COLOR-BLIND-SPOT: THE INTERSECTION OF FREEDOM OF INFORMATION LAW AND AFFIRMATIVE ACTION IN LAW SCHOOL ADMISSIONS

BY ROBERT STEINBUCH & KIM LOVE*

* Robert Steinbuch is a 2015 Fulbright Scholar and Professor of Law at The University of Arkansas at Little Rock, William H. Bowen School of Law. Professor Steinbuch received his J.D. from Columbia Law School, where he was a John M. Olin Law & Economics Fellow and received his B.A. and M.A. from the University of Pennsylvania. He is a former judicial law clerk on the United States Court of Appeals for the Eleventh Circuit and former attorney with the United States Department of Justice, the United States Department of Treasury's Internal Revenue Service, and the United States Senate Committee on the Judiciary. Kim Love is an Academic Professional and Associate Director of the Statistical Consulting Center at the University of Georgia and received her M.S. and Ph.D. in Statistics from Virginia Tech.

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> *The "academy" is supposed to be a realm in which all ideas can be advanced in free and open discourse, in which data matters and smart people struggle toward understanding. Yet these hallmarks of healthy exchange seem absent in debates on affirmative action.*[1]
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> *Because the free flow of information and data in society is truly the lifeblood of academic research, it is more than a little ironic that higher education institutions have been extreme in their secretiveness about admissions and student outcomes. Opacity is evident at every turn—particularly when data touches on race or racial preferences. We saw this . . . when [UCLA] political scientist Tim Groseclose was denied access to even an anonymized version of admissions data . . . even though he was a faculty member of the university's admissions committee. The same thing happened to Robert Steinbuch, a professor at the University of Arkansas, Little Rock [and, at the time, a member of his law school's admissions committee]. When Steinbuch expressed concerns that the university's use of racial preferences might wind up admitting students who would struggle on the bar exam, he found himself unable to get even elementary data linking admissions standards to long-term academic and bar outcomes.*[2]
>
> – *Richard Sander & Stuart Taylor, Jr.*

I. INTRODUCTION

Tim Groseclose describes in his recent book, *Cheating*, the challenges that he confronted in trying to gather and analyze admissions data showing the immense consideration given to race and the ensuing difficulties encountered by those in whose names the affirmative action programs were invoked.[3] Groseclose's narrative parallels the difficulties faced by numerous researchers (some discussed herein), including co-author of this article, Robert Steinbuch.

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1. RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT 175 (2012).

2. SANDER & TAYLOR, *supra* note 1, at 235.

3. TIM GROSECLOSE, CHEATING: AN INSIDER'S REPORT ON THE USE OF RACE IN ADMISSIONS AT UCLA 159–61 (2014). Groseclose wrote about his own experience:

> [b]ecause of my membership on UCLA's faculty oversight committee, and because of the data set that Richard Sander and I obtained, I've had a front-row seat to witness a very egregious case of [] dishonesty. Few people are in a position as good as mine to expose it. . . . [Those at UCLA blocking access] are surrounded almost completely by people, like themselves, who value racial and social justice more than they do other virtues such as honesty, transparency, and the rule of law. . . . This, I believe, is the most significant problem in academia today—the low regard that professors place on honesty relative to other ideals. The narrow problem of race, admissions, and cheating at UCLA is tiny compared to that problem.

Unaware of Groseclose and his actions, and prior to his book, Steinbuch—like several other scholars—sought admissions data from the school at which he served on the admissions committee. He was denied access. Thereafter, a state legislator sought an official governmental opinion from the state's highest-ranked lawyer, the attorney general, something an ordinary citizen cannot compel.[4] After the Arkansas Attorney General issued a favorable opinion, Steinbuch obtained the long sought-after information.

This article—the third in an unexpected trilogy[5] documenting the difficulties that a tenured member of the admissions committee had in obtaining public data from the state school at which he is a faculty member—is the story of both some success in ultimately obtaining public data about affirmative action at the University of Arkansas at Little Rock School of Law and the analysis of the ensuing unique information. The result is two inherently intertwined narratives: (1) how government actors improperly imposed hurdles to the access of public data about admissions in higher education, and (2) the commonly secreted fact that admissions programs aimed at minorities often are dramatic in depth and sometimes tragic in outcome. Indeed, the analysis conducted in this paper is the largest contemporary longitudinal case study of race admissions at a law school. And the results confirmed the informed hypothesis that UALR regularly and systematically admitted minorities with significantly lower academic profiles, resulting in demonstrably poorer outcomes for many of these students when compared to their classmates. The timing of these results coincides with the Supreme Court's forthcoming decision in *Fisher v. Texas*.[6] Likely, the Supreme Court will decide (again) the constitutionality of affirmative action by June 2016.

II. DISCUSSION

A. Freedom of Information Acts

By now, state and federal freedom of information laws (FOIAs)

4. 83 Op. Ark. Att'y Gen. (2012).

5. Robert Steinbuch, *Looking Through the Class and What Alice Found There: A Frustrated Analysis of Law School Admissions Policies and Practices*, 14 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 61 (2011); Robert Steinbuch, *Four Easy Pieces to Balance Privacy and Accountability in Public Higher Education: A Response to Wrongdoing Ranging from Petty Corruption to the Sandusky and Penn State Tragedy*, 46 LOY. L.A. L. REV. 163 (2012).

6. Adam Liptak, *Supreme Court Justice's Comments Don't Bode Well for Affirmative Action*, N.Y. TIMES (Dec. 9, 2015), http://nyti.ms/1U3fb6n [perma.cc/Y796-RR8Z].

are well known for serving the purpose of providing the public, directly or through journalists and researchers, the ability to make informed decisions about government action. "Often the best source of information about waste, fraud, and abuse in the government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled."[7]

Recent examples of the varied benefits of FOIAs are easy to find:

> In February 2004, several D.C. public schools tested as having high lead content in their drinking water; District officials asserted that the cause was isolated drinking fountains.[8] The Freedom of Information Act enabled a motivated academic to uncover the truth: "Marc Edwards, a civil engineering professor at Virginia Tech, said . . . he discovered the problem after studying test data obtained through a Freedom of Information Act request of water samples in the schools. Officials conducting tests for D.C. schools 'did not follow standard protocols [in the tests]. They used methods to make the lead look low when it wasn't,' Edwards said."[9] The researcher described his concern with government opacity in this context: "'It's unconscionable that parents were not told and children were allowed to drink that water and this has gone on for years.'"[10]
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> "Ibraham Al Qosi . . . a Sudanese accountant apprehended after 9/11 on suspicions of ties to Al Qaeda, charged that he and other detainees at Guantanamo Bay had been subjected to bizarre forms of humiliation and abuse by U.S. military inquisitors. . . . Pentagon officials dismissed Al Qosi's allegations as the fictional rantings of a hard-core terrorist."[11] The FOIA changed this impression.[12]
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> "Many of the documents come from an unexpected source: the FBI. As part of a Freedom of Information Act lawsuit brought by the American Civil Liberties Union, the bureau has released internal e-mails and correspondence recording what their own agents witnessed at Gitmo[, along] with accounts from other

7. Barack Obama and Joe Biden, *Ethics Agenda*, CHANGE.GOV (Jan. 31, 2016), http://1.usa.gov/1Q40M5Q [perma.cc/YTZ3-79NC].

8. Theola Labbe, *Tests Find Elevated Lead Levels At Five Schools, D.C. Council Told*, WASH. POST (Feb. 15, 2007), http://wapo.st/1QACyTJ [perma.cc/75H9-YCVM].

9. *Id.*

10. *Id.* (quoting Marc Edwards, a civil engineering professor at Virginia Tech).

11. Michael Isikoff, *Unanswered Questions*, NEWSWEEK (Jan. 16, 2005), http://bit.ly/1ZVBL7w [perma.cc/YKL3-YP7B].

12. *Id.*

> agencies such as the Defense Intelligence Agency[—]also released as part of the FOIA lawsuit. . . ."[13]

> Details concerning noted athlete Pat Tillman's friendly fire death were disclosed as a result of a Freedom of Information Act request: "Army medical examiners were suspicious about the close proximity of the three bullet holes in Pat Tillman's forehead and tried without success to get authorities to investigate whether the former NFL player's death amounted to a crime, according to documents obtained by The Associated Press."[14] Initially, the official descriptions of Tillman's death were different: "The Pentagon and the Bush administration have been criticized in recent months for lying about the circumstances of Tillman's death. The military initially told the public and the Tillman family that he had been killed by enemy fire. Only weeks later did the Pentagon acknowledge he was gunned down by fellow Rangers."[15]

In addition to the perhaps more obvious use of FOIAs by the press, academics have used access laws to conduct critical scholarly research. For example, "[Luke] Nichter, a history professor with a specialization in Nixon-era politics, has filed about 1,000 Freedom of Information Act requests in the past 10 years, and that's 'low-balling' it, he said. Some of what he obtained was used in 'The Nixon Tapes,' a book he wrote with Douglas Brinkley."[16]

Recently, though, FOIAs have taken on a particularly special role in allowing the investigation of higher-education admissions programs in light of the contemporary legal tumult concerning race-based admissions, which have long been controversial.

B. Race-Based Admissions

> [A]lthough affirmative action efforts can take many forms, including special outreach to underrepresented minorities and special programs designed to help minority students acclimate to college or overcome educational deficiencies, the affirmative action controversy in higher education focuses on only one practice[—]admitting minority applicants to selective colleges, universities and professional schools when their credentials, by which is meant prior grades and admissions test scores, are such

13. *Id.*

14. Martha Mendoza, *New Details on Tillman's Death*, WASH. POST (July 27, 2007), http://wapo.st/20ApEd0 [perma.cc/G2SN-X8XP].

15. *Id.*

16. Courtney Griffin, *Professor Uses Freedom of Information Act to Aid Research*, KILLEEN DAILY HERALD (Mar. 15, 2015), http://bit.ly/1EgWVN5 [perma.cc/2WTP-8AHD].

> that their likelihood of admission would be low, perhaps exceedingly so, if they were [W]hite. . . .
>
> [Post World War II] there developed a consensus that the fairest way to select students was on the basis of their prior academic performance and tests designed to predict future performance. This consensus was in part aimed at reducing discrimination and the advantages that those of high social status had in securing admission to Ivy League and other elite schools. Although this so-called meritocratic focus helped some groups like Jews, it offered little to [B]lacks and tended to harm a subset of the most educationally ambitious [B]lacks; who at an earlier time in small numbers, had been able to secure admission to elite schools [but now weren't so able]. . . . because [W]hite applicants with entering credentials stronger than any [B]lack applicants had increased so substantially in numbers that there were more than enough to fill an entering class.[17]

The recent Supreme Court cases of *Grutter v. Bollinger*[18] and *Gratz v. Bollinger*,[19] in which the University of Michigan's Law School and undergraduate admissions programs were respectively challenged, involved extensive briefing of the issue of affirmative action in academia. The cases provide a good review of the contemporary legal and philosophical literature on race-preference programs in higher education.

Grutter considered whether the use of race in admissions by the University of Michigan Law School violated the law. Michigan's law school considered applicant race as "one of many factors" relevant to the admissions program,[20] but the school asserted that race was not the principal consideration; rather it was part of a "holistic review."[21] The school maintained that its "minimal criterion is that no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems."[22] The law school sought to achieve a "critical mass" of minority students who were otherwise underrepresented, as a percentage of the school population.[23]

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17. Richard Lempert, *Affirmative Action in the United States: A Brief Summary of the Law and Social Science* 6–7 (Univ. of Mich. Pub. Law & Legal Theory Research Paper No. 430, Dec. 2014), http://bit.ly/1QQoRlp [perma.cc/324V-VEQ5].

18. Grutter v. Bollinger, 539 U.S. 306 (2003).

19. Gratz v. Bollinger, 539 U.S. 244 (2003).

20. Brief for Respondent, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236, at *3.

21. *Id.* at *46.

22. *Id.* at *4.

23. Brief for Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL

The law school and its allies asserted that: the unique perspective and experiences of minority students help all of their students;[24] attorneys who come from disadvantaged and underrepresented groups will later help those same groups more than other admittees;[25] students admitted under the race-based admissions will help teach their peers more than other admittees;[26] increased minority student representation will help extinguish socioeconomic and racial stereotypes;[27] the aforementioned benefits cannot be accomplished without a race-based classification system, and the classification is the least restrictive method available to achieve these goals.[28]

A brief by certain former military personnel continued that: diversity is necessary and vital to the health of the country;[29] preferential admissions policies in universities allow employers and recruiters greater choice;[30] and preferential admissions policies allow a greater matching of identifying factors between leaders and those that report thereto.[31] The former military personnel also argued that the ROTC program would be significantly damaged without race-based admissions.[32]

Some educators who support race-based admissions policies for law schools also argued the unreliability of standardized exams, such as the LSAT.[33] They highlighted that, on average, minority students score lower on the LSAT than non-minority students—contending that the differences in scores were not reflective of applicant potential.[34] Over a six-year period, the gap in the average LSAT scores between White students and African-American

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164185, at *4.

24. Brief for Amicus Curiae National Association of Scholars Supporting Petitioners, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 144938, at *18.

25. *See* Brief of Amicus Curiae the School of Law of the University of North Carolina Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 359269, at *15–17.

26. *See* Brief for Hillary Browne et al. as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) 2003 WL 359254, at *4–7.

27. *Id.* at *13–15.

28. Amicus Brief, *supra* note 24, at *17.

29. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 1787554, at *9–10.

30. *Id.* at *29.

31. *See id.* at *15.

32. *Id.* at *29–30.

33. Brief of the Society of American Law Teachers as Amicus Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399060, at *17–18.

34. *Id.* at *16–18.

students was 9.6 points, the gap between White students and Latino students was 7 points, and the gap between White students and Native-American students was 6.8 points.[35]

However, this variance exists across many standardized exams.[36] For example, in 1995, the ratio of White to African-American students who scored above 700 in the verbal section of the SAT was 49:1, and in math the ratio of those who scored above 750 was 89:1, when the ratio of Whites to African-Americans in the general population is roughly 6:1.[37] Proponents of affirmative action generally point to this as a basis for intervention, while opponents contend that the same evidence supports opposite conclusions.[38]

The disparity for undergraduate grade point averages and class rank between some minority groups and non-minorities is also large.[39] In 1995, out of the 734 students named by the College Board as Advanced Placement Scholars, only two were African-American; 506 were White.[40] Only 12% of African-American college-bound students were at the top of their class, compared to 23% of Whites and 28% of Asian-Americans.[41]

While some proponents of Michigan Law School's policy lauded the school as walking the fine line between impermissible quotas and "constitutionally permissible" racial classification discussed in the seminal affirmative action case, Regents of the University of California v. Bakke,[42] opponents—perhaps needless to say—propounded the contrary.[43] Opponents of the race-considering admissions program highlighted that: from the ninety-one minority applicants with a 3.0–3.24 undergraduate grade point average, thirty-seven were admitted;[44] only eighteen of the 205 White students were admitted with the same numbers;[45] fifteen minority applicants were admitted with LSAT scores of 148–153, while *no* White applicants scoring in that range were admitted.[46]

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35. *Id.* at *16.
36. Brief of the Center of New Black Leadership as Amicus Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 144864, at *9–10.
37. *Id.*
38. *See id.* at *16–17.
39. *Id.* at *10.
40. *Id.*
41. *Id.*
42. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311 (1978).
43. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 176635, at *9.
44. Brief for Petitioner, *supra* note 23, at *7–9.
45. *See id.* at *7.
46. *See id.*

Out of the fourteen different factors that were statistically analyzed, the criterion that increased an applicant's chances to be admitted to Michigan's Law School the most was being an African-American.[47] As such, opponents to Michigan's policy asserted that this amounted to an impermissible quota system.[48]

Opponents of race-based admissions programs reject the notion that viewpoint diversity necessarily comes from racial diversity,[49] and they posit that this justification for racial diversity can never be a compelling state interest justifying racial categorization.[50] The opportunity for abuse,[51] racism,[52] unintended consequences,[53] and a government-defined viewpoint[54] are real possibilities, they say, that stem from this perspective. And many opponents to race-based admissions policies claim that diversity can be achieved by constitutionally permissible means without using race as a basis for admissions.[55] They highlight that Florida and Texas, for example, implemented programs that increased the numbers of minority students without using a race-based admissions policy.[56]

The Court ruled in favor of the Michigan law school—allowing the "holistic" affirmative action plan to continue.[57] The Court effectively held "that universities have a 'compelling interest' in pursuing 'diversity' if their racial preferences are 'narrowly tailored' to that end."[58] While schools cannot have quotas, they may seek a "critical mass" of minorities through other means.[59]

At the same time that it considered *Grutter*, the Supreme Court faced the companion case of *Gratz v. Bollinger*,[60] in which Michigan's undergraduate admissions program was also

47. *See id.* at *9–10.

48. Brief of the Center for Equal Opportunity et al. as Amici Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 152365, at *11.

49. Brief for Law Professor Larry Alexander et al. as Amici Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2013) (No. 02-241), 2003 WL 164181, at *11–12.

50. Amicus Brief, *supra* note 36, at *4.

51. *See id.* at *5–7.

52. Amicus Brief, *supra* note 49, at *13.

53. Brief for Reason Foundation as Amicus Curiae Supporting Petitioners, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 252513, at *11–20.

54. Amicus Brief, *supra* note 49, at *17–18.

55. Brief of the State of Florida and the Honorable John Ellis "Jeb" Bush, Governor as Amici Curiae Supporting Petitioners, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 182930, at *5.

56. *Id.* at *6–8.

57. SANDER & TAYLOR, *supra* note 1, at 208.

58. *Id.* at 209.

59. *Id.*

60. Gratz v. Bollinger, 539 U.S. 244 (2003).

challenged.[61] At the undergraduate level, the consideration of race was explicitly large and effectively calculated: the school gave more consideration to minority status than it did to a perfect SAT exam.[62] The Court, splitting the baby—some suggested—ruled against the school, holding that the Michigan undergraduate race-based admissions system too rigidly considered race, and therefore, was effectively a quota system.[63] As such, that program was unconstitutional under *Bakke*.[64] It was here that Justice O'Connor made her now somewhat-famous proclamation that affirmative action should end in twenty-five years.[65] That was twelve years ago.

One conclusion from the pair of Michigan cases is that the more ineffable a race-based admissions program is, the more likely it would be upheld. The signal from these conjoined cases was that transparency was not conducive to surviving a judicial challenge.

The next Supreme Court case on affirmative action, *Fisher v. University of Texas*,[66] punted on the issue. Justice Kagan recused because she had worked on the case as Solicitor General.[67] That left only three definite pro-affirmative-action votes. But Justice Kennedy remained, nonetheless, the swing vote, because if he sided with the liberals, a 4–4 vote on the substantive question of the continued constitutionality of affirmative action would default to the decision below permitting the race-based admissions program.[68] The decision however was, surprisingly, near unanimous but not substantive. Kennedy wrote the procedural opinion instructing the trial court to collect more information and make a decision providing less deference to the school in deciding how to administer its race-based admissions program.[69] The result was a 7–1 decision,[70] perhaps driven by competing strategic decisions within both camps of the Court.[71] Two conservative Justices, Scalia and

61. *Id.* at 249–50.

62. Brief for Petitioner, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 164186, at *25.

63. *See Gratz*, 539 U.S. at 272–76.

64. *Id.* at 275–76.

65. Grutter v. Bollinger, 539 U.S. 306, 310 (2003).

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

67. *Id.* at 2414.

68. Garrett Epps, *Is Affirmative Action Finished?* THE ATLANTIC (Dec. 10, 2015), http://theatln.tc/1XZwoDu [perma.cc/R5MS-XMPW].

69. *Id.*

70. *Id.*

71. *See* Richard Lempert, *What to Make of Fisher v. Texas: An Interesting Punt on Affirmative Action?* THE BROOKINGS INSTITUTE (June 25, 2013), http://brook.gs/1S45M0Q [perma.cc/Y75N-6E4H].

Thomas, wrote concurrences eschewing affirmative action.[72] The arguably most liberal Justice, Ginsburg, dissented.[73]

Since the decision was essentially procedural, the parties again sought certiorari, and the Supreme Court granted the request.[74] As such, the Court will decide *Fisher* for a second time. Some believe that the Supreme Court is poised to alter the status quo and significantly restrict, or prohibit outright, the use of race in admissions programs in higher education and elsewhere. Of course, others disagree. Justice Kennedy undoubtedly will decide. He has generally disfavored racial preferences.[75]

III. INITIAL STUDIES

Legal research on affirmative action is moving from philosophical debates to statistical analyses. Studies at two universities, and the events from a third, serve as a useful prelude to the analysis provided here of the UALR Law School.

A. University of California, Los Angeles School of Law (UCLA)

Several researchers tried to analyze some of UCLA's affirmative action efforts that came about after California's enactment of Proposition 209—the state's ban on race-based affirmative action in public universities.[76] One was Tim Groseclose, who was a member of the faculty committee at UCLA overseeing the undergraduate admissions process.[77] Groseclose wanted to evaluate how well the school's admissions process was working.[78] After receiving some resistance from the school, Groseclose involved his colleague, UCLA law professor Richard Sander, in his efforts.[79] Groseclose, with Sander's help, asked to see *identity-redacted* admissions files.[80] The school refused, asserting that the federal student-privacy law, the Federal Educational Rights and Privacy Act (FERPA),[81]

72. *Fisher*, 133 S. Ct. at 2414.
73. *Id.*
74. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633 (5th Cir. 2014) *cert. granted*, 135 S. Ct. 2888 (July 29, 2015) (No. 14–981).
75. Adam Liptak, *Supreme Court to Weigh Race in College Admissions*, N.Y. TIMES (June 29, 2015), http://nyti.ms/1VZacUD [perma.cc/3RUN-2PWQ].
76. Peter Berkowitz, *Affirmative Action and the Demotion of Truth*, REAL CLEAR POLITICS (June 24, 2014), http://bit.ly/1QkUVfh [perma.cc/23ER-42AK].
77. Larry Elder, *Foreword* to TIM GROSECLOSE, CHEATING: AN INSIDER'S REPORT ON THE USE OF RACE IN ADMISSIONS AT UCLA, at vii (2014).
78. Berkowitz, *supra* note 76.
79. *Id.*
80. Elder, *supra* note 77.
81. 20 U.S.C. § 1232(g) (2015); 34 C.F.R. § 99 (2016).

prevented such access to those *without an educational interest for non-de-identified records.*[82]

The school was wrong. First, Groseclose had an educational interest—an exception under FERPA. He was on the admissions committee.[83] Moreover, he agreed to take the records *without* identifiers of the students.[84] While the school initially refused Groseclose's request, it nonetheless gave the very same data to its chosen "independent researcher" (who was paid $100,000).[85] When faced with the potential for bad press and a FOIA lawsuit, the school reversed its decision to withhold the data and provided Groseclose and Sander the requested public information.[86]

Groseclose concludes that the school was not merely mistaken as to the law, but was in fact lying when it refused to turn over the public data.[87] Groseclose believes that the university did not want a faculty member skeptical of the use of race by the admissions committee to evaluate the process.[88] "In the pursuit of what they perceive to be racial justice, Groseclose argues, university administrators and professors cultivate duplicity and thwart the free exchange of ideas."[89] Groseclose resigned from the admissions committee after the school refused to turn over the data.[90]

Stanford scholar Peter Berkowitz says "Groseclose actually underestimates the problem."[91] For example, an admissions committee member at Boalt-Berkeley hinted that the admissions committee continues to practice racial preference after Proposition 209: "No one can know what's in my head."[92] Berkowitz continues:

> Administrators' and professors' demotion of truth in one area reverberates throughout campus life in others, warping the curriculum and stifling the spirit of inquiry. It sanctifies conformity to the party line, denigrates impartial scholarship and inhibits liberty of thought and discussion. It sustains speech codes

82. GROSECLOSE, *supra* note 3, at 14.
83. *Id.*
84. SANDER & TAYLOR, *supra* note 1, at 234.
85. GROSECLOSE, *supra* note 3, at 14-15.
86. *Id.* at 87-88. "After fending off university efforts to deny access on the canard that the data would compromise applicants' privacy—Groseclose and Sander had carefully explained in their original letter to UCLA how they would protect students' privacy—the two professors were ultimately given an unusually rich data set." Berkowitz, *supra* note 76.
87. GROSECLOSE, *supra* note 3, at 14.
88. SANDER & TAYLOR, *supra* note 1, at 165.
89. Berkowitz, *supra* note 76.
90. *Id.*
91. *Id.*
92. SANDER & TAYLOR, *supra* note 1, at 159.

> and permits the evisceration of due process in campus disciplinary procedures. It turns liberal education into illiberal education.[93]

After analyzing the UCLA admissions data, Groseclose concluded that the school's holistic admissions operated, in fact, as a racial-preference program—in violation of California's then-new prohibition thereon.[94] African-Americans were admitted with scores on average well below Hispanics, Asians, and Whites.[95] In fact, the biggest indictment of UCLA's system occurred when "Groseclose demonstrate[d] that [school-hired investigator, Professor] Mare's analysis [also] provides 'significant evidence of racial bias in UCLA admissions.' For example, Mare found that but for 'disparities'—a euphemism for racial preferences—in the admissions process, approximately one-third fewer African-Americans would have been admitted in 2008."[96] "Absent the adjusted disparities estimated in [Mare's] analysis [i.e. absent the apparent racial preferences given to African-Americans], 121 fewer Black applicants would have been admitted . . . ."[97] These conclusions support the claims by opponents of "holistic systems" that such programs are in reality a surreptitious means for admissions committees to violate explicit bans on affirmative action or hide from the unaware public the very large effect that race is credited in race-based admissions programs.[98]

Groseclose concluded that "UCLA broke the law in order to increase [B]lack student enrollment."[99] Had UCLA not had a race-based admissions program, he says, UCLA would have admitted 40% fewer African-Americans in the years under investigation.[100] Groseclose and others employ empirical analysis—rather than anecdotal evidence—to demonstrate that racial preferences across universities are strong, not just tie-breakers, and are often not helpful to students long-term.[101] Rather, Groseclose says that students "benefitting" from such programs are often put in sub-optimal learning environments due to the "mismatch" of skills to

93. Berkowitz, *supra* note 76.
94. SANDER & TAYLOR, *supra* note 1, at 166.
95. *Id.*
96. Berkowitz, *supra* note 76.
97. GROSECLOSE, *supra* note 3, at 2.
98. SANDER & TAYLOR, *supra* note 1, at 161.
99. Berkowitz, *supra* note 76.
100. *Id.*
101. *Id.*; SANDER & TAYLOR, *supra* note 1, at 6, 18-19, 166.

learning environment (discussed further below).[102]

Sander and his co-author Stuart Taylor, Jr., who wrote about the challenges in obtaining public admissions data from, inter alia, UCLA's School of Law, aptly posit that universities do not want to disclose public-admissions data and student outcomes largely because such a disclosure would highlight the magnitude of race-based preferences and the meager outcomes for many students admitted because of those preferences.[103]Their data were bleak: "[B]lack law graduates fail bar exams at four times the [W]hite rate."[104] Academic-support programs did not cause dramatic changes in bar passage rates.[105] "But [minorities] aren't told of their significant disadvantage when they enter, and so they're effectively being set up to fail."[106]

By 1997, half of UCLA School of Law's African-American students scored in the lowest 10% of their classes, while about half of the school's Hispanic students did only somewhat better—landing in the bottom 20%.[107] This should be of little surprise after examining these students' incoming academic profiles.[108] The aforementioned disparity translated quite predictably in first-time bar passage rates: African-Americans—50%; Hispanics—70%; Whites—90%.[109] Perhaps obviously, failing the bar is financially and emotionally taxing, and many who fail to pass the bar on their first try simply never pass.[110]

This phenomenon is in no way unique. At the University of Texas School of Law, less than 10% of White graduates failed the bar the first time. However, over 50% of African-American graduates failed on their first try, and half of those failed again on their second attempt.[111]

Sander and Taylor see the victims of large racial preferences—and they are typically large—as those receiving preferences and doing poorly as a result.[112] A "cascade effect" intensifies this

102. Berkowitz, *supra* note 76.
103. SANDER & TAYLOR, *supra* note 1, at 171.
104. *Id.* at 4.
105. *Id.* at 56.
106. *Id.* at 6.
107. *Id.* at 55.
108. *Id.*
109. *Id.*
110. *Id.* at 52.
111. *Id.* at 205.
112. *Id.* at 6, 18-19.

phenomenon as one moves down the tiers of law schools.[113] The lower ranked the school, the deeper it must generally go in cherry-picking applicants to fill its minority ranks—resulting in a greater disparity between minorities and non-minorities and a greater likelihood that the school admits some students not suited to attend any law school whatsoever.[114]

Sander points out that one study showed racial preferences only increase African-American admissions by about 14%—the remainder is reshuffling placement.[115] For this small group of African-Americans who never would have been admitted anywhere without race-based admissions (constituting one-seventh of the African-American students attending law schools), their prospects are grim.[116] Fewer than one-third of them ever become lawyers.[117]

Sander, Taylor, and other scholars see the admissions programs' biggest effect, however, in shifting the level/tier school to which the remaining 86% of African-American law students are admitted (and attend).[118] That is, they say that African-Americans are overwhelmingly likely to be admitted to a school above their academic abilities, and this fish-out-of-water environment harms the very students that the admissions programs are designed to help.[119] Sander employs the term "mismatch" to explain this phenomenon driving low minority outcomes.[120]

By admitting mismatched minority students to schools higher

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113. *Id.* at 19.

114. *Id.* at 20. This phenomenon might be changing, though. Robert Steinbuch commented:

> [A]s top schools struggle to maintain the quality of their student body, these institutions inevitably drop minority admissions, due to the mismatched average academic profiles of minority cohorts resulting from the unique outcome-driven competition that I' ve described here before. While these high-level schools are strongly concerned about the quality of their admissions, lower-tiered schools generally are forced to focus more on survival. . . . Given the overall drop in applications but the greater relative availability of minority applications to lower-tiered schools caused by top schools eschewing these candidates, lower-level schools quite predictably have increased their admission of these now-available candidates. As I previously discussed in the context of the mismatch phenomenon, the result generally will be quite good for these students, as their profiles will better match their admitting schools. And for the schools that are admitting previously unavailable, well-matched students, they are increasing their likelihood of survival without altering their overall academic profile.

Robert Steinbuch, *Should Law Schools Merge, Dissolve, or Adapt?* NATIONAL JURIST (Mar. 12, 2015), http://bit.ly/1nG8cFI [perma.cc/4XYL-6W6G].

115. SANDER & TAYLOR, *supra* note 1, at 61.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 4.

than their academic profiles justify, say Sander *et al.*, these schools reduced the likelihood of minority graduate bar passage by almost one-third.[121] Although Sander provides compelling evidence, other researchers dispute the mismatch theory.[122]

Putting aside whether or not the fish-out-of-water analysis underlying the mismatch theory is the driving force, the outcomes of race-based admissions in law schools are what count. Leading opponent of the mismatch theory, Richard Lempert, wrote the following in seeking to prevent Richard Sander from obtaining data from the State Bar of California:

> I am a strong supporter of empirical work, and, in particular, a believer in work relevant to policy. Much of my own research has been of this sort. Moreover, I do not think social science research should be hampered or suppressed because some groups, even powerful pressure groups, believe the results of well-conducted research will be uncongenial to their preferred policy preferences. With respect to law school affirmative action, I believe sound empirical work can be a win-win proposition whatever it reveals. *No one gains when students admitted to law school through affirmative action fail to benefit from their education because they do not graduate and pass a bar.* If we can better understand why some students, including members of certain racial groups, have special difficulties in graduating law school and passing the bar, then we might be able to improve the situation, either by better advising students about paths that make sense for them to take or by changing how we admit, educate and test law students.[123]

Indeed, many students admitted to law school through affirmative action fail to benefit from their education because they are unable to graduate and pass a bar.[124] One study showed that over half of the African-American students in the "LSAC data never passed the bar exam and thus failed to become lawyers. By contrast, only 17% of the [W]hite students failed to become lawyers."[125] Sander, and others, conclude that African-American law students who opted to attend schools more in line with their academic abilities failed the bar less than half the time than those who chose to go to a school that Sander and others would characterize as

121. *Id.* at 62.

122. *See* Lempert, *supra* note 17, at 10, 21.

123. Letter from Richard Lempert, Professor, University of Michigan Law School, to Board of Governors, State Bar of California (Nov. 6, 2007) (emphasis added) (on file with author).

124. SANDER & TAYLOR, *supra* note 1, at 226-27.

125. GROSECLOSE, *supra* note 3, at 65.

mismatched.[126]

B. George Mason University School of Law (GMU)

In 2000, George Mason University School of Law, a conservative school—which is unusual—submitted its re-accreditation material to the American Bar Association (ABA), the organization that accredits American law schools.[127] The ABA was dismayed by GMU's lack of diversity.[128] To be clear, the ABA was not concerned with the *efforts* at minority recruitment; it was fixated on the *outcomes*.[129] Re-accreditation was put off; the ABA wanted more minority students enrolled—period.[130]

GMU knew that admitting minority students with low indicators often doomed them to poorer outcomes,[131] but the school wasn't going to risk re-accreditation.[132] Therefore, GMU reinstated race-based admissions, which it had previously rejected.[133] In 2002, African-Americans garnered a six-fold admission bump.[134] GMU threw money at its remarkably few incoming African-American students: approximately 50% of all scholarships went to the 3% of African-Americans enrolled in 2002.[135] This was not enough for the ABA.[136]

The school felt constrained by the facts: "Students with LSAT scores below 150 are more than six times as likely to experience academic difficulty . . . more than thirteen times as likely to be dismissed for academic cause, and almost twice as likely to fail the bar exam on their first attempt."[137] The ABA itself requires that "a law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar."[138]

By the 2004–05 academic year at GMU, African-Americans had a fifteen-fold admissions advantage over similarly skilled Whites.[139]

126. SANDER & TAYLOR, *supra* note 1, at 86.
127. *Id.* at 221.
128. *Id.*
129. *Id.* at 223–24.
130. *Id.* at 224.
131. *Id.* at 225.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 226–27 (quoting pre-report to the ABA).
138. *Id.* at 227.
139. *Id.*

The school also gave even more money to minority candidates than it had previously.[140] In 2006, GMU received its coveted blessing from the ABA.[141]

Shortly thereafter, the U.S. Commission on Civil Rights recommended that the ABA abandon its accreditation condition on diversity.[142] The Commission stated that schools should be free to make their own decisions on whether to consider diversity in admissions.[143] The ABA has neither reconsidered nor changed its policy.[144]

C. Indiana University School of Law

Using a dataset of 309 graduates from the Indiana University Robert H. McKinney School of Law who took the bar exam in one year (2012), Nicholas Georgakopoulos—a professor at the school—presents five regression models with bar passage as the dependent variable in each.[145] Unsurprisingly, Georgakopoulos says that the effect on bar passage is highest for law school GPA, with LSAT second.[146] A student with a law school GPA of 2.83 and a 139 LSAT has a less than 14% probability of first-time bar passage, while a student with that same 2.83 GPA and a 166 LSAT has over a 90% probability of first-time bar passage.[147]

The primacy of law school GPA reflects the fact that both law school exams and the bar examination are designed to emphasize certain skills that both law schools and state bars consider essential to good lawyering.[148] The LSAT measures "natural skill or reasoning," and law school GPA measures "learned legal reasoning and performance."[149]

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140. *Id.*

141. Gail Heriot, *The ABA's 'Diversity' Diktat*, WALL ST. J. (Apr. 28, 2008), http://on.wsj.com/1VgxyVh [perma.cc/DD33-X6Q5].

142. SANDER & TAYLOR, *supra* note 1, at 232.

143. *Id.*

144. *Id.*

145. *See Generally* Nicholas Georgakopoulos, *Bar Passage: GPA and LSAT, Not Bar Reviews* (Indiana University Robert H. McKinney School of Law Research Paper No. 2013-30 Sept. 19, 2013), http://bit.ly/20Ar8aB [perma.cc/62MU-JRR7].

146. *Id.* at 16.

147. *See id.* This increase in percentage points resulting from increasing LSAT with a constant GPA is even greater than the one that results from increasing GPA with a constant LSAT. Thus, it may seem that LSAT score is just as dramatically predictive as GPA with regard to bar passage. However, Georgakopoulos's regression data indicates that LSAT has a noisier relation to bar passage than does law school GPA.

148. *See* Georgakopoulos, *supra* note 145, at 11.

149. *Id.*

Next, Georgakopoulos explores the "phenomenon that 1L[150] GPA is not statistically significant in explaining bar passage" in his sample, while overall law school GPA is.[151] He notes the difference between 1L class structures and upper-level class structures: students choose their upper-level classes, upper-level courses have smaller class sizes, and upper-level class grades include a greater variety of the types of courses available at law school.[152] Georgakopoulos notes that there is a high correlation (0.9) between 1L GPA and total law school GPA; students who tend to excel during their first year in terms of GPA tend to do the same during their second and third years.[153] The strength of this correlation further tends to militate against the cynical view that upper-level students' GPAs increase because they are taking easy courses or receiving inflated grades, because if that view were true, then 1L grades—which aren't "shopped for"—would not correlate so tightly with upper-level GPA.[154]

Georgakopoulos's regressions show that law school GPA is increased by both undergraduate GPA and LSAT.[155] Thus, low undergraduate GPAs and low LSAT scores reduce the probability of bar passage.[156] Approximately 12% of outcome variation is explained by each single-independent-variable model, and approximately 23% of outcome variation is explained by the combination-independent-variable model.[157] The standard error of the estimated GPA in each model is approximately 0.3.[158] This means that for a student whose undergraduate GPA and LSAT predict a GPA of 3.0, the model gives a 95% confidence interval for a law school GPA anywhere between 2.4 and 3.6.[159] A student with a 2.4 law school GPA will have less than a 10% chance of passing the bar; a student with a 3.6 law school GPA will have a greater than 99% chance of passing the bar.[160] The relation between law school GPA and both LSAT and undergraduate GPA is noisy.[161] Scatter plots of the outcomes show that first-time bar failures "tend to be

150. "1L" is a reference to first-year law students.
151. Georgakopoulos, *supra* note 145, at 15.
152. *Id.* at 12–13.
153. *Id.*
154. *Id.*
155. *Id.* at 13–18.
156. *Id.*
157. *Id.* at 14.
158. *See id.*
159. *Id.*
160. *Id.*
161. *See id.* at 13–18.

more frequent at the bottom," and the "bottom" indicates students who underperformed their law school GPA, considering their LSAT scores and/or undergraduate grades.[162]

For second-time bar examinees, however, there is no relationship between undergraduate GPA and law school GPA, or between LSAT and law school GPA.[163] To explain the absence of relation between undergraduate GPA, LSAT, and law school GPA for second-time bar examinees, Georgakopoulos looks to the fact that these graduates all failed the bar the first time: just as the probit regression showed that this population was less likely to pass the bar than their law school GPA would predict, they have a lower law school GPA than their LSAT scores and undergraduate GPAs predict.[164]

The benefits of bar preparation courses were not statistically significant.[165] It matters less which bar preparation course a student takes, and more how the student performed in law school, when it comes to predicting that student's bar passage.[166] Georgakopoulos explains this difference by noting that bar prep courses emphasize rote memorization—which is minimally helpful to bar passage—and law school GPA measures mastery of legal analysis, which maximizes bar passage.[167]

IV. UNIVERSITY AT LITTLE ROCK (UALR) DATA

While co-author of this article, Steinbuch, was serving on both the Admissions Committee and the Readmissions Committee of UALR, William H. Bowen School of Law,[168] he became concerned with the school's admissions processes.[169] Although a former Dean of UALR had more recently suggested that the school did not practice affirmative action in its admissions decisions,[170] the limited

162. *Id.* at 16.
163. *Id.* at 17.
164. *Id.* at 13–18.
165. *Id.* at 19–21.
166. *Id.*
167. *Id.* at 21.
168. Steinbuch, *Looking Through the Class*, *supra* note 5 at 62.
169. *Id.*
170. Interim Dean of the University of Arkansas at Little Rock, William H. Bowen School of Law Paula Casey commented:

> We're looking for people we believe can succeed here . . . [r]ace is not necessarily a factor. We ask a question about race, but the answer is optional. We might not know an applicant's race. . . . We like to have a diverse student body, but I don't think we've had preferences based on race.

Doug Smith, *Affirmative Action on Arkansas Campuses May End*, ARKANSAS TIMES (Aug. 22, 2012), http://bit.ly/20AjWHW [perma.cc/3GPG-KWJT].

public data that Steinbuch possessed at the time indicated that UALR Law School had in fact been practicing significant race-based admissions and that this was often harming the students for whom the program was designed to help.[171]

Steinbuch understood that whatever reasons law schools have for admitting students with deficient skill sets, the schools are unlikely to internalize the costs of their risky admissions choices.[172] Indeed, the externalization of the costs is surreptitious. As Groseclose wrote:

> Yet while faculty and administrators grant racial preferences, they can't reveal that once the students are admitted. To do otherwise would hurt the self esteem of minority students and degrade the "campus climate." It also would harm the university's ability to recruit minority students. Recall, for instance, how the dean of the UCLA law school reprimanded Sander after he scheduled the forum on his mismatch research: "Having this issue come up now," he wrote, "is not helpful to our efforts to recruit students."[173]

The dean, no doubt, was correct: informing at-risk students of their increased likelihood of failure would assuredly result in some of the students rationally choosing to pursue more promising alternatives.

A. At-Risk Student Data From 2003–2007

An attempt to analyze race-based admissions at UALR preceded this study. In an article published in the Harvard BlackLetter Law Journal, Professor Richard Peltz (now Peltz-Steele) recounted how a series of letters in 2006 between the President of a local African-American lawyers association, Eric Buchanan, and the then-Dean of the UALR Law School piqued his interest in the effect of admissions preferences at UALR, where he too was a tenured professor of law.[174] In a letter entitled "African-American Representation at [UALR]," Buchanan wrote, "I understand that over the past four years no more than four African[-]American males have graduated from [UALR]."[175] Later in the letter

171. Steinbuch, *Looking Through the Class*, *supra* note 5, at 89–90. *See* 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. BLACKLETTER L.J. 181, 185, n.23 (2009).

172. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 209.

173. GROSECLOSE, *supra* note 3, at 163.

174. Peltz, *supra* note 171.

175. Steinbuch, *Looking Through the Class*, *supra* note 5, at 87–88 (citing letter from Eric

Buchanan wrote, "[i]t 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] required to repeat the entire first year. One was flatly denied readmission."[176] So aware, Peltz-Steele made a request for data relating to race-correlated admissions standards; however, his request was denied.[177] UALR specifically referenced his lack of membership on the Admissions Committee as a basis for the denial.[178]

Steinbuch, in contrast, was a member of both the Admissions Committee and Readmissions Committee at the time. Steinbuch inquired more about how UALR admissions were decided after the school's administration notified the Readmissions Committee that it had compiled a chart of academic information on students whose first-semester GPAs fell short of the 2.0 good-standing mark during their first year of law school for the years 2003 through 2007 ("At-Risk List").[179] Steinbuch requested the name-redacted Law School Data Assembly Service (LSDAS) forms for each of these students—a seemingly modest request in his view.[180]

LSDAS forms provide normalized GPAs as well as LSAT scores.[181] This allows law school Admissions Committees to compare "apples to apples" notwithstanding that different undergraduate institutions use different GPA scales. The UALR administration denied Steinbuch's request for de-identified records of students who had struggled academically, claiming that the information was protected by the Family Educational Rights and Privacy Act (FERPA).[182] The administration was incorrect.[183]

FERPA places a contingency on federal funding: only schools with privacy policies for the release of students' academic records that maintain student privacy can receive federal funding.[184]

Spencer Buchanan, President, W. Harold Flowers Law Society, to Charles Goldner, Dean, University of Arkansas at Little Rock (Oct. 18, 2006).

176. *Id.*
177. Peltz, *supra* note 171, at n.35.
178. *Id.*
179. Steinbuch, *Looking Through the Class, supra* note 5, at 63.
180. *Id.*
181. *Id.* at 63, n.8.
182. *Id.* at 64–65.
183. *Id.* at 65–68.
184. Steinbuch, *Four Easy Pieces, supra* note 5, at 171 (citing 20 U.S.C. § 1232(g) (2006)).

According to regulations promulgated by the Department of Education, FERPA protects information "linked or linkable to a *specific student* that would allow a reasonable person in the school community . . . to identify the *student* with *reasonable certainty*."[185]

Even if a record contains information that meets the definition of personally identifying information, it can still be released if that information is redacted.[186] And "[b]y construction, practice, or, most often, express statutory mandate, nearly all state FOIAs provide that records containing information that is otherwise exempt from disclosure *must* be disclosed if state officials can, with reasonable effort, first segregate and redact exempt portions of the records."[187] This is the law in Arkansas.[188] The process of redacting personally identifying information from records before providing them pursuant to FOIA is called "de-identifying" the records.[189]

This requirement that personally identifiable information be removed before release of education records to the public is, perhaps obviously, a stricter standard than that for the release of education records to school officials, which merely requires a "legitimate educational interest" for full disclosure to the school official.[190] Though little litigation exists on the definition of "legitimate educational interest," the Kentucky Court of Appeals has defined it.[191] The plaintiff in *Medley* was a teacher who requested tapes of her teaching that the school recorded.[192] The school denied the request pursuant to FERPA, characterizing her request as one from a member of the public—thus, subjecting it to the requirement that personally identifiable information be redacted.[193] In reversing the trial court and the school's characterization of Medley as a member of the public, the Kentucky Court of Appeals reasoned that "Medley's request should be judged in light of her position as a teacher."[194] *Medley* placed the burden on

185. Steinbuch, *Looking Through the Class*, *supra* note 5, at 65. (citing 34 C.F.R. § 99.3 (2009)) (emphasis added).

186. *Id.* (citing Letter from LeRoy S. Rooker, Director, FPCO, to Matthew J. Pepper, Policy Analyst, Tenn. Dep't of Educ. (Nov. 18, 2004), http://1.usa.gov/1WF0RSQ [perma.cc/A5UV-AX2S]).

187. Peltz, *supra* note 171, at 189 (citing Open Government Guide: Access to Public Records and Meetings in Arkansas (John J. Watkins & Richard J. Peltz eds., 5th ed. 2006)) (emphasis added).

188. *See id.*

189. *Id.*

190. Steinbuch, *Looking Through the Class*, *supra* note 5, at 66.

191. *Id.* at 66 (citing Medley v. Bd. of Educ., 168 S.W.3d 398, 401 (Ky. Ct. App. 2004)).

192. *Id.*

193. *Id.*

194. *Id.* (citing Medley, 168 S.W.3d at 404).

the school to prove that the requesting teacher's interest was not legitimate.[195] *Medley* also rejected the school board's claim that the superintendent alone could determine whether a requestor had a legitimate educational interest: "[Determining whether a legitimate educational interest exists] is instead a matter of statutory interpretation, a task clearly within the province of this Court."[196]

In fact, the Department of Justice defines "legitimate educational interest" as a request for information by the requestor "to fulfill his or her professional responsibility."[197] UALR has defined the faculty's professional responsibility as "continuously assess[ing] student progress and alumni success through a variety of formal and informal activities."[198]

The administration, however, denied Steinbuch's request, conceding that though Steinbuch's review of students' non-redacted records as a member of the Admissions Committee did serve an "educational need," Steinbuch's desire to use the identity-redacted LSDAS data of students who had already been admitted "is not relevant" to that same educational need and was thus impermissible under FERPA.[199] As already discussed, when UALR previously denied Peltz-Steele's request for race-correlated admissions data, the stated reason for the denial was that he—unlike Steinbuch—was *not* serving on the Admissions Committee and, therefore, lacked a legitimate educational purpose for reviewing the admissions records.[200] But even if Steinbuch's request somehow fell outside of the "legitimate educational interest," Steinbuch's limited request for only the post-redaction records met the FERPA and FOIA standard for the release of de-identified records to the *public*.[201]

On September 1, 2010, the administration also stated that it would refer the issue arising from Steinbuch's request to its own counsel.[202] Steinbuch received a letter from University of Arkansas's

195. *Id.* at 67 (citing Medley, 168 S.W.3d at 405).

196. *Id.* at 67 (citing Medley, 168 S.W.3d at 405–06).

197. *Id.* at 72 (citing 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), http://1.usa.gov/1TgLyQq [perma.cc/3TM7-DW3T]).

198. *Id.* at 72.

199. *Id.* at 68 (citing E-mail from A. Felecia Epps, Associate Dean for Academic Affairs, UALR Law School, to John DiPippa, Dean, UALR Law School, and Robert Steinbuch, Professor, UALR Law School (July 14, 2012)).

200. *Id.* at 88–89 (citing Peltz, *supra* note 171, at n.35).

201. *Id.* at 67.

202. *Id.* at 80 (citing E-mail from A. Felecia Epps, Associate Dean for Academic Affairs,

General Counsel's Office on November 8, 2010.[203] The letter did not address whether Steinbuch's request met the legitimate educational interest standard of FERPA, but only interpreted Steinbuch's rights under FOIA as a public citizen.[204] The letter stated that redaction of the students' names and institutions would not be enough to remove all possibility that some information in the records could identify an individual student, because "there is such a small pool of students at the school in certain ethnic and other subgroups."[205] The letter failed to recognize that because the LSDAS reports Steinbuch requested derived from students within five first-year classes—aggregated from the years 2003–2007—the pools of "ethnic and other subgroups" could never be so small as to ever identify a particular student.[206] The letter from the university's General Counsel's Office concluded that in order to comply with FERPA, the school could only release the information if "race, ethnicity, national origin and similar data" was also redacted,[207] which further suggested that UALR shrouded the information in order to protect an unspoken race-based admissions policy. The data that Steinbuch received was scrubbed of all race information.[208] Therefore, it was useless for evaluating race-based admissions.

B. All Student Data From 2005–2011

The saga did not end there, however. In February 2012, the UALR Law School released a report prepared by a paid private vendor, Hanover Research, under a $15,000 contract, on factors correlating to Arkansas Bar passage rate for former students from the period 2005–2011.[209] The Hanover Report showed a statistically significant correlation between first-time bar passage, LSAT scores, and undergraduate and law school grades.[210] The Hanover Report also showed a large disparity between first-time bar passage rates of the two largest ethnic groups.

UALR Law School, to John DiPippa, Dean, UALR Law School, and Robert Steinbuch, Professor, UALR Law School (Sept. 1, 2010)).

203. *Id.* at 81 (citing Letter from Jeffrey Bell, Senior Associate General Counsel, UALR, to John DiPippa, Dean, UALR Law School (Nov. 5, 2010)).

204. *Id.*

205. *Id.*

206. *Id.* at 82, 86–87.

207. *Id.* at 81.

208. *See id.* at 78.

209. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 184 (citing Hanover Research, HANOVER REPORT, BAR PASSAGE CORRELATION STUDY (Feb. 2012)).

210. *Id.*

When schools admit less able students, they predictably perform more poorly. "The reason is simple: Entering academic credentials matter. While some students will outperform their academic credentials, just as some students will underperform theirs, most students perform in the range that their entering credentials suggest. Anyone who claims differently is engaging in wishful thinking at students' expense."[211] Others disagree with this:

> Our narrow conceptions of merit ensure that admissions processes at the most selective law schools will continue to be "social engineering to preserve the elites." . . . Now, exclusion [of people of color] has taken on different forms, namely, a faithful reliance on a limited range of admissions factors that have been shown to severely diminish the prospects of applicants from underrepresented and disadvantaged groups. Looming largest, of course, is the LSAT. . . . The merit-based rationalizations used to preserve traditions of exclusion in legal education are becoming increasingly untenable.[212]

The data analysis in this article indicates that the academic metrics do matter and usually reflect academic potential. As schools at the top struggle to admit a sufficient number of academically-gifted minorities to meet their desired diversity outcomes,[213] lower-ranked schools feel an even greater differential between disparately qualified applicant cohorts due to the race-motivated cherry-picking.[214] "Moreover, contrary to popular belief, the gap in grades did not close as students continued through law school. Instead, by graduation, it became wider."[215]

In order to investigate whether lower admissions standards at UALR could explain this disparity in first-time bar passage, Steinbuch sought the data that UALR had already supplied its chosen and school-paid investigator, Hanover Research.[216] Reminiscent of Groseclose's experiences, UALR again refused Steinbuch's request, claiming that "the cohort of students is so small in some years that the individuals can be identified."[217]

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211. Gail Heriot, *A "Dubious Expediency": How Race-Preferential Admissions Policies on Campus Hurt Minority Students*, HERITAGE FOUND. SPECIAL REP. 167 (Aug. 31, 2015), www.herit.ag/1LSn5Kx [perma.cc/CP3G-CUH2].

212. Aaron Taylor, *Questioning the Status Quo on Law School Diversity*, NAT'L JURIST (May 12, 2015), www.bit.ly/1NrUU4v [perma.cc/F763-DK4M].

213. Heriot, *supra* note 211, at 2.

214. *Id.*

215. *Id.* at 5.

216. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 187.

217. *Id.* (citing E-mail from John DiPippa, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Feb. 17, 2012) (on file with author)).

Steinbuch revised his request to explicitly permit UALR to aggregate small cohorts, an option already available—indeed required—under law.[218] The university's General Counsel's Office responded that the data Steinbuch requested were exempt from disclosure *regardless* of whether redaction would make the data non-personally-identifiable.[219]

Steinbuch, a recognized expert on the Arkansas Freedom of Information Act,[220] found this interpretation inconsistent with Arkansas's FOIA, as revealed by the legislative history and judicial precedents that construe the Arkansas FOIA exemptions narrowly,[221] as well as the plain language of Arkansas FOIA exemptions that provide:[222]

> (f)(1) No request to inspect, copy, or obtain copies of public records shall be denied on the ground that information exempt from disclosure is commingled with nonexempt information.
> (2) Any reasonably segregable portion of a record shall be provided after deletion of the exempt information.[223]

At roughly the same time, Steinbuch's colleague, Professor Joshua Silverstein, made a separate request for certain admissions data, specifically: (1) undergraduate and law school transcripts for every student who began law school at UALR in the fall of 2006 and completed the first semester, with all information redacted except for the actual letter grades; and (2) the law school class roster grading forms for fall 2011 that contained only the aggregate incoming class GPA of the students in each course.[224]

In its responses to Silverstein and Steinbuch, the administration told both professors that their requests required approval by the Institutional Review Board (IRB).[225] Thereafter, the IRB notified

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218. *Id.* (citing E-mail from Robert Steinbuch, Professor, UALR Law School, to John DiPippa, Dean, UALR Law School, and Jeffrey Bell, Senior Associate General Counsel, UALR (Feb. 20, 2012) (on file with author)).

219. *Id.* (citing E-mail from Jeffrey Bell, Senior Associate General Counsel, UALR, to Robert Steinbuch, Professor, UALR Law School (Feb. 22, 2012) (on file with author)).

220. John Lynch, *Law School's Records-Case Defense: Erred in 2013*, ARKANSAS ONLINE (Dec. 18, 2015), www.bit.ly/1ng1VjL [perma.cc/8WRB-T7X2].

221. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 189 (citing Thomas v. Hall, 399 S.W.3d 387, 390 (Ark. 2012) (stating that the Arkansas Supreme Court "liberally interpret[s] the FOIA to accomplish its broad and laudable purpose that public business be performed in an open and public manner . . . [and] broadly construes the Act in favor of disclosure.")).

222. *Id.* at 188 (citing ARK. CODE ANN. § 25-19-105(b)(2) (2002), which exempts from Arkansas FOIA only records whose "disclosure is consistent with the provisions of [FERPA].").

223. *Id.* (citing ARK. CODE ANN. § 25-19-105(f)(1)-(2) (2002)).

224. *Id.* at 193.

225. *Id.* at 194 (citing E-mail from John DiPippa, Dean, UALR Law School, to Robert

both Silverstein and Steinbuch that no approval was needed.[226] This too is reminiscent of the experiences of other researchers investigating race-based admissions. For example, when Richard Sander and his colleagues sought to (and did) obtain data from the California Bar, a pro-affirmative action academic unsolicitedly wrote the California Bar and argued that Sander needed approval from UCLA's IRB.[227] But, the UCLA Human Subjects Committee indicated that Sander's evaluation of the California Bar data required no IRB review.[228]

The UALR administration also specifically *reminded* Silverstein that he would not receive any summer research funding for work he would undertake on his FOIA project, and *advised* him that his time and effort would be better spent researching other topics.[229]

C. Arkansas Attorney General Opinion

The pre-litigation options might have been exhausted had Representative Nate Bell of Arkansas's District 20 not become interested in the matter. On June 8, 2012, he requested an opinion from then-Attorney General Dustin McDaniel, a Democrat, concerning whether UALR is required to produce the information that Professors Steinbuch and Silverstein requested.[230] Professors Silverstein and Steinbuch sent the Arkansas Attorney General's Office a letter, in which they reiterated, inter alia, that they were requesting only the anonymized set of LSAT, undergraduate GPA, law school GPA, race, gender, and age data that UALR provided to Hanover.[231] They emphasized that even if redaction of personally identifiable information was impossible, the "legitimate educational interest" exception to FERPA would apply to the request.[232]

This was a critical juncture in this process. As Groseclose describes about a similar experience:

Steinbuch, Professor, UALR Law School (Feb. 20, 2012) (on file with author)).

226. *Id.* at 194 (citing Mem. from Inst. Review Bd. Chair, Inst. Review Bd., to Robert Steinbuch, Professor, UALR Law School (Mar. 7, 2012) (on file with author)).

227. SANDER & TAYLOR, *supra* note 1, at 240.

228. *Id.* at 240–41.

229. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 194 (citing E-mail from John DiPippa, Dean, UALR Law School, to Joshua Silverstein, Assoc. Professor, UALR Law School (May 14, 2012) (on file with author)).

230. Letter from Joshua Silverstein, Assoc. Professor, UALR Law School, and Robert Steinbuch, Professor, UALR Law School, to Dustin McDaniel, Ark. Att'y Gen. (July 16, 2012) (on file with author).

231. *Id.* at 2.

232. *Id.* at 3.

> Under the Public Records Act [FOIA], when a person asks for records from a . . . government agency, the law is clear: the agencies must hand over such records. However, in practice, the agencies often do not. If they refuse, the only recourse for the requestors is to file a lawsuit. However, most people do not know how to do that. And even if they do, most aren't willing to spend the effort to follow through with the lawsuit.
>
> As a consequence, some state agencies play the following game: If they think that the PRA requestor is willing to take them to court, then they hand over the documents. But if they don't, they politely (yet falsely) respond, "Sorry, we don't think the law requires us to give you those documents."
>
> . . . I believe that UCLA officials planned to play the latter game. Notwithstanding what the law said, I believe they had no desire to give us the data we requested. They would give us the data only if they could foresee that a court would force them to do that.[233]

In Arkansas, success in court would likely occur if the attorney general opined in favor of Silverstein and Steinbuch.

The role of attorneys general to FOIA compliance is complicated. Some states, like Illinois, actually allow citizens to make requests of the attorney general requiring the production of an official opinion.[234] Arkansas generally restricts this option to government officials.[235] Typically, the request comes from an agency head seeking to protect himself when he decides to produce documents. Rarely will an agency head seek attorney general input when the government refuses to produce documents because litigating against an attorney general's opinion is a difficult political, no less legal, position for a state agency. On occasion, as here, a request comes from a legislator concerned about the actions of the government agency in denying a FOIA request.

Even though an attorney general is not a wholly independent arbiter—as he represents state agencies—many view attorneys general as somewhat less partisan actors than the agency from which records are sought. Thus, an opinion from an attorney general in favor of a requestor is a powerful statement in favor of disclosure, and one rightly viewed as alluding to future success in court. A ruling in favor of the agency is obviously less illuminating.

After Representative Bell's request, an Associate General Counsel

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233. GROSECLOSE, *supra* note 3, at 82–83.
234. Steinbuch, *Looking Through the Class*, *supra* note 5, at 85.
235. *See* Ark. Code Ann. § 25-16-706.

for the University of Arkansas wrote to the then-attorney general on behalf of UALR.[236] The school now claimed that (1) the information Steinbuch requested—that UALR had already provided to a private statistics company under a paid government contract—was prohibited from disclosure by FERPA, and thus wholly exempt from Arkansas FOIA;[237] (2) the documents Silverstein requested were not "public records" under Arkansas FOIA;[238] and (3) the combination of the data requested by Professors Silverstein and Steinbuch requested may enable linking the data to a particular student.[239]

On July 16, 2012, Silverstein and Steinbuch again wrote to Attorney General McDaniel and explained that the information requested by them did not violate FERPA.[240] The aggregation of seven years of data resulted in even the smallest racial cohort having nine members, which is far too large for a reasonable person to derive the personal identity of its members.[241] Further, even if there had been a racial cohort small enough to make a particular student identifiable with "reasonable certainty,"[242] the school was required to group the number of students in that too-small cohort with the number of students in the next-smallest cohort, in a process called "scrambling."[243] Scrambling would eliminate the potential of identifying a particular student from a very small cohort.[244]

Again, Groseclose faced the same claims. UCLA's blanket denial to him said:

> The University is not able to comply with your request as stated because, under the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. Section 1232 g), the information you have requested is "personally identifiable information" maintained in "educational records," and therefore is prohibited from non-consensual disclosure.[245]

Groseclose's sentiment mimicked Steinbuch's: "The sentence really didn't make sense, since Sander and [Groseclose] had asked that

236. Silverstein & Steinbuch, *supra* note 230, at 7.
237. *Id.* at 3.
238. *Id.*
239. *Id.* at 13.
240. *Id.* at 3.
241. *Id.* at 7.
242. *Id.* (citing 34 C.F.R. § 99.3 defining "Personally Identifiable Information").
243. *Id.*
244. *Id.*
245. GROSECLOSE, *supra* note 3, at 84.

names be deleted from the records."[246]

The Silverstein-Steinbuch letter also described, regarding Silverstein's request, that the university's General Counsel's claim, that thoroughly redacting the watermarks would be impossible, was incorrect.[247] And even if there existed some watermarks that would still be visible after redaction—unlike the examples that university's General Counsel actually provided—the school would be required to disclose all transcripts except for those that could not be properly redacted.[248]

Finally, the Silverstein-Steinbuch letter showed that combining the requested information would not make it any easier to identify any particular student.[249] Because Silverstein requested only grades, without any other information, there was no way to link the grades to any of the information that Steinbuch requested.[250] Silverstein requested undergraduate and law school transcripts for students entering in the fall of 2006.[251] The data that Steinbuch requested was regarding students who matriculated between 2000 and 2009.[252] Moreover, Silverstein's request expressed willingness to accept undergraduate transcripts of students who entered in 2010 or 2011.[253] So there was potential for no overlap whatsoever between the two requested data sets.[254]

When Groseclose faced the same hurdle with Sander, he remarked:

> UCLA was referring to what is sometimes called the problem of "publicly knowable" category variables. For instance, suppose UCLA gave us a dataset that contained things like an applicant's race and the quality of his or her high school. If so, then situations could arise where, say, in one year UCLA might have only one applicant who (i) is Native-American and (ii) attends a high school that was ranked in the sixth decile in California's Academic Performance Index (API). If so, and if we could somehow learn the name of that student from another data source, then from the UCLA dataset we'd know other things such as his grade point average, his family's income, and his parents' education level.

246. *Id.*
247. Silverstein & Steinbuch, *supra* note 230, at 7.
248. *Id.* at 2, 10.
249. *Id.*
250. *Id.* at 13–14.
251. *Id.*
252. *Id.* at 14.
253. *Id.*
254. *Id.*

> Sander suspected that UCLA would use the publicly-knowable problem as an excuse. That's why in our original letter he wrote five paragraphs noting how UCLA could steer around the problem. . . . UCLA officials, however, either did not read those paragraphs or decided to pretend they didn't exist.[255]

The attorney general opined in favor of Steinbuch and against Silverstein regarding their public-data requests.[256] As a result of the attorney general's opinion, the university gave Steinbuch his data—in hard copy only. The university indicated that it no longer maintained any of the electronic files that Steinbuch had specifically requested.[257] Silverstein eventually received orally the core of the information that he requested from the current dean, after a change in administration at the law school.

D. Data Analysis

The data set that UALR provided was remarkably rich. It contained information on gender, ethnicity, undergraduate GPA (UGPA), LSAT score, and law school GPA for 899 law students who finished their studies at the University of Arkansas at Little Rock (UALR) between 2005 and 2011. And so started the statistical analysis.[258]

1. Measures of Law School Success by Ethnicity Alone

White students constituted the vast majority of the sample (83.2%), as they do in the general population. Out of 748 eligible White students, 624 took the Arkansas Bar Exam and 498 of these passed (79.8% passage rate). Those who did not take the Arkansas Bar Exam took an out of state bar exam or none at all. Out of 84 eligible African-American students, 56 took the exam, and 33 passed the exam (58.9% passage rate).

A comparison of White students and African-American students, the two largest groups in the study, and the only two large enough to justify a separate statistical comparison—using a chi-square test of independence—indicates a statistically significant difference

255. GROSECLOSE, *supra* note 3, at 85–86.

256. 83 Op. Ark. Att'y Gen. (2012).

257. E-mail from Paula Casey, Interim Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (June 13, 2013) (on file with author).

258. All statistical analyses were performed in SAS 9.3. Statistical significance is evaluated throughout at the $\alpha = 0.05$ level of significance. The analysis of the data demonstrated no significant relationships between gender and success in law school at UALR.

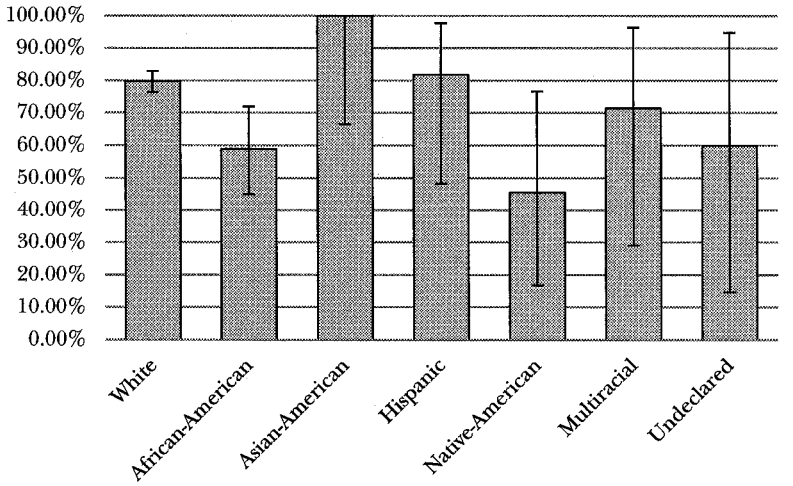
between these two groups in particular ($\chi^2(1) = 13.09$, $p = 0.0003$).

Table 1. Bar Exam-Takers and Passage Rates by Ethnicity

Ethnicity	No. of Eligible Students	No. of Arkansas Bar Exam-Takers	No. Passed	Passage Rate
White	748	624	498	79.8%
African-American	84	56	33	58.9%
Asian-American	18	9	9	100.0%
Hispanic	15	11	9	81.8%
Native-American	13	11	5	45.5%
Multiracial	11	7	5	71.4%
Undeclared	10	5	3	60.0%
Total	899	723	562	77.7%

Figure 1 below illustrates passage rates by ethnicity, including standard error bars. Standard error bars take into account both the natural variability in bar passage and the number of students included in the sample. The standard error bars indicate the precision of these passage rates as they might apply to the larger population of individuals similar to the students who actually attended UALR during the time of the study. For example, the bar passage rate for White individuals between 2005 and 2011 was 79.8%. If a similar group of White students made up of different specific individuals had attended, the passage rate would likely have been slightly different because of natural variability among individuals.

Figure 1. Bar Passage Rate by Ethnicity



* Figure includes standard error bars.

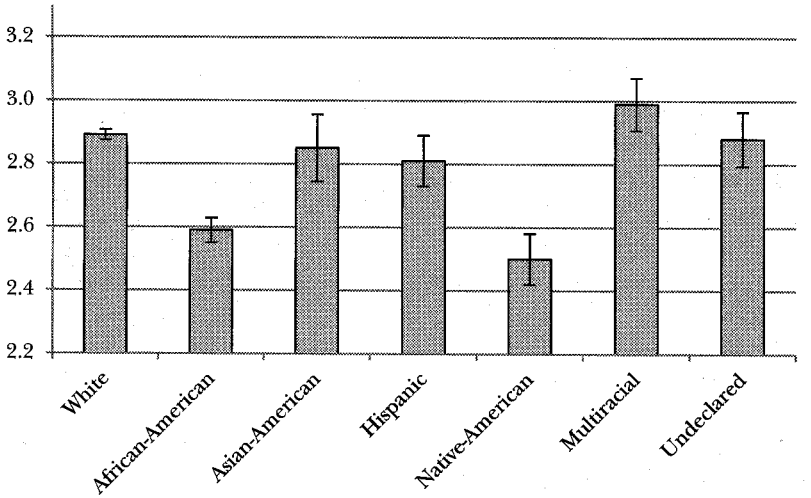
An intermediate measure of a student's success in law school is, of course, law school GPA. Table 2 below provides averages and standard deviations of law school GPAs by the ethnicities of the 873 students in the data set who have a law school GPA record.

For many ethnic groups, the number of students is much lower than the two largest groups (Whites and African-Americans). An analysis of variance (ANOVA) comparing the means of the groups to one another found statistically significant differences among the average law school GPAs of the different ethnic groups. The last column in Table 2 provides an indication of which groups had statistically significant differences; groups with the same letter in this column are not statistically different from one another.

Table 2. Average Law School GPA by Ethnicity

Ethnicity	No. of Students	Mean	Standard Deviation	Mean[259] Comparisons	
Multiracial	11	2.99	0.28	A	B
White	725	2.89	0.44	A	
Undeclared	10	2.88	0.27	A	B
Asian-American	18	2.85	0.45	A	B
Hispanic	15	2.81	0.31	A	B
African-American	82	2.59	0.35		B
Native-American	12	2.50	0.28		B

Figure 2. Average Law School GPA by Ethnicity



* Figure includes standard error bars.

259. Comparisons include a correction for multiple comparisons (Tukey adjustment).

Without taking cause into account, Figure 1 and Figure 2 highlight the disparity in bar passage rates and law school GPAs based on student ethnicity. As shown below, these correlations are driven by the underlying differences in the qualifications of the students admitted to UALR—*not* their race.

2. Detailed Examination of Measures of Law School Success

Certainly there are many factors that are related to success in law school. Among these are measures reflecting students' ability and preparedness to succeed in law school, such as undergraduate GPA and LSAT scores. Table 3 provides the general results of a logistic regression model predicting the probability of passing the bar exam based on undergraduate GPA, LSAT scores, law school GPA, ethnicity, and gender (based on the 705 students who had all relevant information recorded).

Logistic regression is appropriate for estimation of probabilities when the measure of interest for each individual has two outcomes. In this case, each individual either passes or fails the bar exam. According to Table 3, once LSAT score, undergraduate GPA, and law school GPA are accounted for, ethnicity—unsurprisingly—is a highly *insignificant* factor with respect to the probability of passing the bar exam ($\chi^2(6) = 3.09$, $p = 0.7979$).

Table 3. Logistic Regression Results for Probability of Passing Bar Exam

Effect	DF	Wald Chi-Square	P-value
Law School GPA	1	63.11	<.0001
LSAT Score	1	7.94	0.0048
Undergraduate GPA	1	6.54	0.0106
Gender	1	1.70	0.1923
Ethnicity	6	3.09	0.7979

After a backward selection process, in which insignificant factors were removed from the model presented in Table 3 one at a time according to significance, the best model for probability of passing the bar exam is based on the factors presented in Table 4. The most significant factor with respect to probability of passing the bar

exam is law school GPA. Unsurprisingly, Sander and Taylor found the same result with their data.[260] For that data, "[i]f you were in the top third of the class, you had more than a 99 percent chance of passing the bar; if you were in the bottom tenth of the class, you had only a one-in-four chance of passing."[261]

Modeling bar passage with law school GPA alone in the current UALR data set gives different but also striking results: those in the top third of the class had at least a 90% chance of passing the bar, but those in the bottom tenth of the class had less than a 33% chance of passing. LSAT score is the next most significant predictor at UALR and elsewhere for all races;[262] undergraduate GPA, while still significant, is the least impactful of the three factors.

To put this in context, in a nationwide study, average LSAT scores explained 45% of the variability in bar passage rates across schools.[263] This provides sound evidence that average LSAT scores are related to passage rates across universities, and it is logical to assume that individual LSAT scores are similarly useful for predicting whether or not an individual will pass the bar. Indeed, the data here show it to be a significant predictor.

Undergraduate GPA—perhaps obviously—is a poorer predictor of bar passage than law school GPA, because law school measures a specific skill set relevant to the bar exam.[264] Also, "[s]tudents who consistently got As or even high Bs in their law school classes were developing a much more powerful and relevant skill set than those who got low Bs or Cs."[265] But, of course, LSAT scores and undergraduate GPA can be used to predict success during the admissions process, which law school GPA cannot.

260. SANDER & TAYLOR, *supra* note 1, at 52.
261. *Id.*
262. *See id.* at 218.
263. Mike Stetz, *Best Schools for Bar Exam Preparation*, THE NAT'L JURIST at 24–26 (Feb. 2015), http://bit.ly/1Dot3Bq [perma.cc/JP6V-WQX5].
264. *See* SANDER & TAYLOR, *supra* note 1, at 54.
265. *Id.*

Table 4. Logistic Regression Results for Probability of Passing Bar Exam, Best Model

Effect	DF	Wald Chi-Square	P-value
Law School GPA	1	66.05	<0.0001
LSAT Score	1	9.31	0.0023
Undergraduate GPA	1	5.93	0.0149

Table 5 below provides additional information related to the strength of the factors provided in Table 4 above. Odds ratios indicate the change in the odds of passing the bar exam for each one-point increase in the measure in question. In this case, odds refer to the probability of passing the bar exam relative to the probability of not passing the bar exam. For example, for each one-point increase in LSAT scores, the odds of a student in the UALR sample passing the bar exam increased by a factor of 1.07. The 95% Wald confidence limits indicate that for a student in the population, we can be highly confident that the odds of passing the bar increase by a factor somewhere between 1.03 and 1.12 for each one-point increase in LSAT score.

Table 5. Odds Ratios for Passing Bar Exam

		95% Wald Confidence	
Effect	Odds Ratio	Lower Limit	Upper Limit
Law School GPA	13.41	7.17	25.07
LSAT Score	1.07	1.03	1.12
Undergraduate GPA	1.77	1.12	2.79

The equation relating each of these factors directly to the probability of passing the bar is:

> Probability of passing = 1/(1+exp(-(-18.0082 + 2.5957 LGPA + 0.0679 LSAT + 0.5681 UGPA).
>
> where LGPA = law school GPA, LSAT = LSAT score, and UGPA = undergraduate GPA.

To better understand the relationships of law school GPA, LSAT score, and undergraduate GPA to the probability of passing the bar exam, Figures 3 through 5 demonstrate each factor respectively, while holding the others at their average value (average law school GPA = 2.86, average LSAT score = 152.52, and average undergraduate GPA = 3.31). Of course, it should be noted that as law school GPA is significantly correlated with both undergraduate GPA (0.2435) and LSAT score (0.42320), the effects of each on bar passage are typically compounded. In each case, it is clear that those with extremely high scores relative to their peers have a much higher chance of passing the bar and vice-versa.

Figure 3. Relationship of Law School GPA to Bar Passage Rate

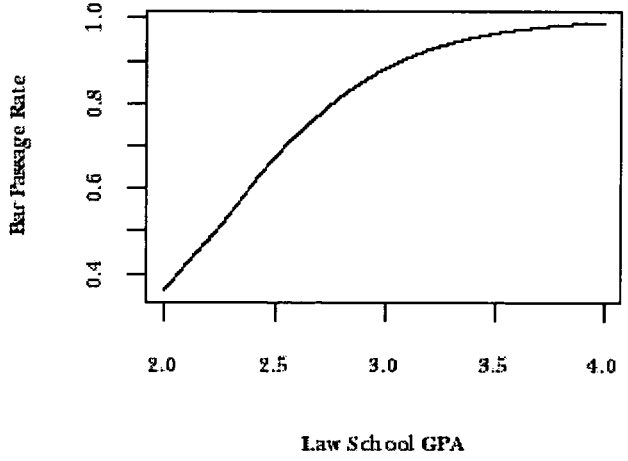


Figure 4. Relationship of LSAT Score to Bar Passage Rate

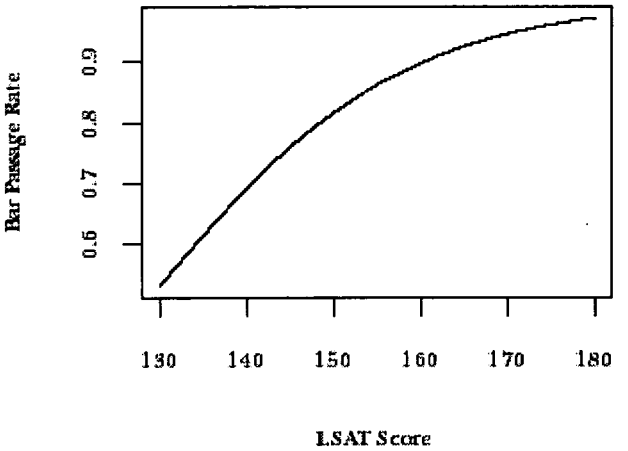
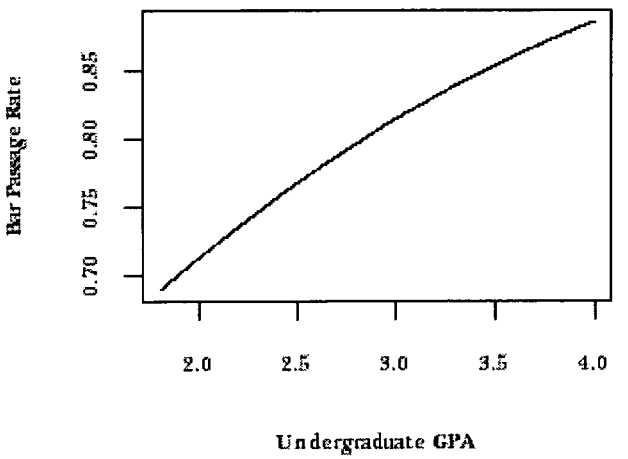


Figure 5. Relationship of Undergraduate GPA to Bar Passage Rate



Law school GPA is not only the most significant of the factors related to bar passage rate, but is itself a measure of success in law school. A general linear model can be used to assess the factors that are significantly related to law school GPA. This model is

appropriate for relating both continuous measures (such as undergraduate GPA and LSAT score) and categorical measures (such as ethnicity) to a continuous measure (such as law school GPA). Table 6 provides general results of a general linear model estimating law school GPA with undergraduate GPA, LSAT score, and ethnicity. Based on these results, ethnicity is not significantly related to law school GPA after LSAT score and undergraduate GPA are accounted for.

Table 6. General Linear Model Results for Law School GPA

Source	DF	F-value	P-value
LSAT Score	1	166.71	<.0001
Undergraduate GPA	1	67.23	<.0001
Ethnicity	6	1.63	0.1365

Applying a backward selection method once again, the best model for law school GPA is provided in Table 7. Only LSAT score and undergraduate GPA are significantly related to law school GPA. The R^2 of this model is 0.2384, indicating that 23.84% of the variability in law school GPA is related to LSAT score and undergraduate GPA.

Table 7. General Linear Model Results for Law School GPA

Source	DF	F-value	P-value
LSAT Score	1	204.54	<.0001
Undergraduate GPA	1	67.69	<.0001

The equation relating LSAT score and undergraduate GPA to law school GPA is:

Law School GPA = -3.0886 + 0.0338 LSAT + 0.2375 UGPA

where LSAT = LSAT score, and UGPA = undergraduate GPA.

To better understand the relationships of LSAT score and undergraduate GPA to law school GPA, Figures 6 and 7

demonstrate each factor respectively, while holding the other at its average value (average LSAT score = 152.52, and average undergraduate GPA = 3.31).

Figure 6. Relationship of LSAT Score to Law School GPA

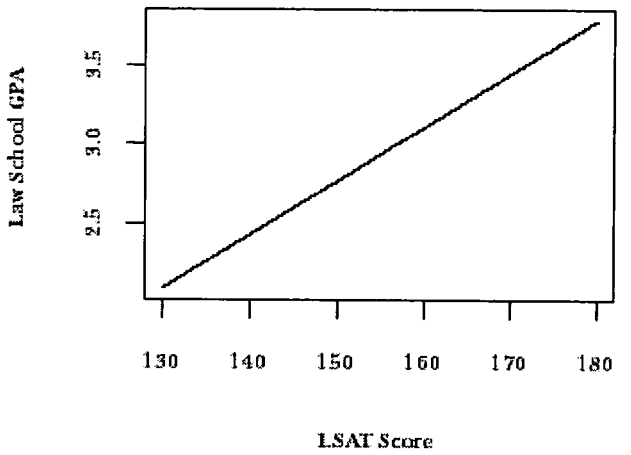
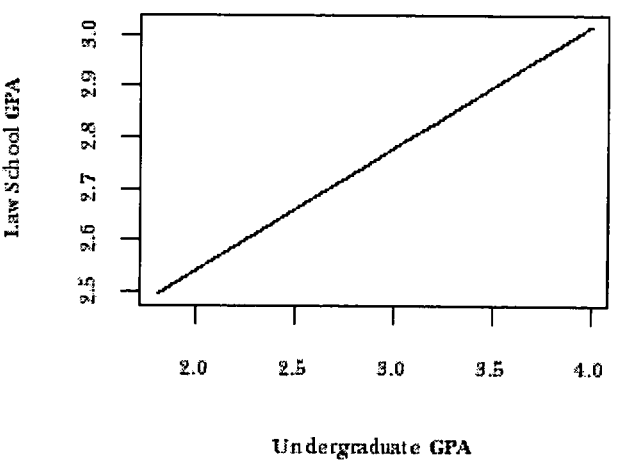


Figure 7. Relationship of Undergraduate GPA to Law School GPA



When factors related to preparation for law school success are accounted for, there is—unsurprisingly—no intrinsic relationship between ethnicity and law school success. This is consistent with results at other schools discussed above.[266] This suggests the appropriateness of an additional analysis relating ethnicity to those factors (LSAT score and undergraduate GPA).

3. Ethnicity and Law School Preparation

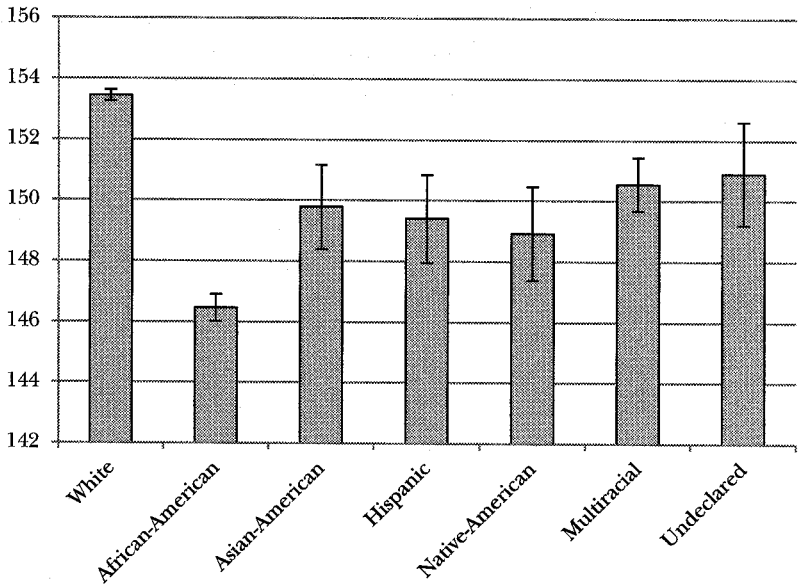
Table 8 provides means and standard deviations of LSAT scores by ethnicity from the UALR data set. The scores are ordered from highest (White, mean = 153.44) to lowest (African-American, mean = 146.46). An ANOVA comparing the means of the groups to one another found statistically significant differences among the average scores of the groups ($F(6, 892) = 27.62$, $p < 0.0001$). The last column in Table 8 provides an indication of which groups had statistically significant differences; groups with the same letter in this column are not different from one another. Given a pooled standard deviation estimate of 5.05 across all ethnicities, the African-American average (lowest) is approximately 1.4 standard deviations below the White average (highest). The R^2 associated with this analysis is 0.1567, indicating that 15.67% of the variability in average LSAT scores of analyzed students enrolled at UALR is associated with ethnicity. That is, the LSAT scores of students whom UALR admitted and enrolled varied significantly depending on the ethnicity of the students.

266. SANDER & TAYLOR, *supra* note 1, at 96.

Table 8. Average LSAT Score by Ethnicity

Ethnicity	No. of Students	Mean	Standard Deviation	Mean Comparisons	
White	748	153.44	5.13	A	
Undeclared	10	150.90	5.38	A	B
Multiracial	11	150.55	2.94	A	B
Asian	18	149.78	5.90		B
Hispanic	15	149.40	5.63		B
Native-American	13	148.92	5.54		B
African-American	84	146.46	4.06		B

Figure 8. Average LSAT Score by Ethnicity



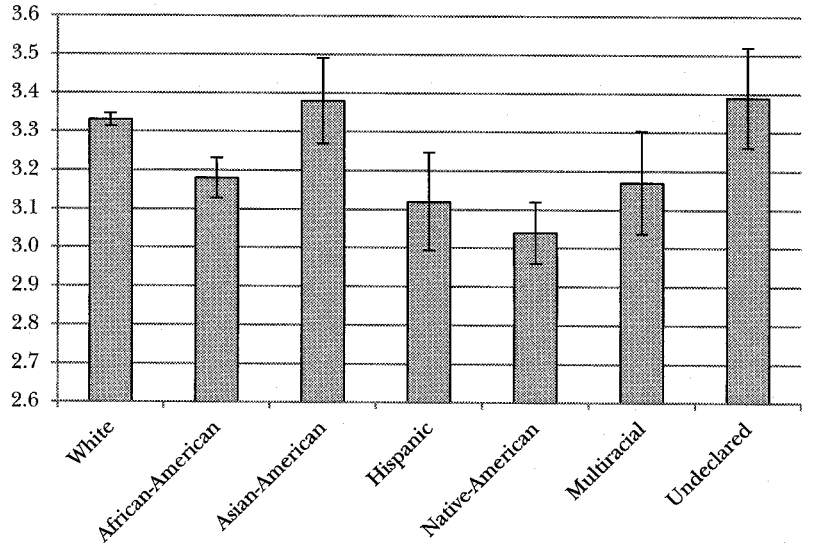
* Figure includes standard error bars.

Table 9 provides means and standard deviations of undergraduate GPAs by ethnicity. An ANOVA comparing the means of the groups to one another found statistically significant differences among the average scores of the groups ($F(6, 892) = 2.90$, $p = 0.0084$). After adjusting for multiple comparisons, none of the pairwise differences in the ethnicities are statistically significant; however, the difference that is the closest to being statistically significant is the one between White and African-American students (Tukey-adjusted $p = 0.0656$). The R^2 associated with this analysis is 0.0191, indicating that only 1.91% of the variability in average undergraduate GPAs of analyzed students enrolled at UALR is associated with ethnicity (virtually all of the differences in undergraduate GPA are unrelated to ethnicity). That is, UALR did not apply very different admissions standards based on undergraduate GPA—as it did for LSAT scores—depending on the race of the student. This analysis, however, does not account for any quality adjustment of undergraduate GPAs.

Table 9. Average Undergraduate GPA by Ethnicity

Ethnicity	No. of Students	Mean	Standard Deviation
Undeclared	10	3.39	0.41
Asian-American	18	3.38	0.47
White	748	3.33	0.45
African-American	84	3.18	0.47
Multiracial	11	3.17	0.44
Hispanic	15	3.12	0.49
Native-American	13	3.04	0.29

Figure 9. Average Undergraduate GPA by Ethnicity



* Figure includes standard error bars.

Thus, the differences in LSAT scores based on race are large and highly significant; the differences in undergraduate GPAs are less significant. LSAT scores below 150 are viewed by many as warnings that test takers lack the skills necessary to practice law. At least two studies, including one this year that examined LSAT scores from 2000 to 2011, have concluded that scores on the test, administered by the Law School Admission Council, closely track later bar passage rates.[267]

Kyle McEntee of Law School Transparency, a nonprofit watchdog organization, said his group's recent study showed that many schools were admitting students whose lack of legal aptitude made them vulnerable to failing the bar.[268] And, at the same time, they are incurring six-figure student debt that will weigh them down in the future.[269]

267. Elizabeth Olson, *Study Cites Lower Standards in Law School Admissions*, N.Y. TIMES (Oct. 26, 2015), http://nyti.ms/1WHMtt2 [perma.cc/6YDA-EGMN].
268. *Id.*
269. *Id.*

Law School Transparency spent nine months reviewing incoming LSAT scores for law schools.[270] The report shows that law schools have been admitting students with lower LSAT scores since applications began to decline in 2011.[271] While the LSAT is designed to predict success in the first year of law school, McEntee said it is also a strong indicator for success on the bar exam.[272]

Law School Transparency considers scores between 150 and 152 a "modest risk."[273] Scores between 147 and 149 are "high risk."[274] Lower scores are "higher risk" and even lower ones are "extreme risk."[275]

At UALR, for the data set analyzed here, the bottom quartile LSAT score for students who graduated is 149. Thus, 25% of the graduating classes had LSAT scores deemed high risk. However, this bottom-quartile group did not have comparable proportions of ethnic cohorts. Over two-thirds of graduating African-American students were admitted with LSAT scores in the bottom quartile of the class. Similarly, almost half of the African-Americans obtained a law school GPA in the bottom quartile.

The bottom quartile for the LSAT is 149.

LSAT: less than 149
White: 15.91%
African-American: 69.05%

270. Mike Stetz, *Law Schools Admitting More At-Risk Students, Study Says*, NAT'L JURIST (Nov. 16, 2015), http://bit.ly/2016x6A [perma.cc/3PVA-GHNM].

271. *Id.*

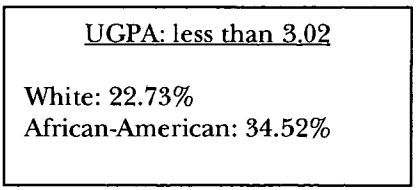
272. Olson, *supra* note 267.

273. Stetz, *supra* note 270.

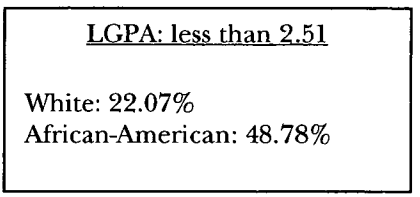
274. *Id.*

275. *Id.* Legal educators who have followed law school admission trends agree that the drop in LSAT scores is concerning. However, some, such as Derek Muller, a professor at Pepperdine University School of Law, question how much of an indicator the LSAT score is: LSAT is not the sole, or even best, predictor of bar pass rates or even first-year grades . . . It does a good job, but there are better measures — the index score, which combines LSAT and UGPA, is a better predictor of both; and first-year law school GPA is a much better predictor for bar pass rates. But with limited data disclosed from schools, LSAT is an important factor to consider.

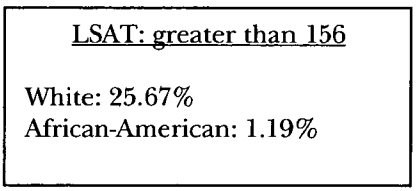
The bottom quartile for undergraduate GPA is 3.02.

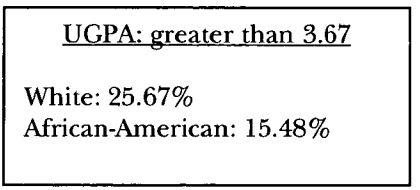


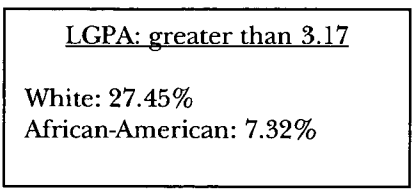
The bottom quartile for law school GPA is 2.51.



The data show a similar starkness for the top quartile for each metric.







The data analysis confirms three hypotheses about the population studied:

> 1. Ethnicity was significantly related to success in UALR's law school, as measured by probability of passing the bar exam and law school GPA.
>
> 2. When factors related to preparation for law school, such as LSAT score and undergraduate GPA are accounted for, there was no longer a relationship of ethnicity to success in law school as measured by probability of passing the bar exam and law school GPA.
>
> 3. Thus, the metrics related to preparation for law school—LSAT score and undergraduate GPA—for students admitted and enrolled by UALR's law school were significantly related to ethnicity, specifically for Whites and African-Americans.

When viewed together, these results demonstrate that African-Americans performed significantly worse in law school and on the bar exam than Whites at UALR as a consequence of being admitted with significantly lower objective metrics. While there is nothing intrinsic to ethnic identity that determines success in law school, measures related to preparation for law school were significantly different between these ethnic groups at UALR in the studied population—and these factors are strong predictors of success.

4. What to Make of the Results

Richard Lempert—ardent proponent of race-based admissions—describes his experience with affirmative action and his test for success:

> My impression of the law school's first few cohorts of affirmative action admittees was that we had to admit two [B]lack students to produce one competent graduate, and it was the students who did not succeed and not the school that paid the price. This experience[] quickly disabused the faculty of the romantic notion that their superior teaching or identifiable student characteristics not captured in academic indicators could make up for the academic deficiencies of some of those whom the school accepted. . .
>
> But as schools refined their affirmative action admissions procedures and set floors on the academic qualifications of those whom they would admit, far fewer minority students struggled just to maintain passing grades, although as a group affirmative action admittees still tended to cluster in the bottom ranks of

> their classes, as would be expected from their admissions credentials relative to those of their [W]hite classmates. . .
>
> So the real issue is not how well affirmative action minorities do gradewise relative to their [W]hite counterparts, but whether academic weaknesses keep them from graduating, and if they do graduate, from succeeding as they continue their education or enter the job market.[276]

At UALR's law school, academic weaknesses kept a disproportionate percentage of some minorities from succeeding in passing the bar—the entrance exam to the legal-practice. (Graduation rates were not measured.) Employing Lempert's test, UALR's efforts do not pass.

E. 2013 UALR Data

1. Institutional Review Board (IRB) Déjà Vu

Well after receiving the longitudinal data discussed above, the administration collected some data on the 2013 bar results, which Steinbuch asked for at that point. To its credit, the administration did not, then, claim that Steinbuch was not entitled to any of the data. This complied with the FOIA. Receipt of the information, however, was not wholly unremarkable. First, Steinbuch received an e-mail from the Dean of the Law School stating, in relevant part:

> After our exchange of emails, I developed a concern about whether I needed to have evidence that you have obtained IRB approval to give you the data. Yesterday afternoon, I spoke with . . . [the] Research Compliance Officer for UALR's IRB, and she told me that I could give you the information now, but that you would need IRB approval to publish something about the data. I thought you would like to know the UALR IRB's position. . . . Regardless of what the UALR IRB asks of you, I would also like to request, out of respect to the students whose data you possess, that, if you do publish something about the data, you follow the standard practice of referring to Bowen without identifying it by name, such as "a law school affiliated with a medium-sized Southern university."[277]

Steinbuch responded as follows:

> I appreciate your request that I conceal the source of the data. I

276. Lempert, *supra* note 17, at 10, 21.

277. E-mail from Michael Hunter Schwartz, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Nov. 14, 2013) (on file with author).

> see that you refer to this as "standard practice." Respectfully, however, concealing the source of data is not "standard practice" in empirical research. I've attached, merely as an example, an article on bar passage rates by a noted Indiana professor, who writes therein: "The dataset consists of the graduates of the Indiana University Robert H. McKinney School of Law, Indianapolis, who took the Indiana bar examinations in the two sittings in 2012."[278]

And Steinbuch received the following message from the IRB after submitting the information thereto:

> Please see the attached official memo from the IRB regarding your protocol submission. *Once again, the finding was NHSR (Not Human Subject Research).* The Board thanks you for your prudence and diligence in submitting this, and reminds you that once you've received an NHSR determination on a particular study, you are not required to submit that same study again. The IRB's finding of NHSR is permanent UNLESS you change something in your study that could impact their decision. In that case, it is good to call and check with me first.
>
> *Therefore, this NHSR finding means this project as submitted does not fall under the jurisdiction of the IRB because it does not meet federal criteria for the definition of research. And if it's not research, the IRB has no say.* You can repeat this study over and again exactly as you submitted it without having to come back to the IRB.[279]

This is reminiscent of prior experiences with regard to investigating race-based admissions. As discussed above, Silverstein and Steinbuch were incorrectly told that their prior requests required approval by the Institutional Review Board (IRB).[280] And when Richard Sander and his colleagues sought to (and did) obtain data from the California Bar, a pro-affirmative-action academic argued that Sander needed approval from UCLA's IRB.[281]

The 2013 data consist of 139 individuals: 127 total students took the Arkansas Bar Exam (12 did not), and of those, 89 or 70.1% passed the bar exam. Table 10 provides details according to

278. E-mail from Robert Steinbuch, Professor, UALR Law School, to Michael Hunter Schwartz, Dean, UALR Law School (Nov. 14, 2013) (on file with author).

279. E-mail from Rhiannon Gschwend, Research Compliance Officer, Inst. Review Bd., to Robert Steinbuch, Professor, UALR Law School (Dec. 12, 2013) (on file with author) (emphasis added).

280. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 194 (citing E-mail from John DiPippa, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Feb. 20, 2012)); *Id.* (citing Memorandum from Elisabeth Sherwin, Inst. Review Bd. Chair, Inst. Review Bd., to Robert Steinbuch, Professor, UALR Law School) (Mar. 7, 2012)).

281. SANDER & TAYLOR, *supra* note 1, at 240–41 (letter on file with author).

ethnicity. The number of exam-takers in all groups except for White and African-American is too small to include in an analysis; even the African-American numbers are rather low for a very detailed analysis. A Fisher's exact test of independence was conducted between White and African-American exam-takers, and no significant difference was found in bar passage in this data set ($p = 0.3101$).

Table 10. Bar Exam-Takers and Passage Rates by Ethnicity, 2013

Ethnicity	No. of Eligible Students	No. of Arkansas Bar Exam-Takers	No. Passed	Passage Rate
White	106	99	70	70.7%
African-American	12	11	6	54.5%
Asian-American	4	3	3	100.0%
Hispanic	9	6	3	50.0%
Native-American	4	4	3	75.0%
Multiracial	0	-	-	-
Undeclared	4	4	4	100.0%
Total	139	127	89	70.1%

In terms of comparing the two data sets, the percentage of Whites is lower in the 2013 data (76.26% vs. 83.20%), which is just barely statistically significant according to a chi-square test of independence ($\chi^2(1) = 3.98$, $p = 0.0460$). The percentage of White graduates taking the bar exam is also lower, as a consequence of this lower eligibility (77.95% vs. 86.31%; $\chi^2(1) = 5.93$, $p = 0.0149$). The percentage of African-American graduates taking the bar exam has not significantly changed (8.66% vs. 7.75%; $\chi^2(1) = 0.13$, $p = 0.7239$). The ratio of African-American to White has also not

changed significantly between the two data sets ($\chi^2(1) = 0.00$, $p = 0.9803$), remaining near 0.112 in both data sets. For all individuals, the overall passage rate has decreased from the earlier data set to the 2013 data set, dropping from 77.3% to 70.1%, which is not quite a statistically significant decrease ($\chi^2(1) = 3.53$, $p = 0.0603$). However, among White students alone, the bar passage rate dropped from 79.81% to 70.71%, which is a statistically significant decrease ($\chi^2(1) = 4.20$, $p = 0.0404$). The pass rate of African-Americans decreased slightly from 58.93% to 54.55%; however, given the small number of African-American individuals in the 2013 data set, this is not statistically significant according to a Fisher exact test ($p = 1.0000$).

The following sections will compare the 2013 outcomes to the larger data set. Because the number of non-White and non-African-American individuals in this data set is so small, we will only make this comparison for White and African-American individuals.

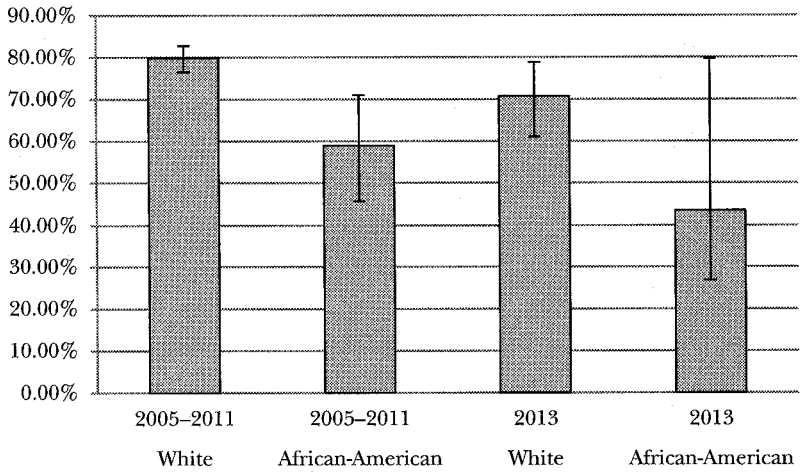
2. Measures of Law School Success by Ethnicity Alone

First, bar passage rates are compared between the earlier data set and the 2013 data set. The results of a logistic regression including the effect of ethnicity, the data set, and an interaction between the two are shown in Table 11. While ethnicity is shown to remain statistically significant across the two data sets ($\chi^2(1) = 5.87$, $p = 0.0154$), there is no interaction between ethnicity and data set ($\chi^2(1) = 0.20$, $p = 0.6563$). This implies that the difference in bar passage rates between White graduates and African-American graduates has remained the same.

Table 11. Logistic Regression by Ethnicity and Data Set

Effect	DF	Wald Chi-Square	P-value
Ethnicity	1	5.87	0.0154
Data Set	1	0.90	0.3417
Ethnicity*Data Set	1	0.20	0.6563

Figure 10. Bar Passage Rate by Ethnicity and Dataset



* Figure includes standard error bars.

Regarding law school GPA, a similar analysis with results in Table 12 indicates that there is also no change in the difference between average GPAs of White and African-American students across the two data sets. But it is clear that overall GPAs have changed from the previous data set to the 2013 data set.

Table 12. Results of Linear Regression Comparing Law School GPA by Ethnicity and Data Set

Source	DF	F-value	P-value
Ethnicity	1	21.68	<.0001
Data Set	1	36.58	<.0001
Ethnicity*Data Set	1	0.13	0.7173

Table 13 provides details comparing the average law school GPAs across the two data sets and ethnicities. Note that while in each data set the gap between White and African-American GPAs has remained similar, law school GPAs increased in the 2013 data set, leading the scores of the African-American students in 2013 to be

statistically similar to the scores of the White students from the earlier data set. The law school began mandatory mean grading in the fall of 2011.

Table 13. Average Law School GPA by Ethnicity and Data Set

Ethnicity	No. of Students	Mean	Standard Deviation	Mean Comparisons		
African-American, 2005–2011	84	2.59	0.35	A		
White, 2005–2011	748	2.89	0.44		B	
African-American, 2013	12	2.99	0.61		B	
White, 2013	106	3.35	0.44			C

3. Complex Examination of Measures of Law School Success Across Data Sets

Here we again examine the relationship of multiple factors, including ethnicity, undergraduate GPA, LSAT score, and law school GPA to bar passage. We include interactions of each of these factors with the data set here, in order to determine whether these relationships have changed between the older data set and the 2013 data set. Table 14 shows the results of a full logistic regression model including all of these factors.

Table 14. Logistic Regression Results for Probability of Passing Bar Exam, Two Data Sets

Effect	DF	Wald Chi-Square	P-value
Law School GPA	1	22.46	<.0001
LSAT Score	1	7.99	0.0047
Undergraduate GPA	1	24.48	<.0001
Gender	1	0.82	0.3657
Ethnicity	1	5.13	0.0235
Data Set	1	3.78	0.0518
Law School GPA*Data Set	1	3.31	0.0688
LSAT Score*Data Set	1	1.23	0.2679
Undergraduate GPA*Data Set	1	16.49	<.0001
Gender*Data Set	1	0.03	0.8530
Ethnicity*Data Set	1	4.38	0.0363

As before, a backward selection is performed to eliminate insignificant factors and stabilize results for the factors that are significant. Table 15 shows the same model after statistically insignificant factors are removed.

Table 15. Logistic Regression Results for Probability of Passing Bar Exam, Two Data Sets, Best Model

Effect	DF	Wald Chi-Square	P-value
Law School GPA	1	20.36	<.0001
LSAT Score	1	9.06	0.0026
Undergraduate GPA	1	23.90	<.0001
Data Set	1	5.50	0.0190
Law School GPA*Data Set	1	7.17	0.0074
Undergraduate GPA*Data Set	1	15.58	<.0001

According to this final model, there are still no effects by ethnicity once other significant factors are accounted for (ethnicity is not significant overall, nor has the relationship of ethnicity to bar passage changed over the two data sets). As when looking at only the older data set, law school GPA, LSAT score, and undergraduate GPA are all significant predictors of passing the bar. Note that here, data set is significant, indicating that there have been changes in the bar passage rate across the two data sets ($\chi^2(1) = 5.87$, $p = 0.0190$), even after accounting for other factors. Additionally, there are interactions of data set with law school GPA ($\chi^2(1) = 7.17$, $p = 0.0074$) and undergraduate GPA ($\chi^2(1) = 15.58$, $p < 0.0001$), indicating that the relationship of these two measures to the probability of bar passage is different from the older data set to the 2013 data set.

Table 16 provides odds ratios for each of these effects, which help to better understand the reason for these results. According to Table 16, the odds of passing the bar between 2005 and 2011 increased 13.67 times for each additional law school GPA point. This was reduced to just 1.93 times for each additional GPA point in 2013. In other words, the law school GPA's relationship to bar passage diminished in 2013. This may be related to the effect of the mandatory mean that was adopted between these periods, which led to grade compression. On the other hand, the effect of undergraduate GPA was the opposite. Between 2005 and 2011, the odds of passing the bar increased by 1.69 times for each additional undergraduate GPA point. In 2013, the odds of passing the bar increased 150 times for each additional undergraduate GPA point.

Table 16. Odds Ratios for Passing Bar Exam

Effect	Odds Ratio	95% Wald Confidence Lower Limit	95% Wald Confidence Upper Limit
Law School GPA, 2005–2011	13.67	7.22	25.87
LSAT (both data sets)	1.07	1.02	1.11
Undergraduate GPA, 2005–2011	1.69	1.05	2.71
Data Set	0.00	0.00	0.24
Law School GPA, 2013	1.93	1.02	1.11
Undergraduate GPA, 2013	150.55	17.11	1324.65

Next, undergraduate GPA, LSAT scores, ethnicity, and gender, are examined for their relationship to law school GPA across the two data sets. Table 17 provides the results of a full general linear model.

Table 17. General Linear Model Results for Law School GPA, Two Data Sets

Source	DF	F-value	P-value
LSAT Score	1	7.04	0.0081
Undergraduate GPA	1	41.23	<.0001
Gender	1	1.29	0.2570
Ethnicity	1	4.23	0.0400
Data Set	1	35.83	<.0001
LSAT Score*Data Set	1	36.31	<.0001
Undergraduate GPA*Data Set	1	4.28	0.0389
Gender*Data Set	1	4.98	0.0259
Ethnicity*Data Set	1	3.10	0.0785

Applying backward selection to remove non-significant factors leads to the model presented in Table 18. Of note is that ethnicity is not statistically significantly related to law school GPA once other factors are accounted for. This is true in both data sets; there is no interaction between ethnicity and the data set. However, LSAT score interacts with data set, as does undergraduate GPA and gender.

Table 18. General Linear Model Results for Law School GPA, Two Data Sets, Best Model

Source	DF	F-value	P-value
LSAT Score	1	10.50	0.0012
Undergraduate GPA	1	50.68	<.0001
Gender	1	0.97	0.3243
Data Set	1	33.20	<.0001
LSAT Score*Data Set	1	33.98	<.0001
Undergraduate GPA*Data Set	1	6.81	0.0092
Data Set*Gender	1	4.51	0.0339

The equation relating each of these terms to law school GPA is:

> Law School GPA = -3.1088 + 0.0335 LSAT + 0.2609 UGPA – 0.0449 (if female) + 6.1101 (if 2013 data) – 0.0431 LSAT (if 2013 data) + 0.3021 UGPA (if 2013 data) + 0.1678 (if female and 2013 data).

This equation and Table 18 show that the relationship between LSAT score and law school GPA decreased from the earlier data set to the 2013 data set ($F(1,916) = 33.98$, $p < 0.0001$). On the other hand, the relationship between undergraduate GPA and law school GPA increased ($F(1,916) = 6.81$, $p = 0.0092$). Note also that females increased their law school GPA between the two data sets ($F(1,916) = 4.51$, $p = 0.0339$).

Once again, from examining the relationships between ethnicity and law school GPA in the presence of other factors, it is not surprising to see that there is no intrinsic relationship between

ethnicity and law school GPA; this was true both for the earlier data set and the 2013 data set.

4. Ethnicity and Law School Preparation Across Two Data Sets

Table 19 provides the results of a linear model, which determines whether the relationship between ethnicity and LSAT scores has changed from the earlier data set to the 2013 data set. According to this table, the difference in ethnicity did not change from the older data set to the 2013 data set ($F(1,946) = 0.48$, $p = 0.4880$). Note that the average LSAT score also did not change between the two data sets ($F(1,946) = 0.57$, $p = 0.4485$). Means and standard deviations of LSAT scores are provided in Table 20.

Table 19. Linear Model Results for LSAT Score by Ethnicity and Data Set

Effect	DF	F-value	P-value
Ethnicity	1	59.70	<0.0001
Data Set	1	0.57	0.4485
Ethnicity*Data Set	1	0.48	0.4880

Table 20. Average LSAT Score by Ethnicity and Data Set

Ethnicity	No. of Students	Mean	Standard Deviation	Mean Comparisons
White, 2013	106	153.49	5.51	A
White, 2005–2011	748	153.44	5.13	A
African-American, 2013	12	147.67	5.05	B
African-American, 2005–2011	84	146.46	4.06	B

Finally, Table 21 provides the results of a linear model determining whether the relationship between ethnicity and undergraduate GPA has changed from the earlier data set to the 2013 data set. According to these results, the difference in undergraduate GPAs across ethnicities from the earlier data set to the 2013 data set is not statistically significant ($F(1,946) = 2.49$, $p = 0.1151$). Unlike LSAT scores, however, there is an overall change in undergraduate GPA from the earlier data set to the 2013 data ($F(1,946) = 23.72$, $p < 0.0001$). Table 22 shows the means and standard deviations of these values across ethnicities and data sets, and indicates that the undergraduate GPAs of White students in 2013 were statistically similar to the undergraduate GPAs of African-American students in the earlier data set. However, within each data set, the difference in the average undergraduate GPAs of White and African-American students remains similar. Overall, from the earlier data set to 2013, the average undergraduate GPA became lower.

Table 21. Linear Model Results for Undergraduate GPA by Ethnicity and Data Set

Effect	DF	F-value	P-value
Ethnicity	1	13.33	0.0003
Data Set	1	23.72	<0.0001
Ethnicity*Data Set	1	2.49	0.1151

Table 22. Average Undergraduate GPA by Ethnicity and Data Set

Ethnicity	No. of Students	Mean	Standard Deviation	Mean Comparisons
White, 2005–2011	748	3.33	0.45	A
African-American, 2005–2011	84	3.18	0.47	B
White, 2013	106	3.09	0.34	B
African-American, 2013	12	2.72	0.23	C

F. 2015 Unsuccessful Data Request

1. Pre-Attorney General Opinion Déjà Vu

In 2015, Steinbuch made a request for UALR's latest data compilation that the administration had used to make another presentation to the faculty on bar passage, as it had done with the 2013 data. The university provided Steinbuch with a chart like the one it provided him for the 2013 data. That is where the similarity ended, however. Upon examination of the spreadsheet containing ten years of data, Steinbuch discovered that all race, LSAT score, and undergraduate GPA data were redacted. But law school GPA and individual grades were provided. Steinbuch thereafter requested the excised data, and the university invoked the same reasoning it employed prior to the Attorney General's opinion of 2012.

The Dean wrote:

> Because you served on the law school's admissions committee throughout the time period when all of the students in this spreadsheet applied to the law school,[282] it is reasonable to

282. Steinbuch was not employed by UALR during some of the time in which students in the spreadsheet applied to the UALR Law School and he did not serve on the admissions

> assume your knowledge of the applicants, particularly applicants whose credentials are distinctive in terms of being higher or lower relative to their peers.[283] Likewise, it is likely there are combinations of undergraduate GPA and LSAT score that would be memorably distinctive. Those issues would be exacerbated by ethnicity data, particularly because the law school admits so few students of color. It is therefore reasonably likely that, if we were to provide the redacted information, you would be able to infer identity and therefore the data is data that could reasonably be expected to lead to personally identifiable information. For similar reasons, as a professor at a small law school like Bowen that has only a very small number of students of color, the ethnicity data needed to be redacted in any event because providing even the ethnicity data alone would reasonably be expected to lead to personally identifiable information.[284]

Steinbuch responded:

> Regarding the refusal to provide the race, LSAT, and undergraduate GPA, please note the following:
>
> 1. I received this very information separately from both you (Dean Schwartz) and [then interim-]Dean [Paula] Casey previously for two distinct data sets. If the currently posited position regarding the FOIA would be correct, then those previous releases violated the law. The alternative, which is the case, is that the current refusal to produce the records violates the Arkansas FOIA.[285] As such, please place the records on a litigation hold pending further disposition of the matter.
>
> I will note that the school's current position is the same as it was prior to—and seems not to consider—AG Opinion 2012-083.[286]
>
> 2. Regarding the process of the admissions committee, faculty only sees a portion of the applicants for screening. Those applicants approved by faculty on the committee go to the chair for potential admission. The chair then decides who's admitted, and the faculty on the committee do not receive a list of who is admitted and enrolled.
>
> Therefore, the assertion that "it is likely there are combinations

committee when some of the other students applied.

283. Michael Hunter Schwartz, Dean of UALR Law School, did not continue Professor Robert Steinbuch's long tenure on the admissions committee beginning in the fall of 2014, just prior to Steinbuch serving as a Fulbright Scholar in 2015. Steinbuch has not been reappointed to the committee.

284. E-mail from Michael Hunter Schwartz, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Oct. 17, 2015) (on file with author).

285. Ark. Code Ann. § 25-19-103 (2015).

286. 83 Op. Ark. Att'y Gen. (2012).

> of undergraduate GPA and LSAT score that would be memorably distinctive"[287] is factually unsupportable. In fact, I wonder whether there are any significant unique LSAT & GPA combinations in the whole cohort, although this doesn't matter under the FOIA,[288] as discussed below.
>
> 3. The assertion that "it is therefore reasonably likely that, if we were to provide the redacted information, you would be able to infer identity and therefore the data is data that could reasonably be expected to lead to personally identifiable information,"[289] as a basis to refuse production of the requested records is improper under the Arkansas FOIA.
>
> Citing the Wisconsin case[290] that the Attorney General relies upon in AG Opinion 2012-083, [the treatise on the Arkansas FOIA by] Watkins & Peltz state[s] that unless the:
>
> [I]nformation would [] "make a student's identity easily traceable," . . . its disclosure would not violate FERPA. This approach is consistent with the Arkansas FOIA's requirement that records containing both exempt and non-exempt information be disclosed with the latter deleted. . . . The court was undaunted by the possibility "that in a small number of situations the requested information could possibly create a list of characteristics that would make an individual personally identifiable." [291]

The school's website lists the most recent publicly released application data (which is one year delayed from the current class), which shows that in one year alone the school had 624 applications, leading to 125 enrollees; and the J.D. Enrollment and Ethnicity section shows 18.8% minority enrollment.[292]Apparently, that's a "very small number of students of color . . . [such that] providing even the ethnicity data alone would reasonably be expected to lead to personally identifiable information."[293] Moreover, the LSAT and

287. E-mail from Michael Hunter Schwartz, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Oct. 17, 2015) (on file with author).

288. *Id.*

289. E-mail from Michael Hunter Schwartz, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Oct. 17, 2015) (on file with author).

290. Osborn v. Bd. of Regents of Univ. of Wis. Sys., 647 N.W.2d 158 (Wis. 2002).

291. E-mail from Robert Steinbuch, Professor, UALR Law School, to Michael Hunter Schwartz, Dean, UALR Law School, and Judy Williams, Associate Vice Chancellor of Communications and Marketing, UALR Law School (Oct. 19, 2015) (on file with author) (citing JOHN J. WATKINS & RICHARD J. PELTZ-STEELE, THE ARKANSAS FREEDOM OF INFORMATION ACT 120 (5th ed. 2010)).

292. UALR LAW SCHOOL STANDARD 509 INFORMATION REPORT (2014), http://bit.ly/1OSKcEU [perma.cc/U3VA-RBFZ].

293. E-mail from Michael Hunter Schwartz, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Oct. 17, 2015) (on file with author).

undergraduate GPA data were redacted for *all* ethnicities, including, inter alia, the approximately 1,000 White graduates in the spreadsheet—not just a "very small" cohort.

Thereafter, Steinbuch filed suit against Dean Schwartz and the University of Arkansas at Little Rock for violating the FOIA.[294] Two days later, the same day that the local newspaper reported on the case, the Associate Dean called a minority student enrolled in one of Steinbuch's class and asked whether Steinbuch ever discussed his research, for which he made FOIA requests. Thereafter, in an effort to distinguish its current refusal from its prior FOIA productions of information, the school contended that it broke the law in providing the 2013 data.[295] The case is still pending.[296]

V. CONCLUSION

This third article, in an unexpected trilogy, documents the difficulties that a tenured, now-former member of the admissions committee had in obtaining public data from a state law school in Arkansas in which he is faculty. The story contains both the success of ultimately obtaining some—but not all the requested—public data about affirmative action, and the analysis of the ensuing unique information. The former is a tale of ongoing roadblocks presented to getting public information. The ultimate success in obtaining the key documents led to the largest contemporary longitudinal case study of race admissions at any law school. And the results are dramatic: Ethnicity has been significantly related to success in the University of Arkansas at Little Rock School of Law, as measured by probability of passing the bar exam and law school GPA, because African-Americans as a cohort had been admitted with significantly lower objective metrics than Whites. Consequently, African-Americans have performed significantly poorer in law school and on the bar exam than Whites at UALR Law School. The affirmative action program at UALR Law School often harmed the very individuals it was designed to help.

294. John Lynch, Law School Violates Open-Records Act, Suit Says, ARKANSAS ONLINE (Nov. 19, 2015), http://bit.ly/1P6ei9t [perma.cc/Z9F7-U986].

295. Lynch, *supra* note 220.

296. *Id.*