⁹

In these cases, support for diversity came from various amici of the court, including the Society of American Law Teachers (SALT), which filed amicus briefs in *Bakke*, *Grutter*, *Fisher*, and *Schuetze*.⁷⁰ In the latter case, SALT's brief described studies that emphasized the educational benefits of diversity, including its contributions to problem solving.⁷¹ The brief also states that diverse classrooms prepare students "to become effective 'corporate counselors and deal makers' as well as 'culturally competent leaders.'"⁷² On the contrary, the brief cites lack of diversity as impairing the effectiveness of a learning environment and that students must combat "tokenism" and isolation, which correlates to depressed academic achievement.⁷³ More critically, the brief emphasized that diversity has serious learning consequences for all students—not simply minorities.⁷⁴

B. *The Law School Setting*

Diversity within law schools closely relates to diversity among other areas of society. Most obviously, the legal profession tends to reflect the diversity found in law schools. However, the clientele of most lawyers is somewhat financially homogenous. As one recent report notes, there is a tremendous access-to-justice gap for Americans, which leaves most people living in poverty and a majority of

66. *Schuetze v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal, By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1651 (2014).

67. *Id.*

68. *Id.*

69. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2215 (2016).

70. Brief Amicus Curiae of the Society of American Law Teachers in Support of Respondents at 1–2, *Schuetze v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal, By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014) (No. 12-682); Michelle Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011, 1017 (2009) (examining the lag in efforts to diversify the legal profession and efforts in the medical profession).

71. Brief Amicus Curiae of the Society of American Law Teachers in Support of Respondents, *supra* note 70, at 6–7.

72. *Id.* at 7–8.

73. *Id.* at 8–9.

74. *Id.* at 11.

moderate-income individuals with unmet legal needs, such as representation and other services.⁷⁵ These gaps run along class and color lines, which leave indigent ethnic minorities at a particular lag in accessing courts and legal services.⁷⁶ The access-to-justice gap shows that a “client” in the legal profession essentially means one who can pay, which in practice precludes vast numbers of Americans who cannot.⁷⁷ Thus, law schools are instrumental for addressing these gaps—both by diversity efforts and focusing on training lawyers committed to public interest work.⁷⁸

As law schools, the legal profession, and clients continue to lag in diversity, some schools and professors have actively promoted initiatives to address the lack in diversity.⁷⁹ Many of these initiatives focus on racial diversity; however, even this limited perspective is telling. Although law schools are more diverse than in previous eras, the number of African-American and Mexican American students attending law school has been declining.⁸⁰

A 2009 online publication presented a number of findings that help quantify the racial trends.⁸¹ Entitled “A Disturbing Trend in Law School Diversity,” this study by the Society of American Law Teachers and the Lawyering in the Digital Age Clinic at Columbia University School of Law provided analysis of Law School Admission Council (LSAC) racial data.⁸² Despite 15 years of consistent application rates, LSAC racial data reported a declining enrollment for African Americans and Mexican Americans. This is true for the same period over which law schools grew by about 3,000 students.⁸³ By 2008, these groups accounted for a smaller percentage of the entering class than in 1993.⁸⁴ Thus, neither African American nor Mexican American students filled any of the additional 3,000 enrollment spots. The data also showed that both groups had higher “shut out” rates, which occurs when an applicant is denied admission by every law

75. See AMERICAN BAR ASSOCIATION COMMISSION ON THE FUTURE OF LEGAL SERVICES, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 5 (2016).

76. See *id.* (individuals living in poverty or of moderate-income struggle to receive sufficient legal assistance).

77. See *id.* at 26 (describing that some clients have urged their law firms to consider alternative payment plans to traditional hourly billing).

78. *Id.* (recommending that law schools implement “incubator” programs).

79. See generally Nance & Madsen, *supra* note 12, at 295–300 (reviewing current diversity initiatives in law school and beyond); Faisal Bhabha, *Towards a Pedagogy of Diversity in Legal Education*, 52 OSGOODE HALL L. J. 59, 64–80 (2014) (examining twenty years of diversity promotion in legal education); Catherine E. Smith, *Seven Principles: Increasing Access to Law School Among Students of Color*, 96 IOWA L. REV. 1677 (2011).

80. *A Disturbing Trend in Law School Diversity*, COLUMBIA LAW SCHOOL, <http://blogs.law.columbia.edu/salt/> (last visited Feb. 12, 2017) (on file with *The University of the Pacific Law Review*).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* (“Indeed, there was a 7.5% decrease in the proportion of African Americans in the 2008 class as compared with the 1993 class. There was a 11.7% decrease in the proportion of Mexican Americans in the 2008 class as compared with the proportion entering law school 15 years ago.”)

school that considered the applicant's candidacy. This means that a higher percentage of minority applicants are left without options for law school, which results in "lost opportunity costs in the form of lower mean incomes."⁸⁵

But just how big are the gaps?⁸⁶ The figures are discomfoting. In 2013, one study reported that although African Americans and Mexican Americans represented about 26 percent of the American workforce, they comprised less than 10 percent of the country's lawyers.⁸⁷ In 2014, most elite law schools admitted Blacks in percentages much lower than their number in the general population.⁸⁸ According to a study of the top 15 law schools, Harvard admitted the most, with 8.7 percent of the law students being Black.⁸⁹ The last on the list is Michigan, which had blacks accounting for 3.6 percent of its law students.⁹⁰ In contrast, blacks comprised of over 13 percent of the American population in 2015.⁹¹ Despite their numerical presence in society, the ABA reports that only 3 percent of all lawyers working for "big law" firms were black.⁹² Even this lowly figure has continued to decline.⁹³

In the judiciary, these numbers are equally bleak.⁹⁴ On the federal bench as of April 2015, two-thirds of judges are male and nearly three-quarters are white.⁹⁵ Approximately one-third of active U.S. district court judges and 35 percent of federal courts of appeals judges are women.⁹⁶ At the state level the

85. *Id.*

86. See generally J. T. Manhire, *The Most (and Least) Representative Law Schools for Gender, Race, and Ethnicity*, REPRESENTATIVE L. SCHOOLS 1 (Jan. 7, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2711332 (on file with *The University of the Pacific Law Review*) (The figures that follow are often grounded in the assumption that law student demographics should reflect the demographics of society. However, there is much to cast doubt on this as an appropriate comparative baseline.)

87. Jennifer Smith, *Microsoft Wades Into Law Firms' Diversity Debate*, WALL STREET J. (Dec. 10, 2013, 11:30 AM), <http://blogs.wsj.com/law/2013/12/10/microsoft-wades-into-law-firms-diversity-debate/> (on file with *The University of the Pacific Law Review*).

88. See *Ranking the Top Law Schools by their Percentage of Black Students*, J. OF BLACKS IN HIGHER EDUC. (Dec. 30, 2014), <https://www.jbhe.com/2014/12/ranking-the-top-law-schools-by-their-percentage-of-black-students/> (on file with *The University of the Pacific Law Review*).

89. *Id.*

90. *Id.*

91. *Quick Facts United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/00> (last visited Feb. 16, 2017) (on file with *The University of the Pacific Law Review*).

92. Debra Cassens Weiss, *Only 3 Percent of Lawyers in BigLaw Are Black and Numbers Are Falling*, ABA J. (May 30, 2014, 12:18 PM), http://www.abajournal.com/news/article/only_3_percent_of_lawyers_in_biglaw_are_black_which_firms_were_most_diverse (on file with *The University of the Pacific Law Review*).

93. Elizabeth Olson, *Black Lawyers Lose Ground at Top Firms*, N.Y. TIMES (May 29, 2014), <https://mobile.nytimes.com/blogs/dealbook/2014/05/29/black-lawyers-lose-ground-at-top-firms/> (on file with *The University of the Pacific Law Review*).

94. See generally Nicole E. Negowetti, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, 15 NEV. L. J. 930 (2015).

95. *Id.* at 934.

96. *Id.*

numbers are telling: 87 percent of state high court judges⁹⁷ and 86 percent of state trial court judges are white.⁹⁸

An empirical study on diversity in the legal profession made a number of relevant findings.⁹⁹ One finding is that African Americans and Hispanics in the legal profession are woefully underrepresented as a whole.¹⁰⁰

In addition to reflecting comparable lag that these groups experience in other prestigious professions, the study found that their underrepresentation:

may be caused primarily by social forces external to the legal profession, and that, in addition to continuing its current diversity efforts, the legal profession should put a concentrated emphasis on initiatives that assist these underrepresented groups to become eligible to pursue all types of prestigious employment opportunities that have significant barriers to entry.¹⁰¹

As the study indicates, underrepresentation may be due to factors external to the legal profession, which means that minority lawyers must endure a range of obstacles above and beyond those demanded by the profession itself in the struggle to succeed.¹⁰²

As this portrait suggests, both law schools and legal practice fail to reflect demographic realities.¹⁰³ The disparity is similar for Latinos, who in 2010–2013, along with African Americans, enjoyed a spike in acceptance to colleges.¹⁰⁴ The increases, however, came at less prestigious law schools with lower admission standards.¹⁰⁵ Hence, in most recent years, it is clear that these demographic groups are entering law schools in greater numbers, but the highest positions in the legal field remain largely the domain of white male and female elites.¹⁰⁶

The gaps are plain in the raw racial demographics of law schools. For example, despite the recent diversity gains noted above, whites still accounted for

97. *Id.*

98. *Id.*

99. *See generally* Nance & Madsen, *supra* note 12.

100. *Id.* at 271.

101. *Id.*

102. *E.g.*, Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCIENTIFIC AMERICAN (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/> (on file with *The University of the Pacific Law Review*) (including obstacles such as group “discomfort, rougher interactions, a lack of trust, greater perceived interpersonal conflict, lower communication, less cohesion, more concern about disrespect, and other problems”).

103. *See* Stetz, *supra* note 16, at 28.

104. *See id.* at 25.

105. *Id.* at 28.

106. *Id.*

approximately 67 percent of all law students in Fall 2014.¹⁰⁷ In contrast, African Americans comprised nearly 11 percent of all students in that same year.¹⁰⁸ At first glance, these figures seem to suggest that African Americans are lagging just a couple points short of their numbers in society. But this should not mislead one to think that law schools across the country enroll at this level. The 11% figure is possible only because of the heavy lifting HBCU law schools do with respect to diversity efforts. For example, Thurgood Marshall School of Law graduates more African Americans than all 9 other Texas law schools combined, and accounts for a significant portion of African Americans in the legal profession.¹⁰⁹ In 2011, the school graduated its 1000th individual of Hispanic heritage,¹¹⁰ while individuals from Hispanic ancestry consistently represent about a third of the school.¹¹¹ Because a handful of law schools are responsible for much of the diversity in law school, the vast bulk of law schools fall far from reflecting what society really looks like. Hence, law schools are less diverse than the numbers indicate, and as one law school dean has put it, “the longstanding lack of diversity among students threatens to negatively affect the long-term future of the entire profession—and the literal face of the legal profession for generations.”¹¹²

Thurgood Marshall School of Law offers a clear picture of the conflict:

The majority of our students have LSAT scores in the last quartile compared to the approximately 2,000 students who enter other Texas law schools annually. The literature suggests a strong correlation between LSAT score and Law School GPA and bar passage. Even with academic remediation and skills enhancement, we face substantial difficulties in sustaining a 75% bar passage rate for first-time takers based on the composition of our entering classes.¹¹³

The school’s mission to make an impact on urban communities is directly at odds with those schools that aim to turn a profit. Rather than being profit-driven, the school sees itself as a “school of opportunity. We have opened our doors to

107. *Admitted Applicants by Ethnic & Gender Group*, LAW SCHOOL ADMISSION COUNCIL, <http://www.lsac.org/lscresources/data/ethnic-gender-admits> (last visited Feb. 12, 2017) (on file with *The University of the Pacific Law Review*).

108. *Id.*

109. Stetz, *supra* note 16, at 28.

110. Alice Adams, *TSU’s Thurgood Marshall School of Law Continues Unique Mission*, HOUSTON CHRONICLE (Oct. 13, 2014, 2:52 PM), <http://www.chron.com/jobs/getting-ahead/article/TSU-S-Thurgood-Marshall-School-of-Law-continues-5804814.php> (on file with *The University of the Pacific Law Review*).

111. Stetz, *supra* note 16, at 28.

112. Kevin R. Johnson, *Some Thoughts on the Future of Legal Education: Why Diversity and Student Wellness Should Matter in a Time of “Crisis,”* UC DAVIS LEGAL STUDIES RESEARCH PAPER SERIES, Research Paper No. 488, 13 (Apr. 2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764545. (on file with *The University of the Pacific Law Review*).

113. TEXAS SOUTHERN UNIVERSITY, THURGOOD MARSHALL SCHOOL OF LAW STRATEGIC PLAN 2014–15 TO 2019–20 (2015).

our students because we believe that applicants' life experience, maturity, and extraordinary dedication to their own future successes warrant the opportunity to join the legal profession."¹¹⁴ The school is committed to a holistic model of building a student body, where life experience, maturity, and extraordinary dedication may outweigh a student's performance on admissions indicators traditionally used by law schools.¹¹⁵ The choice to admit such students requires a commitment to take seriously some of challenges that diversity presents, some of which are described next.

IV. COLLATERAL COSTS & MAKING PAYMENT

*"[T]he relative excellence of law schools rests in part on the diversity of their . . . student bodies."*¹¹⁶

This section makes the case that schools desiring a more diverse student body, or those that are achieving it by default, must acknowledge and anticipate the costs. Increasing and maintaining diversity requires commitments at various levels of a law school's being. At the base of these is consideration of how greater diversity impacts the classroom with respect to pedagogy. In addition are issues that the administration must anticipate to service a diverse student body. Creating diverse environments requires administrative consciousness that the needs of a diverse pool of individuals differ from those of the traditional law student. Straddling the pedagogical and the administrative are the regulative issues that complicate shifts toward greater diversity. The ability of a law school to survive depends on numbers, including bar passage rates, which may make diversity a daunting challenge for institutions that struggle to keep up with accreditation standards. This section presents some of these challenges and provides commentary on how law schools might rise to the occasion to meet these needs.

114. *Id.*

115. *Id.* ("TMSL considers a number of factors when reviewing an applicant's record in addition to their undergraduate grade point average and LSAT scores. Among those factors are evidence of critical thinking ability drawn from personal statements, essays, and letters of recommendation. We also consider plausible bases for discounting a comparatively low LSAT or UGPA, especially when the applicant had comparatively strong accompanying UGPA or LSAT. Among these bases are significant improvement in the UGPA or LSAT performance, or an UGPA or LSAT that was earned or achieved in the distant past. We also consider post baccalaureate degrees, and the quality of the performance represented therein. We also consider prior significant work with the legal profession, especially when the work is documented and applauded. We also examine an applicant's 'mission statement,' which could constitute evidence of the applicant's motivation, independent learning skills, and external support systems.")

116. Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1566 (2011).

A. *Pedagogical*

Achieving greater diversity triggers issues that relate directly to the classroom.¹¹⁷ “Indeed, one cannot simply recruit ‘a diverse student body and [neglect] the intellectual environment in which students interact. To do so would be irresponsible.’”¹¹⁸ Teaching in an inclusive environment necessarily must build on the explicit recognition that students of different background have different needs. Specifically, these students face the “triple threat”: solo status from being a part of an under represented group; the stereotype threat that accompanies being a member of a stereotyped group; and the challenges that come with lacking a background in law.¹¹⁹ In the same way the inclusion of women in legal education required the creation of women’s restrooms and other facilities for equal opportunity, law schools must be attendant of how a truly diverse set of students requires the same. There are a number of factors that directly impact the law school classroom due to increased diversity that are examined in this section.

Schools seeking greater diversity must recognize that non-traditional students are more vulnerable to isolation¹²⁰ and dislocation than other more traditional students.¹²¹ As a result, minorities may have a more difficult time adjusting to law school.¹²² The adjustment may be made more difficult in part due to differences in socialization and experience of women and minorities, which may situate them differently in relation to the traditional law school teaching methods.¹²³ For example, the Socratic technique has achieved fame in law school pedagogy, but when wielded haphazardly can have different negative effects on

117. Dowd, *supra* note 8, at 39 (offering pedagogical strategies for equality in law school).

118. *Id.* at note 75 (quoting Patricia Gurin, *Wood & Sherman: Evidence for the Education Benefits of Diversity in Higher Education: Response to the Critique by the National Association of Scholars of the Expert Witness Report of Patricia Gurin in Gratz, et al. V. Bollinger, et al. and Grutter v. Bollinger, et al.*, available at <http://www.umich.edu/~urel/admissions/research/gurin.html>); Bhabha, *supra* note 79, at 63 (describing diversity pedagogy in North American law schools as “thin”).

119. Sean Darling-Hammond & Kristen Holmquist, *Creating Wise Classrooms to Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 25 LA RAZA L.J. 1 (2015).

120. Julie M. Spanbauer & Katerina P. Lewinbuk, *Embracing Diversity Through a Multicultural Approach to Legal Education*, 1 CHARLOTTE L. REV. 223, 224 (2009) (describing student and professional isolation that results when students are not a part of the dominant culture and are surrounded by a largely white student body with few faculty role models).

121. *See, e.g.*, Lisa Pruitt, *A Kinder, Gentler, Law School?*, U.C. DAVIS L. REV. 1941 (2005) (examining how race impacts the law school classroom such as to give minorities a disadvantage).

122. Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L.J. 140, 145 (1995).

123. Dowd, *supra* note 8, at 40; Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL ED. 112, 120 (2002) (identifying core results of traditional education as including student loss of self-confidence, esteem and security, which affects both personal and academic well-being).

minority students.¹²⁴ This is particularly true in light of one study of Michigan Law School that pointed out that the school's environment seemingly makes it difficult for minority student to express their views and feel accepted.¹²⁵ Another recent attempt to underscore the point is a video created by UCLA School of Law's African American awareness campaign entitled "33." This video represented the number of African American law students enrolled out of a population of 1,100 students, in a city with millions of African Americans.¹²⁶ The title provides a sense of the isolation and pressure that is exerted just because of racial realities.

Another simple illustration of these types of challenges, is for those parent-students who sometimes must bring a child to class. When the child is younger, there are undoubted impacts on both the students and professor. This situation may challenge the professor to modify the presentation or challenge students to articulate their ideas differently due to the child's presence. Although there has been debate on whether law schools should offer day care,¹²⁷ there are few, if any, law schools that do, thus making this situation sometimes unavoidable. The main point for the instructor will be to accommodate the situation as reasonably as possible. More importantly, is the teacher's recognition that no student wants to bring a child to class, but that sometimes there is no other option available. Not only does it divulge information about the student that might otherwise remain private, but also leaves the student vulnerable to criticism from students based on faulty perceptions.

Student bodies that are diverse with respect to other kinds of diversity, such as disability or income status, face challenges as well. Another example is accommodating visually impaired students. Having such a student in a classroom requires a number of front-end preparations for the professor that require extra labor. As far as pedagogy goes, it means that anything shown visually must be articulated for the student verbally, which is a difficult task. It also includes ensuring that the student has place to sit in front for hearing purposes and ensuring the student obtains any visual graphics or problems *prior* to the class in which they are covered. It also requires close collaboration between the administration and students to obtain electronic copies of textbooks for the class or for proctoring of an exam. Sometimes, the school must accommodate a family

124. See, e.g., Spearlt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, 48 CAL. WEST. L.REV. 467, 477-78 (2012) (describing the abuses of Socratic methodologies in law school).

125. Walter R. Allen & Daniel Solorzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237, 285-87 (2001).

126. Akoto Ofori-Atta, *There are only 33 Black Students at UCLA School of Law*, THE GRAPEVINE BLOG (Feb. 12, 2014), http://www.theroot.com/blog/the-grapevine/_33_black_students_at_ucla_school_of_law/ (On file with *The University of The Pacific Law Review*).

127. David Lat & Elie Mystal, *Should Law Schools Offer Child Care? An ATL Debate*, ABOVE THE LAW, May 11, 2011, <http://abovethelaw.com/2011/05/should-law-schools-offer-child-care-an-atl-debate/> (on file with *The University of The Pacific Law Review*).

member or other individual who must guide a student around the building, including appearing with the student in class, study sessions, and other student functions.

For schools that attract lower income students there are financial stressors that threaten a student's ability to be equipped with basic tools for law school. Indeed, it is not uncommon for a student to forgo purchasing course textbooks or other materials due to their high costs. When this occurs, a student is at a severe learning disadvantage, which can often be assuaged by mindful professors. This would include the professor making all course materials available online or in the library reserves. For a student who must sacrifice purchasing a text, such a courtesy could make a huge difference, thus benefitting all students.

There are other adjustments that can be made in the classroom to advance teaching goals in a diverse environment. According to one study that surveyed "transformative" law professors for the core themes that defined their pedagogy, professors responded that teaching with empathy and enthusiasm; getting feedback from students during the semester; providing opportunities for students to learn practical skills; and modernizing the classroom, including transcending classical cases and embracing discussion about the type of modern political and social phenomena that attracted many students to law school in the first place, were effective teaching techniques.¹²⁸ Other pedagogically inclusive techniques might include "taking care to refer to diverse populations in our course materials, lectures, hypothetical questions, and written problems."¹²⁹ Moreover, instructors might adopt the habit of referring to their students as "attorney Johnson," or "counsel" rather than "Mr.," "Mrs.," or "Ms. Johnson," all of which assumes much about a student's gender or sexual identity.

Schools seeking to attract a more diverse student body must foster academic support and programming for bar-readiness.¹³⁰ For first-generation law students or first-generation college graduates, there is little doubt that such individuals fare less well on bar exams and law school grading in general. Therefore, if such individuals are to succeed in the law school classroom, there must be remedial efforts and initiatives to provide extra support for class and bar performance. Moreover, law schools must be able to determine the impact of their work, including the process of defining the skills and outcomes most appropriate for

128. Darling-Hammond & Holmquist, *supra* note 119, at 17–18.

129. Dowd, *supra* note 8, at 150.

130. In its AALS self-study, the school states that this area is designed to "provide assistance to student in each class in the Law School and to provide that service while interfacing with faculty teaching in the core curriculum and other service areas" TEXAS SOUTHERN UNIVERSITY THURGOOD MARSHALL SCHOOL OF LAW, *supra* note 23, at 80.

their student population, as well as how to measure success on achievement of those outcomes.¹³¹

More specifically, schools might provide greater opportunities for minority students to develop their professional identity,¹³² and be saddled with “high quality work assignments.”¹³³ Clinics hold the promise of such development as students in clinics are afforded continuous critical assessment and feedback, which contribute to a well-rounded lawyer, who will continue to learn beyond graduation from law school.¹³⁴ Such low student to teacher ratios found in clinics may pedagogically benefit students who require more individualized attention than others. As one commentator notes, minority students gain confidence by serving indigent clients, and clinics “immediately engage the student in the law school and surrounding legal community. The work that a student can accomplish in a clinic serves as an extrinsic anchor of support . . . even in the face of cultural isolation they may feel from their peers and in the classroom.”¹³⁵ Moreover for all students, clinical courses can provide students with the direct exposure to multicultural legal issues and clients.¹³⁶ Still, the value added of clinics must be tempered by the lack of studies of clinical outcomes generally, and specifically with respect to schools or school matriculants, or sub-groups. More specifically, one study found that practical skills may not be as urgent as

131. EDUCATING TOMORROW’S LAWYERS, *Foundations for Practice: The Whole Lawyer and the Character Quotient* 1, 35 (2016), available at http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf (on file with *The University of the Pacific Law Review*).

132. See, e.g., EDUCATING TOMORROW’S LAWYERS, *Report on the 2012 Conference and Introduction to the 2013 Conference* (2013), available at http://iaals.du.edu/sites/default/files/documents/publications/report_on_the_2012_conference.pdf (on file with *The University of the Pacific Law Review*) (summarizing presentations from “The Development of Professional Identity in Legal Education: Rethinking Learning and Assessment”).

133. These types of assignments have been noted as essential to a lawyer’s career progression. If the same hold true for law students, it seemingly renders clinics critical for diversity efforts. Indeed in this study, the evidence showed that other supportive programming was used more effectively by individuals who received high quality work assignments. See Forrest Briscoe and Katherine C. Kellogg, *The Initial Assignment Effect: Local Employer Practices and Positive Career Outcomes for Work-Family Program Users*, 76 AM. SOCIOLOGICAL REV. 291, 300 (2011) (“Exposure to powerful initial supervisors helps employees gain access to reputational-building project opportunities, which in turn allows them to build a significant track record with a wide range of supervisors and clients by the time they use the reduced-hours program.”).

134. Suzanne Valdez Carey, *An Essay on the Evolution of the Clinical Legal Education and Its Impact on Student Trial Practices*, 51 U. KAN. L.REV. 509, 527 (2003); see also, William D Henderson, *Solving the Legal Profession’s Diversity Problem*, PD QUARTERLY, at 23 (February 2016) (“Feedback accelerates professional development. Feedback is also very expensive because it requires a practice master to closely observe performance and communicate subtle points in a manner that the less experienced lawyer is able to hear and absorb.”)

135. Alisha Lineswala, *Building a Diverse Law Student Body from the Inside: Strategies for Law Schools to Recruit and Retain Students of Color* (LSAC 2014), available at <http://www.lsac.org/docs/default-source/diversity/lineswala-essay-2014-web.pdf> (on file with *The University of the Pacific Law Review*).

136. Calleros, *supra* note 122, at 147.

character for the practice of law, which effectively shifts some of the discussion from what happens in the classroom to what happens in the admissions office.¹³⁷

B. Administrative

At the administrative level, diversity entails costs that differ from those that help to create initiatives, pipeline programs, training, websites, and other means of achieving diversity. The running of a law school, however, requires executive decisionmaking and policies that require support in other areas. Whereas some law schools may have funds available for luxury spending on conferences, symposia, and other formal events, institutions committed to diversity must first ensure that students have the academic support to succeed on the bar and beyond.

This is not to diminish the academic challenges that administrations face, some of which tie directly to the pedagogical issues above. For example, one experienced law instructor has outlined a five-step plan for helping students from disadvantaged backgrounds, which gives a sense of the basic issues at stake in educating a diverse student body.¹³⁸ The first prescription is that “law schools must change the mindsets of students from disadvantaged backgrounds,” which entails dispelling the notion that intelligence is fixed. “Second, law schools should help motivate their students.” Third, schools must teach students how to be metacognitive thinkers, which relates to strategizing and decisionmaking abilities in the legal context. Next, schools must help disadvantaged students become “self-regulated learners,” such that they become able to learn on their own. The final suggestion is that schools must help students develop better study habits. For administrations, the prescriptive is instructive for understanding some of the basic academic challenges of achieving greater diversity, even though some of these apply to many other law students, not simply “disadvantaged” ones.

Practically speaking, greater diversity will force school leaders to allocate resources differently. As a simple example, enhanced diversity invariably leads to more student organizations and advocacy groups at the law school, all of which will likely receive some sort of school support and resources. Other schools may implement training or programing for students, faculty, and staff. For example, a school may implement gender training for faculty and students or make this a part of professionalism training in a simulation or professional ethics

137. EDUCATING TOMORROW’S LAWYERS, *supra* note 131, at 36 (finding that among the most important factors for adapting to legal practice is one’s “character quotient,” what has more immediate relevance to legal practice than skills training: “For years, there have been debates between those who think graduates need to be ‘practice-ready’ and those who believe that law school should not be a trade school—and it appears they are both right. Respondents to our survey were clear: new lawyers do not require the ‘nuts and bolts’ immediately when they begin to practice, but they do require foundations that will allow them to build and grow over time.”).

138. E. Scott Fruehwald, *How to Help Students from Disadvantaged Backgrounds Succeed in Law School*, 1 TEXAS A&M L. REV. 83, 85 (2013).

course. Schools that are serious about creating an inclusive culture will work to highlight the contributions of women in the law, and be willing to cultivate greater gender diversity. This means ensuring that all stakeholders understand why inclusivity is a worthy goal to attain—an endeavor that itself requires resources.

In a diverse environment, administrations would do well to recognize that their school policies are likely built around the needs of the traditional law student. As one scholar notes, “legal education must acknowledge and move away from a model of education that is grounded in the experience and socialization of white males, a model that provides the greatest comfort and support for success of white males in a racially and sexually diverse classroom.”¹³⁹ Low income students, those who identify as LGBT, or members of non-Christian religion all enter an environment in which they are disruptive of the status quo, which is founded on baselines that support the traditional student. A simple illustration is that major school holidays revolve around Christian celebrations. Since members of this faith are automatically afforded these Christian-based breaks in education, members of others must be afforded similar accommodations. Diversity requires that all be afforded the opportunity to observe religious holidays without having to pay a penalty for missing class or rescheduling an assessment.¹⁴⁰ Such leniency is already common for students involved in journal, mock trial, and other extra-curricular events, so the accommodation is no stretch.

A final consideration is the extent to which accommodations are facilitated in other areas of student learning and assessment. A wider array of students will require certain accommodations for different students. For example, students with functional disabilities or other recognized disadvantages are tested separately under a different time limit. This is similar to the type of testing accommodation that a state bar might provide for an examinee.¹⁴¹ Routinely servicing students who require accommodation adds additional layers of task management, which taxes the administration with real labor and work hours required to coordinate exams with the professor, proctor exams, and provide technical assistance during testing.

139. Dowd, *supra* note 8, at 37.

140. *See, e.g.*, UNIVERSITY OF HOUSTON LAW CENTER, *Enhancing the Power of Legal Education Through Diversity*, available at <https://www.law.uh.edu/admissions/Diversity.pdf> (on file with The University of the Pacific Law Review) (featuring an article about a Jewish student who opted not to participate in his own graduation, but the school was “more than accommodating, offering to host a private graduation ceremony just for him, including a processional, speeches, photos, and the granting of the Juris Doctor hood”).

141. TEX. SUP. CT. RULES GOVERNING ADMISSION TO THE BAR OF TEX. R. 12 (in Texas, examinees with disabilities can apply for testing accommodations with written proof of the disability: “Statements from licensed physicians or a professional specialist that specifically set forth the physical, mental or emotional handicap or disability and the relationship between the disability and the inability to take the examination under standard conditions shall be required.”).

C. *Regulative*

The quest for diversity may have regulative costs that prove critical. As all American law schools are accredited by the ABA, this organization promulgates standards for compliance and determines whether a law school achieves and maintains accreditation. Although the ABA itself has developed diversity initiatives,¹⁴² the organization's standards often make it difficult for law classrooms themselves to become more diverse. Part of the problem is that some of the important metrics the ABA uses for its assessments are based on traditional measurements, which essentially sit in zero sum competition with diversity efforts. The ABA weighs a number of factors, including law students' GPA, LSAT score, and bar passage rate in its tabulation of whether a law school can competently prepare its students for the legal profession.

In a very real sense, an institution seeking greater diversity must take a realpolitik approach when determining just how much diversity it can afford. Whether a school seeks to achieve intellectual, racial, gender, class, or other diversity goals, they must be balanced with the potential downstream affects. Among the most important issues is whether a school will be able to make the necessary showing to the ABA.

The case of the University of North Texas (UNT) Law School offers a telling example of how this problem can materialize. The school, which opened its doors in Fall 2014, was created to serve a different mission than simply to make money. UNT is the state's most affordable law school and was created with the mission of training lawyers to fill the access to justice gaps. While many of UNT's students do not brandish the highest academic credentials, they do bring a range of experience that goes beyond the traditional law student, and many aspire to work in public service.

Yet this school's mission faces jeopardy in the present since there are signs that the school will not be granted accreditation.¹⁴³ In 2016, the advisory committee for the ABA recommended that the school not be granted accreditation status. For the school's current students, this decision was crucial because, in Texas, one cannot sit for the bar exam unless one graduates from an ABA-accredited law school. Regardless of what the ABA decides, there is relief for the first graduating class since the Texas Supreme Court recently granted a

142. See Diversity Initiatives, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/advocacy/diversity_initiatives.html (last visited Jan. 20, 2017) (on file with *The University of the Pacific Law Review*).

143. Matthew Watkins, *How UNT-Dallas' Grand Law School Experiment Could Be Overruled*, TEXAS TRIBUNE (Aug. 23, 2016), <https://www.texastribune.org/2016/08/23/unt-dallas-wants-fix-law-school-it-may-not-get-cha/> (on file with *The University of the Pacific Law Review*).

request by UNT to waive that requirement—which it has for July 2017 and the two administrations in 2018.¹⁴⁴

One of the driving rationales of the advisory committee's recommendation was that there were too many UNT students with too low LSAT scores. Despite the fact that both the ABA and the *Grutter* court have questioned the dominant role of LSAT scores for evaluating law schools, in the UNT decision the court emphasized that while the LSAT and UGPA are appropriate predictors of bar success, these factors say little about whether one has developed a solid professional identity or one's capacity to practice. Accordingly, UNT has remained steadfast in its mission, and shortly after the decision, the school's dean vowed: "We're not going to chase LSAT scores or GPAs. We're also looking at other things, like overcoming obstacles."¹⁴⁵ The tension suggests that students with maturity and character can become excellent lawyers, even if they struggle to pass the bar.

Although, the situation looked near-doomed for the school, very recently the ABA revisited the issue and decided to give UNT another opportunity at accreditation.¹⁴⁶ Exactly how this will play out going forward will be watched by many, including HBCU law schools and other schools whose mission is committed to diversity. A decision is expected to be handed down before the school's first graduating class would normally take the bar exam in summer 2017.

Finally, even if there is a favorable ruling for UNT, it is likely to be quickly followed by other perils to maintain accreditation. For example, the ABA recently rejected the opportunity to revise Standard 316, which would have made bar passage more stringent.¹⁴⁷ However, this development hardly means the end of the issue, and it seems destined for the ABA to revisit this decision. Thus, for UNT and other similarly situated schools, bar passage will be an ongoing challenge. For some schools, the irony may reach an apex when HBCUs themselves must focus recruiting efforts on white students to boost their numbers. One HBCU law school, for example, Southern University Law Center,

144. Angela Morris, *Texas Supreme Court Allows UNT Law Grads to Take Bar Exam*, TEXAS LAWYER (Aug. 23, 2016), <http://www.texaslawyer.com/id=1202774718253/Texas-Supreme-Court-Allows-UNT-Law-Grads-to-Take-Bar-Exam?slreturn=20170010234514> (on file with *The University of the Pacific Law Review*).

145. Holly K. Hacker, *UNT Dallas Law School in Danger of Not Getting Accredited*, DALLAS NEWS, (Aug. 8, 2016), <http://www.dallasnews.com/news/education/2016/08/08/unt-dallas-law-school-danger-getting-accredited> (on file with *The University of The Pacific Law Review*).

146. *The University of North Texas Dallas Law School Gets Another Chance to Earn Accreditation*, WBAP/KLIF NEWS, Nov. 17, 2016, <http://www.wbap.com/2016/11/17/the-university-of-north-texas-dallas-law-school-gets-another-chance-to-earn-accreditation/> (on file with *The University of the Pacific Law Review*).

147. Stephanie Francis Ward, *ABA House Rejects Proposal to Tighten Bar-pass Standards for Law Schools*, ABA JOURNAL (Feb. 6, 2017), http://www.abajournal.com/news/article/aba_house_rejects_proposal_to_tighten_bar_pass_standards_for_law_schools (on file with *The University of the Pacific Law School*).

had a 37 percent white incoming class, Fall 2015¹⁴⁸ and the same percentage of students in total the same year.¹⁴⁹ This is not to imply that bar passage reform is the cause of the demographic shifts at Southern, but to show that even HBCUs must adapt to change, including to survive the ABA's regulative requirements.

V. BOTTOM LINE: SUPPORT & RESOURCES FOR SUCCESS

The legal profession does not yet reflect the diversity of the public, especially in positions of leadership and power.¹⁵⁰

As this essay has argued, achieving greater diversity requires a commitment to developing and maintaining initiatives with the necessary support and resources. Just as increasing women in the law came with its own unique set of costs, so too is the case for further diversification. Law schools seeking success in this area must be prepared to meet these challenges and others that come with educating greater numbers of non-traditional students.

One recent example of the type of programing that might be developed in this regard is the LEAP Program at Thurgood Marshall School of Law.¹⁵¹ This program was instituted to insure the successful matriculation of students whose indexes indicated they were at risk. The program was implemented by the admission of twenty-nine students in the summer of 2016 pre-admission program. Each LEAP student participated in the summer program where they were provided a supportive and hands-on learning environment with individualized attention. In its first year, the school admitted 29 students under this provisional status. Having successfully completed the summer program, all are now enrolled and will receive support, monitoring, and will be tracked for progress during their matriculation. This program was designed and implemented by professors and the school's Office of Academic Support, Office of Assessment,¹⁵² and Center for Legal Pedagogy.¹⁵³

For this school and others that work to maintain or expand student diversity, their efforts may be made more difficult because of accreditation regulation. As

148. *Admissions Data*, SOUTHERN UNIVERSITY LAW CENTER (2015), available at <http://www.sulc.edu/wp-content/uploads/2016/05/Admissions-Data.pdf> (on file with *The University of the Pacific Law Review*).

149. *Enrollment Data*, SOUTHERN UNIVERSITY LAW CENTER, (2015), available at <http://www.sulc.edu/wp-content/uploads/2016/05/Enrollment-Data-and-Attrition.pdf> (on file with *The University of the Pacific Law Review*).

150. Weiss, *supra* note 92, at 6.

151. *TMSL Welcomes Back the LEAP Program*, THURGOOD TODAY (Aug. 2016), available at http://www.tsulaw.edu/news/thurgood_today_issues/TTAugust-2016final.pdf (on file with *The University of the Pacific Law Review*).

152. *Assessment*, TEXAS SOUTHERN UNIVERSITY THURGOOD MARSHALL SCHOOL OF LAW, <http://www.tsulaw.edu/assessment/> (last visited Jan. 20, 2017) (on file with *The University of the Pacific Law Review*).

153. *Pedagogy*, TEXAS SOUTHERN UNIVERSITY THURGOOD MARSHALL SCHOOL OF LAW, <http://www.tsulaw.edu/centers/Pedagogy/index.html> (on file with *The University of the Pacific Law Review*).

mentioned, the ABA for the moment has shelved plans to raise bar passage requirements. This decision is sensible in light of the fact that the plan has been advanced without empirical evidence or data that explains why simply ratcheting upwards is prudent, points explicitly made by HBCU law school deans in an editorial opposing the ABA's proposed changes.¹⁵⁴ The deans assert that implementing changes without knowledge of how the changes will impact law schools is imprudent. This is particularly true in light of recent dips in bar passage and the fact that some schools have adopted the Uniform Bar Exam, all of which bears on bar passage. More specifically, there is little knowledge on whether the changes will have a disparate impact on mission-based schools like Thurgood Marshall, which put forth herculean efforts to take students whose indices suggest law school failure, and turn them into success stories in law, all the while diversifying the profession.¹⁵⁵ Due to a proposal that lacks sound justification and justness, the mission to provide access to students who might not otherwise get an opportunity for law school may itself fall into jeopardy. As one commentator has written, it might be more prudent for the ABA to draft a standard that "looks at admissions, academic support, early v. late attrition, and bar pass, and gives the ABA considerable discretion within that framework to deny or withdraw accreditation."¹⁵⁶

The ABA's decisionmaking in this regard appears more attuned to political pressures than any evidence-based rationale. However, in light of recent dips in bar passage across the country,¹⁵⁷ a move by the ABA to make bar passage more stringent should be viewed as suspect.¹⁵⁸ The summer 2016 administration of the California bar exam had the lowest number of students passing the bar in over

154. Dannye Holley et al., *HBCU Law Deans Say ABA Bar-Passage Rule Changes Will Hurt Profession's Diversity*, NATIONAL LAW JOURNAL (Oct. 19, 2016), available at <http://www.nationallawjournal.com/id=1202770271784/HBCU-Law-Deans-Say-ABA-BarPassage-Rule-Changes-Will-Hurt-Professions-Diversity?slreturn=20170011000708> (on file with *The University of the Pacific Law Review*).

155. *Id.*

156. Rick Bales, *The ABA 75% Rule: Dead on Arrival?*, LAW DEANS ON LEGAL EDUCATION BLOG (Feb. 9, 2017), http://lawprofessors.typepad.com/law_deans/2016/10/the-aba-75-rule-dead-on-arrival.html (on file with *The University of the Pacific Law Review*).

157. Mark Hansen, *What do Falling Bar-Passage Rates Mean for Legal Education—and the Future of the Profession*, ABA JOURNAL (Feb. 9, 2017), http://www.abajournal.com/magazine/article/legal_education_bar_exam_passage (on file with *The University of the Pacific Law Review*).

158. The ABA has long been criticized for foster "academic racism" through accreditation standards that systematically exclude African Americans as a liability to law schools. One author has criticized the ABA for placing such stress on the LSAT, despite it historically being a poor predictor of a student's ability to eventually pass the bar exam and become a successful lawyer. See George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 104 (2003); also, recently, the ABA has been considering whether to allow law schools to accept testing other than the LSAT for admission purposes. See Karen Sloan, *Move Over LSAT, There's Another Test in Town*, THE NATIONAL LAW JOURNAL (Feb. 9, 2017) <http://www.nationallawjournal.com/id=1202772423882/Move-Over-LSAT-Theres-Another-Test-in-Town?mcode=0&curindex=0&curpage=2> (on file with *The University of the Pacific Law Review*).

three decades.¹⁵⁹ If bar exams are becoming more difficult and are graded with increased scrutiny, it could prove deadly in combination with a more stringent passage requirement. More specifically, it raises questions about how the move might impact HBCUs and other schools that bear the weight of diversity in legal education.

Looking forward, it would obviously be more just for the ABA to grandfather HBCUs and other mission-based schools into the existing rules. As these institutions are critical to ensuring that African American and Latino communities are serviced by members of their ethnic community, it is critical that such schools continue to exist. Increasing the difficulty of accreditation cuts directly against these efforts and should not be based solely on reactionary politics.

Finally, although for its purposes, this essay has primarily focused on pro-diversity arguments, it is worth considering whether the “costs” of diversity in society have the same outcomes in law schools. That is, do the same arguments against diversity in general apply for law schools too? Researchers have posited a number of social and political problems that arise from greater social diversity, including cultural issues, social conflicts, and dissent.¹⁶⁰ What are problems for society at large, however, do not translate onto the law school setting. Indeed, these by-products of diversity, which work against social solidarity and cohesion, may not have much of an impact on law schools. In law school, conflicts are assumed in a zero-sum competition that is already in effect, with law school grading orthodoxy premised on stringent grading curves. Law schools are centers of highly individualistic competition that tend *apriori* to disincentivize solidarity and cohesion, and instead reward the fiercest competitors. With the rigors of law school being something legendary in American culture, whether diversity will alter this in any meaningful way seems doubtful. Law schools are alienating spaces,¹⁶¹ with some students existing in survival-mode to avoid curving out, while others are competing for merit scholarships and trying to land their dream job. Conflict is not only built into the system—it is also the subject of study, which may make law schools somewhat impervious to this critique, or as one philosopher put it “Justice is conflict.”¹⁶²

There is also little threat of cultural conflict in law schools. Whereas in society language has been a deeply divisive issue, it is non-starter for the average

159. Teresa Lo, *California Bar Announces July 2016 Bar Exam Results*, JD JOURNAL (Feb. 9, 2017), <http://www.jdjournal.com/2016/11/21/california-bar-announces-july-2016-bar-exam-results/> (on file with *The University of the Pacific Law Review*).

160. Peter Skerry, *Beyond Sushiology: Does Diversity Work?*, BROOKINGS (Feb. 9, 2017), <https://www.brookings.edu/articles/beyond-sushiology-does-diversity-work/> (on file with *The University of the Pacific Law Review*).

161. Dowd, *supra* note 8, at 144 (“Law school appears to alienate nearly all students to varying degrees.”).

162. STUART HAMPSHIRE, JUSTICE IS CONFLICT (2001).

law student. Despite that in some places in the United States, it was illegal to speak Spanish¹⁶³ and that “English Only”¹⁶⁴ movements have surfaced in recent decades, the importance of language in the culture wars is non-existent in law school. This is likely because law students comprise of individuals who already have English competency and have been socialized to formal education. Law school is merely an extension of a system they already know and accept. Likewise for the use of English—a certain competency is first required even to take the LSAT and apply to a law school. Law students are thus already self-selected into a specialized group that is linguistically homogenous. That is not to say that the most diverse law schools are free of cultural conflict, but to stress that analysis of the source of the conflict is critical. For example, bigotry can stand on its own and is independent of diversity. There can be bigots in homogenous culture or diverse culture. The point is that conflicts created by bigotry in the presence of diversity should never mistaken diversity as the source of the problem. To assign causation to diversity misapprehends the source of conflict.

As this essay has argued, there are a variety of costs associated with achieving a more diverse law student body. For schools that seek successful outcomes in this area, it will be critical to anticipate these challenges and commit to making diversity an ongoing entry in the law school’s strategic planning.¹⁶⁵ More than anything, this essay hopes to temper over-optimistic views about diversity, and instead offer a reminder that diversity is not free. Like any other resource for students, a diverse student body must be assembled and maintained—it cannot happen alone. Any school seeking to achieve greater diversity owes their students the support, resources, and services necessary to succeed. It likewise owes itself a fair opportunity to determine just how much diversity it can afford.

163. T.R. Reid, *Spanish At School Translates to Suspension*, WASHINGTON POST (Feb. 9, 2017), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/08/AR2005120802122.html> (on file with *The University of the Pacific Law Review*).

164. U.S. SENATE ROLL CALL VOTES 109TH CONGRESS 2ND SESSION (2006), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00131 (on file with *The University of the Pacific Law Review*).

165. See, e.g., UNIVERSITY OF WASHINGTON SCHOOL OF LAW, *Strategic Plan for Diversity, Inclusion, Equity, and Multiculturalism* (2014), available at <https://www.law.washington.edu/diversity/DiversityPlan.pdf> (on file with *The University of the Pacific Law Review*).