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COMMENTARY: Law School Affirmative Action: An Empirical Study Confirmative Action

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SUMMARY:

... Lempert, Chambers, and Adams's study of the careers of three generations of students of color admitted to the University of Michigan Law School fills several important gaps in our knowledge about the consequences and implications of affirmative action protocols in law school admission. ... So what is genuinely striking then about the Michigan study? Not only did the soft processes predict minority alumni career success at least as well as the hard test-based criteria, but they gave birth to several previously undetected rewards: (1) a more diverse student body which Michigan Law students and alumni conclude is an educational good in itself; (2) a student body that will go on to serve historically underrepresented populations; and (3) a student body that will be more involved in giving back to - as well as providing leadership for - the larger community. ... It also might mean that conventional criteria fail to predict - and even more may undermine - what the law school purports to value according to the mission of legal education in general and the University of Michigan's specific mission in particular. ... In sum, the major findings of the Lempert et al. study are that LSAT and UGPA are not proxies for merit, that Michigan law students value diversity and regard a diverse legal education as a better education, and that affirmative-action soft processes are better predictors of qualities that the school and profession value. ...

TEXT:

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Lempert, Chambers, and Adams's study of the careers of three generations of students of color admitted to the University of Michigan Law School fills several important gaps in our knowledge about the consequences and implications of affirmative action protocols in law school admission. First, it provides empirical data for the argument that conventional test-based admission policies both mask and support deep flaws in the way we allocate opportunity and privilege. They reward people who then often fail to give back to society. They also fail to identify those who in fact have much to give and do give in service of the profession and its larger goals.¹ Second, it shows that using an

alternative measure for admission does not reduce the number of places available to qualified applicants. It simply alters, in an important way, how we view qualifications. It links qualifications at the entry level to the standards and achievements that the school and the legal profession claim to value in law school graduates. Third, the data reveal conflicting values at the heart of an important public institution. The study shows that what the University of Michigan aims for in lawyers and [*566] what it selects for in law students are not the same things. According to the University of Michigan Law School mission statement, the school "looks for students likely to become esteemed practitioners, leaders of the American bar, significant contributors to legal scholarship and/or selfless contributors to the public interest." The school also expects that all those it admits will "have a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others" (Lempert, Chambers, and Adams 2000, 396). Yet this study finds that the criteria the law school employed to admit most of its applicants has little if anything to do with these goals.

Thus, the study deserves attention across the ideological spectrum because of what it finds about not only affirmative action's strengths but conventional admission's weakness. It confirms the value of affirmative action to the intended minority beneficiaries, their white classmates, and society at large. My reading of this study suggests that affirmative action could well become confirmative action, in that many of the criteria used to select its beneficiaries should be confirmed and broadened to select all incoming law students.² In other words, affirmative action should not be understood simply as a race-based exception to the general admission rule of rank ordering test scores and grades. Instead, it is an experiment that succeeded so well at the University of Michigan Law School it might be used to rethink how that school admits everyone. Rather than ban affirmative action, its critics might urge this law school in particular and other similar institutions more generally to expand their practice and revamp the entire admissions criteria for all incoming law students.³

I. THE MICHIGAN STUDY FINDINGS

The study looks at the relative postgraduate performance of minority and white alumni of the University Law School starting with the graduating class of 1970, the first class with more than 10 minority graduates. It focuses on race-conscious affirmative action in admissions to one elite institution of higher education. The authors conclude that traditional, "hard," test-score- [*567] based admissions processes are no better predictors of success after law school - whether success is measured by earned income, career satisfaction, or service contributions - than are "soft," more whole-person selection criteria (Lempert, Chambers, and Adams 2000, 468).⁴ Those who graduate from the University of Michigan Law School tend to succeed,⁵ whether as applicants they were admitted, on the one hand, pursuant to criteria that emphasize "mental aptitude" for the study of law, or on the other hand, by virtue of expectations about their capacity to contribute to the community of legal education, legal profession, or citizens generally.

That a test-centered approach does not predict success better than a more whole-person approach would not surprise those of us who have been skeptical about current

overreliance on aptitude testing to allow efficient, but not necessarily "merit-based" decision making.⁶ Even conceding the LSAT's modest ability to "predict" first-year grades,⁷ such tests do not predict much beyond a student's performance six months to a few years after they take the test, and then, only in comparable, (i.e., classroom) [*568] examination settings.⁸ Indeed, Harvard College did a study of three classes of its graduates over a 30-year period and found that two things predicted success as Harvard measured it: low SAT scores and a blue-collar background.⁹

So what is genuinely striking then about the Michigan study? Not only did the soft processes predict minority alumni career success at least as well as the hard test-based criteria, but they gave birth to several previously undetected rewards: (1) a more diverse student body which Michigan Law students and alumni conclude is an educational good in itself; (2) a student body that will go on to serve historically underrepresented populations; and (3) a student body that will be more involved in giving back to - as well as providing leadership for - the larger community.

The first finding is that both white as well as nonwhite students feel their educational experience is enriched by the presence of a more racially and ideologically diverse student body.¹⁰ This finding is especially interesting in that the only group that expressed an initial resistance to the educational value of diversity was white males, but even that resistance faded beginning in the early 1990s. White women looked more like their African American and Latino peers from the beginning, in that large numbers of the white women graduates consistently valued the opportunity to learn in a diverse classroom community.¹¹

The study also found that the minority graduates succeeded - after graduation - in ways that eluded many of their white counterparts. These findings are especially significant because they suggest that measuring the success of affirmative action only during the period students are in school fails to identify its real strength. It is the value of affirmative action in identifying students who actually succeed in the larger world after graduation that has too often been overlooked.¹² Thus, the study finds that (1) minority alumni provide, on average, considerably more service to minority clients than do white alumni; indeed, all Michigan alumni, including white alumni, are "disproportionately likely to serve same-race clients" and (2) [*569] among those Michigan graduates who enter the private practice of law, "minority alumni tend to do more pro bono work, sit on the boards of more community organizations, and do more mentoring of younger attorneys than white alumni do" (Lempert, Chambers, and Adams 2000, 401). The study found, in other words, that minority graduates use the opportunity provided by their legal education to accomplish, at higher rates than their white counterparts, two of the law school's goals. They provide legal service to an underrepresented segment of the population, and they provide community service and leadership to the community as a whole.

While important, these two observations are not the only significant results of this study of almost 30 years of affirmative action at the University of Michigan Law School. If they were, those who already support affirmative-action policies alone might hail this study, but few others would grant it the attention it deserves. The results of the study,

however, are entitled to close scrutiny even among the most ardent critics of affirmative action. The study finds that soft admissions criteria are adequate substitutes for hard test-based policies when the baseline is not first-year grades but the actual career paths taken by law school graduates. The study also finds that on all three measures of success - financial satisfaction, career satisfaction, and public service - conventional admissions practices are limited, short-sighted measures that are in many important ways inferior to the criteria used to select beneficiaries of affirmative action.

The authors found no relationship between admission indexes and income as an attorney.¹³ They found a relationship between high admission indexes and career dissatisfaction.¹⁴ They found a negative correlation between high admission test scores and community service.¹⁵ In other words, those with high admission-index scores tend to contribute less to society.¹⁶ While years since graduation is the most important predictor of doing pro bono work, serving on community boards, or providing leadership more generally, minority status is the most important of the other relevant variables. Simply stated, minority graduates realized the expectations of the admissions' [*570] committee that admitted them as students because the committee actually looked at what they had accomplished in the multiple domains of their life.¹⁷ It turns out that those who were leaders in their community before law school also do more relevant community and public service after they graduate.¹⁸

Some may doubt the significance of this finding that traditional test-centered entry level predictors are failing us. Skeptics of the study might remain resolutely committed to the conventional predictors on the grounds that although such indicators fail to correlate with public service, that is not their "job." Predicting who will do public service or be public spirited is arguably not the role of entry-level admission tests. These aptitude or admissions tests help schools identify the types of people who will succeed in the first year of law school and thus, by implication, in the profession.

There are two problems with this claim. First, the University of Michigan asserts that one of its goals is to identify and train those who will be leaders after graduation. Those who do public service and function as leaders are thus "successful" by the schools' own definition of its mission, and those who do not do public service or function as leaders are not.¹⁹ Second, LSAT and UGPA fail to correlate with other post-law school accomplishments, including level of lawyers' income and career satisfaction (Lempert, Chambers, and Adams 2000, 468). And while the admissions index, composed of LSAT and UGPA, modestly predicts about 12.3% of the variance [*571] in law school grades, even those with high grades throughout law school tend to do less service than those with lower grades.²⁰ Compared to the admission's index, with its emphasis on LSAT scores, law school grades are better predictors of financial earnings after graduation; yet even grades are not good predictors of career satisfaction or contribution to the community. Moreover, the authors conclude, that whatever it is about law school grades that predict higher income does not translate backwards to redeem the LSAT as a predictor of post-graduation success. The qualities of an individual who gets good grades and then earns lots of money are apparently qualities that have little to do with what the admission index tells us about students' likely school performance: "high [law school grades] reflects

something, perhaps an innate love for the law, or a sense of mission, or maybe a capacity for hard work under pressure, which relates to income success in practice. This capacity appears to be largely orthogonal to whatever it is that [undergraduate grades] and LSAT measure" (Lempert, Chambers, and Adams 2000, 481).

Those invested in the conventional admission testocracy²¹ might nevertheless remain unpersuaded because of their skepticism about racial diversity as a goal. Racial diversity among those admitted to elite universities has been offered as a major reason for affirmative action. Criteria to assure a diverse class, it is said, were necessarily criteria at odds with or at least supplemental to those criteria necessary to assure a competent or even superiorly "qualified" class. The assumption, shared by both critics and supporters of affirmative action, was that standardized admission indexes (relying on both undergraduate grades and the LSAT) predict one's capacity to learn and, by implication, practice the law. But in order to achieve a diverse class of students it was necessary to compensate for underperformance among minority candidates on these conventional measures of "worth." Thus, under the rubric of "affirmative action," efforts were undertaken to recruit and [*572] admit minority candidates with less impressive test scores. These candidates were often selected, therefore, based on supplemental criteria such as leadership ability, community service, motivation (as evidenced in their ability to overcome obstacles), and unusual evidence of accomplishment that suggested the ability to follow through on goals.

Part of the skepticism of affirmative action's critics is that while diversity may benefit minority applicants, by giving them access to opportunity they otherwise would not have, it does little for better "qualified" white applicants, whose opportunities to succeed are reduced in kind.²² The study, however, rebuts this claim in two ways. First, it shows that using an alternative measure for admission does not reduce the number of places available to qualified applicants. Rather, it redefines what it means to be truly "qualified" based on the work one does as a lawyer rather than as a law student. It identifies the need to connect our view of qualifications at the admission stage with competence after graduation. It links qualifications at the entry level to values that the school and others proclaim as measures of career success for those who enter the profession. Second, it shows that white students within the law school, especially white women joined by increasing numbers of white men as well, affirm the value of the racial diversity they experienced there.

II. THE SIGNIFICANCE OF THE STUDY FINDINGS

What is most important about the Michigan study is not its defense of affirmative action in the abstract. The study's major contribution is to confirm the value of affirmative action as a better method for identifying qualified lawyers than conventional techniques. Affirmative action's success, in other words, challenges that widely shared, almost religiously inspired assumption that visible rankings of "natural aptitude" are the most appropriate way to assure competence or even quality among those who perform well on the tests. Test scores and comparable measures of either "legal aptitude" or general intelligence may correlate modestly with law school grades. But they do not predict or

correlate with anything else that we claim to value.²³ [*573] Whatever it is that explains the extremely modest relationship between the conventional admissions' index and law school grades fails to explain the career trajectory, the levels of satisfaction or the community service profiles of law school graduates. As the authors conclude, "LSAT scores and UGPA scores, two factors that figure prominently in admissions decisions, correlate with law school grades, but they seem to have no relationship to success after law school, whether success is measured by earned income, career satisfaction, or service contributions"(Lempert, Chambers, and Adams 2000, 401).

The Michigan researchers, who sought to study the long-term consequences of affirmative action protocols, inadvertently discovered something just as important: conventional admissions procedures are predictive failures in two key ways. They fail to predict career success.²⁴ They also fail to identify in advance those who will fulfill the mission of this public law school.²⁵ This discovery, which is especially significant as it applies to a state-subsidized education at a public institution, verifies the ironic impulses of the British sociologist Michael Young, who coined in 1958 the term meritocracy to satirize the rise of a new elite that valorized its own mental aptitude. Young argued that a meritocracy is a set of rules put in place by those with power that leaves existing distributions of privilege intact while convincing both the winners and the losers that they deserve their lot in life.²⁶ That the "winners" of a test-centered meritocracy seem to take their privileged position for granted may then explain why those who should succeed according to conventional predictors do not.²⁷ It may also explain why the whole-person, particularized selection criteria used to admit minority candidates [*574] actually correlate with the career paths and service attributes of minority graduates.²⁸

Michael Young's intuition - that those who succeed in a self-described meritocracy begin to take their success for granted - has significant implications that deserve further investigation. One possibility is to look at the socializing effect of the meritocracy's emphasis on visible, rankable test scores. The study does not actually state that a test-centered approach may socialize successful students to believe they have "earned" their success and have no obligation to give back. Nor does the study suggest the potential socializing effect of the current emphasis on aptitude testing - with its multiple-choice and timed protocol that rewards what at least the coaching industry argues is "quick strategic guessing" as to what answer the test maker is looking for rather than what may be a good or defensible position. One can certainly begin to speculate, however, that multiple-choice, timed testing may train successful candidates not to question authority, not to look for innovative ways to solve problems, not to do sustained research or to engage in team efforts at brainstorming, but instead to try to answer questions quickly and in ways that anticipate the desires or predilections of those asking the questions.

Other possible explanations, that the study does support, at least indirectly, include the fact that the test may select for people who are only good at taking tests and lack other social skills that make people effective lawyers; or those who do well on tests and exams may have qualities of mind and habits of work that ultimately deny them a "full" life (they eliminate all other distractions to the exclusion of family and friends). The study suggests that students who get good grades in law school are more likely to be persons

who do less service because they are likely to prioritize grades over everything else, a consequence of which "is that a person has little time for service" (Lempert, Chambers, and Adams 2000, 489).²⁹

There is yet another explanation as to why the minority students selected by whole-person criteria do not perform as well on high-stakes tests, but do end up succeeding in a way valued by both the institution and [*575] society. As Claude Steele has discovered (1999), a high-stakes testing environment may trigger stereotype threats in minority students that contribute to their underperformance on both the predictive test and law school exams; yet such high-stakes testing does not reproduce the challenges within the environment in which minority lawyers function and do fine. Steele studied high-achieving students at both Michigan and Stanford and found that the threat of stereotyped expectations depressed blacks students' test performance.³⁰ Because of the black students' lower test scores, their professors have lower expectations of their law school performance, which expectations triggered Steele's "stereotype threat." These students, who are high achievers, may withdraw from the law school classroom, instead putting their energy into outside activities that actually present greater opportunities for leadership training than in-class participation.³¹ In part because they do not perform as well on these tests, minority students may look for other ways to channel their energy, including mentoring, community service, and leadership generally.

What an empirical study like this forces us to do is to become more explicit about what, in fact, a school is attempting to measure or predict when it looks at an applicant and what a school is attempting to do when it then educates or trains the applicant who becomes a student.³² Usually we think a school is trying to identify a potentially "successful" applicant, and train a potentially successful lawyer. And if we take "success" to mean anything other than high law school grades, including such things as [*576] contributing to the diversity of the educational experience for all students or providing leadership to the entire community, then the affirmative-action processes of Michigan are the most empirically accountable tools for achieving this. Such processes focus on concrete measures of what applicants have accomplished rather than generic predictors of what candidates are considered capable of doing.³³ They look for qualities within the applicant that may not correlate with excellence in law school as measured simply by grades but that will generate excellence in the profession as measured by career and financial satisfaction as well as public service. It turns out that the affirmative-action practice of recruiting candidates with leadership skills, initiative, guts, and a record of community service is a good predictor that law school graduates with those qualities will actually use them to benefit the larger community. It suggests that the special scrutiny involved in affirmative-action admissions policies offers us a fundamental reason to reexamine not affirmative action but conventional action in admission practices.³⁴ It also offers us an incentive to rethink the legal-education [*577] environment itself and to question whether traditional approaches promote qualities of mind and character that the profession most needs.³⁵

This is not as provocative a claim as it might first sound. It does not mean that race-conscious policies should permeate law school admissions or that law school classrooms

should abandon their emphasis on argument and critical thinking. It does not mean that conventional admissions processes are complete and utter failures.³⁶ It does mean that, compared to holistic affirmative-action processes, so-called objective measures such as undergraduate GPA and LSAT scores that rank order law school applicants fail to measure students' potential as law school graduates. It does mean that admissions practices better serve the mission of legal education in general and the University of Michigan's specific public mission in particular when they focus on concrete measures of what applicants have accomplished or challenges they have overcome rather than generic predictors of what candidates are considered capable of doing.³⁷ It also might mean that conventional criteria fail to predict - and even more may undermine - what the law school purports to value according to the mission of legal education in general³⁸ and the University of Michigan's specific mission in particular.³⁹

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III. NEXT STEPS

Certainly this study will serve the advocates of conventional approaches to affirmative action well in litigation. Indeed, some critics will argue that this study is not to be taken seriously as scholarship because it was produced defensively in the face of a challenge to the law school's policies of affirmative action. Those who read this study defensively, however, will be missing its fundamental potential. The study's long view of the school's program of affirmative action has allowed us to see what the school values or at least claims to value. Thus, it has given all of us important data to reflect on the school's mission and, potentially, to produce a system of admission that better reflects that mission or that at minimum precipitates a broader democratic evaluation of who this great public law school is - and should be - serving.

At minimum, this study should prompt a much larger reevaluation of how Michigan and other universities might realize their mission to educate and train leaders for a multiracial democracy. Certainly, the data confirm that conventional approaches are not working as they should. Several options might thus be pursued to follow up this study. Law schools, especially public institutions like the University of Michigan, could at least be more explicit and more open about their real mission, and express a willingness to abandon those rigid entry-level criteria that do not predict the kinds of behavior among their graduates that the school purports to value.⁴⁰ An even more confirmative response would be for public institutions to supplement their evaluative techniques not only at the admission stage but throughout the three years of law school and in continuing legal education outreach. This requires that more of us join a conversation to help reexamine the "mission" of publicly funded institutions like the University of Michigan. If taxpayers are subsidizing opportunities for students to attend college or law school, what is it that the taxpayers legitimately can expect those students to know how to "do" and be motivated to do well once they attain their degree?⁴¹

[*579] One specific approach might be to use a mix of criteria, with a certain number of students admitted based on their test scores in relation, for example, to the predictive

validity of such scores - that is, no more than 20% of the entering class. The rest of the class would then be admitted based on a whole-person evaluation that seeks to identify "the distance traveled" by the applicant in overcoming obstacles, the leadership and community service record, and the evidence of the applicant's long-term commitment to making a contribution to the community that is ultimately subsidizing his or her tuition. Or, perhaps more as a heuristic than a practical tool, public universities might consider using the tests as a floor, below which no one in recent memory has succeeded in graduating from the institution. Above that test-determined floor, applicants could be chosen by several alternatives, including a lottery,⁴² portfolio-based assessment (Wolf 1989; Meisels 1996/1997), or a more structured and participatory decision-making process (Sturm and Guinier 1996).⁴³ If efficiency and equal opportunity are the [*580] driving values, then the Texas 10% plan has much to recommend it.⁴⁴ Any of these alternatives to the testocracy are by no means easy to implement nor able to deliver without error. Yet, what the Lempert study makes clear is the gross inadequacy of existing conventions and the need at least to experiment with new and more transparent, accountable, and democratic admission practices.

In sum, the major findings of the Lempert et al. study are that LSAT and UGPA are not proxies for merit, that Michigan law students value diversity and regard a diverse legal education as a better education, and that affirmative-action soft processes are better predictors of qualities that the school and profession value. The cumulative effect of these findings is to challenge the conventional faith in the test-driven admissions policy. Thus I join Professor Thomas Russell when he calls for "serious thought about the instrumental role of state law schools as agents of state policy," in order to assist judges, educators, and other policymakers to craft and maintain admissions policies that meet the goals of states seeking to train professionals to meet the diverse challenges of the twenty-first century. This is especially true for state institutions whose mission invariably has a public character.⁴⁵ [*581] Yet as Glenn Loury writes in his introduction to the new edition of *The Shape of the River* (Bowen and Bok forthcoming), "the goals and purposes openly espoused by our leading colleges and universities" are also "public" purposes (his emphasis). Education, whether provided by elite, private schools or taxpayer-subsidized institutions is a "special, deeply political, almost sacred, civic activity."⁴⁶ Admission must be linked to mission. After all (ad)mission is a subset, or should be, of the institution's - and the larger society's - goals.⁴⁷

In addition, the challenge of embedding admissions into the institution's mission should prompt us to reconsider issues of curriculum, learning theory, and the ways to motivate all members of a diverse population to reach their full potential.⁴⁸ Thus, Lempert et al.'s study raises serious questions not only about law school admissions practices but about the practice of legal education more generally.

CONCLUSION

This study suggests that if a school wishes to choose students who will have successful legal careers, true to the spirit of a publicly funded university, affirmative-action-type admission processes are far superior to generic test-based ones. In that context, the study

confirms the opportunities of [*582] affirmative action.⁴⁹ What is so interesting is who the beneficiaries of those expanded opportunities are. It is the white students at the school, who increasingly benefit from a diverse learning environment. And it is the public at large, who gain leaders and community-service-oriented professionals, as well as the students who are considered the more traditional beneficiaries. It is also the legal profession and those committed to legal education, who profess a commitment to law as a public profession.

This study may be useful in the litigation facing the law school, but it is important because it convincingly reminds us of the need for a dynamic and ongoing conversation about the mission and practice of legal education in particular and public institutions more generally. The study confirms the benefits of affirmative action to all Michigan graduates. It tells us that affirmative action critics' much-touted reliance on objective measures of merit have little to recommend them over the life span of a lawyer. After all, it is the life's work of the graduates that is the big test. Thus, rather than ban affirmative action, the law school might do well to expand its practice and to revamp the admissions criteria for all incoming law students.

If the message of this study is heard, affirmative action can become confirmative action, confirming that schools like the University of Michigan Law School should admit and then train everyone as individuals, as citizens, as civic-minded lawyers and as potential public-spirited leaders in a multicultural democracy.

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FOOTNOTES:

¶n1. Some may argue that I am overstating the implications of the study's results. Certainly Michigan's white students also engage in substantial pro bono and other service activities at a level that appears to the authors to go beyond what is formally required. Moreover, the negative correlation between "hard credentials" and service activities may be explained by ethnic status. That is, blacks and Latinos tend to give back more than white students, and the difference in their admission's index does not explain much of the variance. Indeed, in the authors' regression analysis the admissions index variable is not significant after ethnic status is controlled. Finally, the authors are careful to point out that many lawyers give back or feel they are giving back to society in their regular jobs. On the other hand, to the extent the school continues to rely on the so-called hard credentials to admit students, it will in fact be preferring those who are likely to do less service, meaning what lawyers do beyond their regular jobs.

¶n2. I thank Jeannie Suk, HLS 2002, for naming this proposal, which is developed further in an essay for the National Urban League's *State of Black America 2000*, by the same title. The concept named confirmative action seeks to confirm the lessons of affirmative action as a longitudinal measure of what law schools value in their graduates and to confirm a more holistic approach to individual applicants that links admission criteria to this longer-term and "public-spirited" measure of success.

¶n3. This study only reviewed data from a single law school. Some might reasonably argue that it would be necessary to replicate these findings at other similar institutions before launching a major restructuring of law school admissions protocols. On the other hand, *The Shape of the River* by Bowen and Bok studied students at 25 elite schools and found similar evidence that those admitted pursuant to affirmative action protocols were

more likely to become leaders in their communities.

✚n4. "Perhaps the core finding of our study is that Michigan's minority alumni, who enter law school with lower LSAT scores and UGPAs than its white alumni ... appear highly successful - fully as successful as Michigan's white alumni - when success is measured by self-reported career satisfaction or contributions to the community. Controlling for gender and career length, they are also as successful when success is measured by income" (Lempert, Chambers, Adams 2000, 496). While the study does not explore all the criteria employed in Michigan's affirmative action program, race, it appears, may not have been the only or necessarily the most significant factor in the process. Apparently, each applicant was evaluated as a whole person based on letters of recommendation, and evidence of student motivation, as well as some reliance on minimum test scores and grades (from conversation with Richard Lempert, 22 December 1999, in which he carefully chronicled the history of admissions during his tenure; my summary admittedly merges several distinct periods in this history).

Although many variables may have affected each admission decision, one relevant factor would seem to have been leadership potential. On the other hand, the fact that minority graduates demonstrate community leadership may reflect less on demonstrated leadership skills before admission and more on the opportunities for leadership they had while in law school. See notes 17 and 31 below. Alternatively, race itself may have served as a proxy for leadership. See discussion at note 18 below.

✚n5. See David Wilkins's comment (2000) in this issue, in which he emphasizes the importance of the "big wheels" of the Michigan Law School, what others call "branding," that continue to "keep on turning" or open doors for graduates, both white and black.

✚n6. See, e.g., Sturm and Guinier 1996, describing ways in which SAT and LSAT tests correlate as much with parental income as first-year grades. See also Lemann 1999, describing theocracy of testing as a religion in which mental aptitude replaced inherited privilege as the means for identifying the new elite; testing is as much faith based as scientific, since the validity measures are much weaker than most people realize. Test-based admission criteria are certainly bureaucratically efficient, but given their relatively modest ability to predict what we claim to value, Lemann suggests we have promoted efficiency, or pseudo-scientific rationality, to the detriment of other important ideals and goals.

✚n7. LSAT "explains" 14% of performance, for example, at the University of Pennsylvania Law School in the first year. See Guinier, Fine, and Balin 1997. This is about average for law schools. See Selmi (1995, 1264)(correlation coefficients for the LSAT, which is intended to predict first-year law school grades, tend to hover around .35; correlation coefficient of .3 means that the test explains 9% of the variation in predicted performance). Or as Linda Wightman stated when she was at the LSAC, nationwide the LSAT predicts first-year law school grades 9% better than random.

✚n8. The Lempert study does find a modest relationship between LSAT and grades over

the three years in law school. In our study at the University of Pennsylvania, we found a similarly modest relationship over the three years of law school. However, most efforts attempt to validate the LSAT primarily on its relationship to first-year grades.

¶9. Shipler 1995. Harvard, like the University of Michigan Law School study here, measured success in terms of financial and career satisfaction and contribution to the community.

¶10. Most Michigan graduates now agree that diversity of opinion, background, perspective and race, ethnicity or gender contributed to their legal education (Lempert, Chambers, and Adams 2000, 494 and table 5A).

¶11. Prior to the 1990s it seemed as if only students of color valued diversity. But when the authors controlled for gender they discovered that the white women at Michigan looked at diversity in ways similar to their colleagues of color. The white men were the only cohort that was indifferent to the value of diversity, and even this cohort changed its views beginning in 1990 (Lempert, Chambers, Adams 2000, 414).

¶12. The study by Bowen and Bok (1998) was similarly groundbreaking in its effort to study affirmative action using longitudinal measures.

¶13. "In no decade is there a statistically significant relationship between the admissions index and ... the log of income" (Lempert, Chambers, Adams 2000, 468).

¶14. There is, in fact, no statistically significant relationship between the admissions index (LSAT and UGPA) and career satisfaction. However, for the 1980-89 cohort, "there is a statistically significant negative relationship between UGPA and career satisfaction" (Lempert, Chambers, Adams 2000, 468; emphasis in original).

¶15. "In all decades, those with higher index scores tend to make fewer social contributions ... than those with lower index scores, and this negative relationship is statistically significant among graduates in the 1970-79 and 1990-96 cohorts" (Lempert, Chambers, Adams 2000, 468-69).

¶16. They mentor fewer young attorneys, sit on fewer community boards, and do less pro bono work. This negative relationship is statistically significant among the 1970-79 and 1990-96 cohorts. If one compares the entry-level LSAT scores of Michigan graduates with their "service" index, there is a negative relationship that is statistically significant among 1980s graduates as well (Lempert, Chambers, Adams 2000, 469).

¶17. According to Lempert, the school's affirmative-action efforts were initially based on the assumption that if they put people in an environment like the University of Michigan Law School, they would flourish. They were looking to get "the best people" and picked students they thought could do the work. My impression from the study, and from my own experiences, is that the admissions process for minorities considered the "whole person" in deciding whom to admit among competing, qualified applicants. To

some extent the school most certainly relied on the test-based credentials for minority applicants; yet again, if as was true at other institutions, they probably used them as a cut-off floor rather than an acutely sensitive ranking system. Early on, as was true at many comparable institutions, minority students may have also played a role in the recruiting and selection process, and to the extent they tried to find student leaders, that may have influenced the admission criteria.

The actual procedures employed should certainly be further investigated, since, those criteria worked to admit students who ultimately became leaders within their profession. In particular, the criteria used to admit the first generation of black students are worth studying since that early generation gave back even more to the community than those that followed. This may not simply be a function of the selection criteria but also of the experience the first cohort of black students had in the law school itself, where they had numerous occasions - outside the classroom - to develop leadership skills.

¶18. It is also possible that the relevant variable here is not what students did before law school, or even during law school, but their "race." Race may be functioning here as a proxy for commitment to others, to public service, and to giving back. See discussion in Guinier 2000 (discussing idea that those who identify as part of a community are more likely to define their own goals in community-oriented ways). See also note 17, above, and accompanying text.

¶19. This is also consistent with the public character of the school as an institution of higher education in general, as an institution training graduates to enter a "public profession," and as a public, state-subsidized institution. See discussion below at notes 40, 41, and 45-47 and accompanying text.

¶20. In "no decade does [the admission's index explain more than 12.3% of the variance in law school grades" (Lempert, Chambers, Adams 2000, 465).

¶21. I use the term testocracy to highlight the ways in which selection policies are heavily dependent on standardized tests. See Sturm and Guinier (1996, 968): "We argue that the 'meritocracy' is neither fair nor democratic, neither genuinely predictive nor functionally meritocratic... Instead, a 'testocracy' masquerades as a meritocracy. By testocracy we refer to test-centered efforts to score applicants, rank them comparatively, and then predict their future performance."

In fact, the 'testocracy' does not provide a fair playing field for candidates. First many standardized tests are substantively unfair because they assume that there is a single, uniform way to complete the job, and then tests applicants solely upon criteria consistent with this uniform style. In this way, the testing process entrenches the status-quo mode of production, excluding those individuals who may perform the job just as effectively through different approaches. Second, conventional selection methods advantage candidates from higher socioeconomic backgrounds and disproportionately screen out

women and people of color, as well as those in lower-income brackets. When combined with other unstructured screening practices ... standardized testing creates an arbitrary barrier for many otherwise-qualified candidates (1996, 982).

¶n22. Of course, many other objections have been raised to the use of race as a factor in high-stakes admissions. I do not purport to canvas all the criticisms of affirmative action, nor do I offer unqualified support for affirmative action as it has been practiced at the University of Michigan or elsewhere. My goal here is to suggest that affirmative action cannot be attacked or defended in the abstract but should be viewed in comparison to the strengths, and weaknesses, of conventional criteria.

¶n23. The operative word is "claim" to value. They do tend to correlate with parental income (i.e., with the applicant's socioeconomic status and wealth). But few seem to offer that correlation as a public virtue in a formal sense. Those who defend the current emphasis on aptitude testing do so on grounds of equal opportunity, not preferential treatment for the rich. While they don't justify the tests as preferences, they do concede that those who are already privileged are in a better position to take advantage of the opportunities to learn the law that the University of Michigan offers. This argument often contends that upper-middle-class applicants enjoy better preparation, better study habits, and are thus better students. The argument then finds its confirmation in the first-year grades of those who have been selected. But one alternative way of reading the same data, an alternative that this study reinforces, is to conclude that those who are less well prepared take longer to catch up, but when they do, they actually surpass the already privileged along the axis of things we affirmatively value.

¶n24. As Tom Russell writes in his companion piece in this volume: "The gap that the researchers did discover is more intriguing. Lempert et al. found that the numerical criteria for admission are largely irrelevant to career success."

¶n25. The law school's mission statement tracks that of the university itself. See note 39 below.

¶n26. Jerome Karabel, professor of sociology at University of California at Berkeley (1999), described this phenomenon as Michael Young's contribution to "meritocracy's dirty little secret."

¶n27. Michael Young's satire (1958) argues that a test-centered ranking system would encourage the sense of "desert" among those who excelled, and would possibly discourage them, as winners, from doing anything to question their success. On the other hand, Henry Chauncey and others whose commitment to testing for mental aptitude helped propel the SAT and LSAT into the credentializing machines they have become believed that testing people for mental aptitude would not only allow the selection of those who are most competent. It would also allow institutions of higher learning to recruit a leadership class who would discharge their public service responsibilities with renewed vigor. See, Lemann 1999. As this study demonstrates, the association between leadership, service and mental aptitude testing was perhaps the biggest flaw in the

Chauncy program.

¶n28. The study does not explicitly test the effectiveness of whole-person admissions criteria. Rather the authors hypothesize that a plausible reason why they fail to get a correlation between the admissions index and success measures is that in accordance with Michigan's official admission policy, softer measures more indicative of the whole person were considered. One obvious next step, therefore, is for these authors or other scholars to get the resources needed to code the soft data from the admissions files for the alumni in the study in order to provide data that bear directly on the whole-person issue.

¶n29. The study also suggests that the dedication necessary to achieve a high LSGPA may result in long-term career dissatisfaction, because a person with such dedication is likely not good at balancing "separate spheres" of satisfaction: "Those likely to have concentrated most on getting good grades while in law school may be more likely than others to dedicate themselves to their jobs and to narrowly defined job responsibilities. The result is that they tend to earn more than others, but they also tend to do less service and to feel less satisfied because their jobs are so consuming" (Lempert, Chambers, Adams 2000, 489-90).

¶n30. Steele found that the underperformance of black students "appears to be rooted less in self-doubt than in social mistrust" (1999, 44).

¶n31. Although this study does not support that conclusion directly, the first generation of black students, whose test scores were further below those of their white counterparts than succeeding cohorts, were apparently the most likely to become leaders after graduation. Of course, there are many potential explanations for this phenomenon, beyond just the intriguing conclusion that those with the weakest test scores demonstrate the greatest leadership. Indeed their race or ethnic background, and the sense of obligation to others from their community, may help explain this relationship too. See above, notes 17, 18, and accompanying text (minority status is a key variable in predicting community leadership after graduation).

¶n32. The formal school policy states the goal of graduating lawyers who will be esteemed practitioners as well as leaders and "selfless contributors" to the public interest. Tom Russell points out in his comment in this volume, "Lempert and his colleagues offer no evidence as to whether this formal expression of policy is actually meaningful to the Michigan faculty." Russell cannot tell "whether an associate dean wrote the policy and the faculty approved it without discussion or whether the faculty debated and thoughtfully considered the policy." Were the first option true, it suggests the need, as I conclude here, for a larger and much more "transparent" public discussion about the explicit mission and goals of a public law school. Yet according to one of the study's authors, the school's admissions policy was debated in and adopted by the whole faculty, with the policy statement being written by a committee that he, by coincidence, chaired on the two occasions it was substantially revised (phone conversation with Richard Lempert, 22 December 1999). The fact remains, however, that the whole faculty adopted the policy while still pursuing hard credential-based admissions standards for most

entering students. Thus, my point still holds that (1) what the school claims to value in its graduates and what it selects for in its students are not the same things, and (2) we need a much more explicit, sustained and transparent effort to link admissions protocols to mission.

¶n33. Indeed, many educational theorists argue that assessment processes that focus on actual student accomplishments are superior means of evaluating student capabilities and potential, particularly in comparison to decontextualized standardized tests. See, e.g., Wallach 1985. Wallach argues that "Given the low association between intelligence test scores and actual gifted achievements, assessing gifted attainments, for example, by judging actual work samples, deserves more emphasis in selection decisions" (1985, 116). A substantial portion of the educational literature is dedicated to attempts to develop such assessment techniques. See, for example, Meisels 1996/1997.

¶n34. Again, the recognition that decontextualized, standardized tests are not ideal assessment techniques has long been a staple of educational theory. Especially in the context of early childhood education, in which the subject of assessment (the child) is envisioned as unformed and with a future undetermined, overreliance on standardized testing has been harshly condemned. See, for example, Vito Perrone 1991. The Association of Childhood Education International takes the position that standardized testing is inappropriate, and argues that "teachers and parents should oppose using test results to make any important judgment about a child" (1991, 141).

It may also be appropriate to reconsider the assumption that only those who are already smart can learn, which assumption permeates conventional admission criteria. See, for example, Kristof (1997), who writes about Japanese elementary schools and how they build a sense of community and responsibility, in part because they work from the premise that all children can learn and that each child has some strengths that should be developed to benefit both the child and the larger society. Kristof, who was bureau chief for the New York Times, observed "a basic difference between America and Asia in perspectives about education: in opinion polls, Asians say that academic distinction comes primarily from hard work, while Americans tend to credit innate intelligence. As a result, Japanese parents push their children (and Japanese children push themselves) because they think it will make a fundamental difference" (1997, 45). See also Kristof 1998. Here, he describes his American son's experience with Japanese first grade as more fun than American/international school. For Americans, who value individuality and use tests to differentiate those who are "smart" and therefore capable of learning, standards and rigor are necessary to create hierarchy, even in early grades. In Japan, the assumption is that everyone can learn if they work hard, and thus the challenge is to create incentives for everyone to participate in the learning project. For example, "all the children learn to play the piano." Even the math teaching used story problems and other creative methods to drive home the principles of what they were learning.

¶n35. Law practice is changing. Unless we have the freedom to experiment, what we are teaching in law school is increasingly out of sync with what is going on in the practice. See Wilkins 2000; see also Sturm 1997.

¶36. LSAT and UGPA scores do in fact correlate modestly with high law school grades, and almost without exception, Michigan graduates who were admitted pursuant to such indexes are successful, measured with respect to society at large. On the other hand, whether a particular way of admitting students is a failure turns on two things: (a) the baseline against which it is compared and the goal it is trying to achieve, and (b) the potential of other alternative methods of admission. Thus, if all that Michigan Law School is attempting to do is admit students who will get good grades in law school, one could argue that the conventional indexes are modestly successful. Tom Russell makes a similar point in his comment (2000).

¶37. See, e.g., Rhodes 1999. Rhodes, former president of Cornell University, calls for admissions decisions on an assessment of the student as a whole person, with honest regard for race and ethnicity as two attributes among many others - scholastic promise, analytical skills, comprehension, test scores, grades, essay quality, creativity, artistic and musical ability, athletic skills, community service, leadership ability, motivation, success in dealing with adversity, teacher assessment, career objectives, geographic origin, economic background, interview performance, and more. One by one, person by person, Rhodes says, is the basis for educational success. "It is also the basis for a free society: we should not lightly abandon it for a system which, however swift, however simple, not only judges individuals by numbers, but uses numbers as ambiguous as those of class standing. Even in an age bedazzled by rankings, surely we can do better than that" (1999, A23). This criticism applies forcefully to the increasing tendency, even of elite institutions like the University of Michigan, to rely on rank ordering of applicants based on "the numbers."

¶38. See, e.g., ABA 1992, 123-221 (better known as the MacCrate report). This was the report of an ABA task force on law schools and the legal profession discusses the professional skills and public values needed in the legal profession and how they are developed.

¶39. Indeed the mission statement of the university says this: The University of Michigan's mission is "Preeminence in creating, communicating, preserving and applying knowledge, art, and academic values and in developing leaders and citizens who will challenge the present and enrich the future" (Kornhaber 1999).

¶40. Given the role of lawyers in our society, it would seem that private law schools are equally justified and perhaps should be compelled to consider similar factors. It would certainly be anomalous if a court were to hold that while public law schools could practice "confirmative action" for the reasons set forth here, private law schools would be violating the Civil Rights Act if they did the same thing. As a profession, lawyers are officers of the court who are publicly regulated. It would seem, therefore, that all law schools should attend to soft variables that seem to produce the kinds of service-oriented graduates the society needs and the profession claims to value. Of course, public law schools enjoy an additional and special reason why they should not be captured by credentials that seem to prefer those less likely to provide service beyond the work they

do in their regular job.

✚n41. Here I am optimistic about what such a conversation might produce, based in part on thought experiments like the one Tom Russell (2000) reports at the University of Texas Law School. Russell's musing was prompted by his dismay at the dismantling of affirmative action there and the implications for the law school as an agent of the state and an instrument of state policy. According to Russell, white residents of the state of Texas now enjoy a "preference" in admissions and a significant, close to \$ 10,000, tuition subsidy. Russell concludes that a "definitional project" to address the mission of state law schools is imperative. "Lempert et al. focus on the goals of the Michigan faculty; they might also broaden their inquiry by the faculty goals as expressions of state policy... Such a study would require that state law schools, state universities, and legislators first define just what the goals of state universities ought to be... With the goals of state-sponsored professional training in mind, educators and legislators can work together to determine whether present patterns of admissions will best meet these goals and serve the needs of states in the twenty-first century. Perhaps educators and politicians will agree that the best practice is to subsidize the educations of those who have the highest test scores. I suspect, though, that a thoughtful inquiry will yield a more diverse result" (2000, 518).

✚n42. Sturm and Guinier (1996, 1018, nn.271, 274, and accompanying text) describe a proposal to use a lottery above an admission-index floor to admit students to a magnet school in San Francisco so that random selection above a baseline of qualification becomes the principle for distributing high-stakes opportunity. A lottery is a useful heuristic because it exposes the arbitrary nature of decision making when high-stakes opportunity is such a scarce resource. The challenge is to distribute such an opportunity, especially when considered a public resource, fairly and legitimately. A lottery may push the "losers" to challenge the scarcity of the resources in the first place, since they have been excluded based on luck not "merit." Thus, the lottery challenges the meritocracy's tendency, at least in the ironic sense in which Michael Young devised the term, to convince the winners and the losers that they deserve their lot in life.

✚n43. When I was on the admissions committee in the early 1990s at the University of Pennsylvania Law School, the process of admitting people who had some "special" quality to be considered - which included being a poor white chicken farmer from Alabama - was openly deliberative. The committee included students who knew about the specific localities in which many of the applicants resided. The applications were redacted to eliminate personal identifying information but were otherwise available to the entire committee. The letters of recommendation were read and considered (by contrast to the 50% of the class who were admitted solely on a mathematical equation based on their LSAT scores, their college rank, and the "quality" of their college as determined by the median LSAT score of its graduating class). In this process, the committee of faculty, students, and admissions personnel had a sense we were admitting a "class" of students, not just random individuals. Thus, we might give weight to some factors over others, depending on the "needs" of the institution to have racial and demographic diversity, but also on our commitment to fulfilling the needs of the profession to serve the entire public and to train private and public problem solvers who would become the next generation of

leaders. Thus, not all students were admitted primarily because of their academic talents. We considered those who might be better oral advocates and eventual litigators. Others were already accomplished negotiators or future advocates of alternative dispute resolution practices. None of these students was admitted if we felt they were unqualified to do the work demanded of them at the institution. As far as I am aware, all of them subsequently graduated and went on to satisfying careers.

¶44. Certainly the Texas 10% plan, in which all those in the top 10% of their high school graduating class are automatically eligible for admission to the two flagship public universities is efficient and, according to the most recent data, quite successful in short-term measures. It has recruited as many Mexican American and black students as under the affirmative action program outlawed in the Hopwood case, and the first freshman class that entered under the 10% plan has apparently performed better than its predecessor classes with a higher GPA after one year. The great virtue of what David Wilkins (2000) calls "visible, rankable scoring" mechanisms is their purported efficiency. They relieve faculty and others from the difficult choices involved in the exercise of discretion. On the other hand, their promise of efficiency, at least based on the Lempert study, is both short term and misleading. They offer opportunity to many who fail to take full advantage of that opportunity over the course of their career in ways that deny the citizens, the taxpayers, and the profession legitimate expectations of service and contributions, based on the institution's own goals as well as those of the profession itself. Thus in the long run one could use the Lempert study to argue that "visible rankable" sorting mechanisms are inefficient and arbitrary. This is an important conclusion because it potentially makes room for other admission practices that may be more cumbersome to administer and less immediately efficient. Alternatively, this argument suggests the benefit of a lottery, since it is both efficient and arbitrary without being misleading.

¶45. See Kornhaber 1999, 10-11: "The mission of ... selective public universities share three entwined elements that are common to nearly all other institutions of higher education: These institutions are to provide instruction to build students' knowledge in various disciplines. They are also formed to conduct research to advance the boundaries of existing knowledge. The third component, service, originated with American public higher education and may be its key contribution to all universities public and private, here and abroad. In contrast to the aloof medieval institutions of Europe and the colonies, which trained future clerics and oligarchs, American public colleges and universities were specifically constituted to serve the nation's democracy and its economy. They have been established to provide the society with knowledge and technical expertise. Equally as important, they are intended to develop leaders and to hone the critical perspectives needed by citizens in a participatory democracy" (citations omitted).

¶46. Loury applies his argument to private institutions, especially "given their considerable influence on national life and culture."

¶47. Here I refer to issues of democracy and the ways in which public education should be evaluated based on its transparency (the visibility of its public goals), its accountability (the degree to which its practices are accountable to its public character,

both in terms of its goals and the citizens who promote and subsidize the institution), and its ability to deliver on its promise of equality (whether it distributes a public resource and opportunity in a genuinely democratic fashion). The public character of these institutions implicates issues of citizenship as well as the democratic values of public education itself. I develop this argument elsewhere (Guinier 1997/98; 2000).

✚n48. The educational literature on learning theory is vast. It suggests that within the classroom, the choice of task and reward structures can have either positive or negative academic and social outcomes for different students. See, for example, the work of Howard Gardner and Mindy Kornhaber, which suggests that a cooperative approach works best for certain learners: those for whom personal relationships can support their ownership of content (Gardner 1991; Kornhaber and Gardner 1993), students of color, and others who need to develop the ability to ask questions when they don't know the answer and who best learn conceptually challenging material in intellectual exchange with peers in informal settings. For evidence of this from the example of mathematics, see Steele 1999 and Singham 1998 (describing work of Professor Uri Treisman). On the other hand, a cooperative approach may be dysfunctional when it is not sufficiently structured. The type of pedagogical structure may yield different outcomes depending on whether the goal is to develop skills, master information, retain and be able to apply information, or promote creativity. See, for example, the work of Teresa Amabile (1996).

✚n49. This is certainly true for the University of Michigan Law School, and it seems quite likely to be so at least in other elite schools, and possibly more generally. We, of course, await further study to understand better the generalizability of Lempert, Chambers, and Adams's findings. Even without such additional research, however, the study points to likely benefits to society at large, to the profession, and to underrepresented communities when admissions processes are linked to what the institution values, including a commitment to public service in its graduates and to a diverse profession that can serve the legal needs of the public at large.