

# UNSINKABLE? THE COLLEGE ADMISSIONS SCAM WAS THE TIP OF THE ICEBERG

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## Introduction

This Symposium is about the creation, preservation, and destruction of hierarchies in legal education and practice. There are, of course, way too many non-meritocratic hierarchies cemented into place in both the legal academy and in the legal workplace, and their dismantling has proven nearly impossible. This is because most hierarchies, once in place, sustain themselves through replication fueled by the privilege and self-interest of those who benefit from them. It is an honor to write for this Symposium; being a Freedman Fellow was nothing short of life-changing for me personally. There is an immense benefit to questioning, and where appropriate, disrupting hierarchies, especially in the dynamic field of education. However, in order to begin to question hierarchies, there must be an exposition.

While I wholeheartedly support shining a light on a number of illegitimate hierarchies that have calcified over the years and benefit neither students nor clients, I have decided to write this piece about a less obvious hierarchy. This hierarchy, with its near-invisible, barely perceptible framework, has permeated and pervaded legal education, and thus legal practice; it is the hierarchy that privileges audacity, dishonesty, and ruthlessness via ruthlessness in the admissions process. Indeed, those perennially poised to, through embellishment, omission, or outright lies, take advantage of any “honor system” under which they are governed or evaluated, walk among other students through the halls of our chosen schools. They then accompany them into practice, viewed as officers of the court, vetted by the profession, and trusted by clients.

Though accuracy and honesty are traits that are essential for those contemplated by the legal profession to enter it, the law school application and admissions process is rife with opportunities for prospective students to deploy everything from their wealth to their creativity to alter their perception in the eyes of those charged with admitting them. While it would be nearly impossible to craft a system that would capture all of these exploitations and siphon out those would-be lawyers who are less than honest, there are some modest steps that can be taken to chill the willingness to misrepresent oneself and deter at least some of those tempted to engage in dishonesty.

It is important to note the significance of curbing this problem, even if just slightly. Law schools have limited opportunities to admit students, and most turn down qualified students each year.<sup>1</sup> When a student opts to take a spot in a law school’s class, there is one less spot remaining for another able student, and the qualitative differences between prospective students’ applications can often be quite slight.<sup>2</sup> Moreover, there is a demonstrable correlation between the culture of privilege, entitlement, and exploitation that engenders this dishonesty on applications, not to mention the wealth so often put toward advancing the dishonesty, and race, sex, and other protected class memberships whose underrepresentation in the profession have long plagued it.<sup>3</sup>

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<sup>1</sup> See Shawn P. O’Connor, *3 Common Reasons Law School Applications Get Rejected*, U.S. NEWS (Apr. 21, 2014), <https://www.usnews.com/education/blogs/law-admissions-lowdown/2014/04/21/3-common-reasons-law-school-applications-get-rejected>.

<sup>2</sup> See *id.*

<sup>3</sup> Anonymous Former Admissions Counselor, *I Worked in College Admissions and Had to Admit a Bunch of Mediocre Rich Kids*, BUZZFEED NEWS (Mar. 12, 2019, 8:05 PM),

This means that as dishonesty is permitted to be transformed into privilege, the already extant hierarchies entrenched in racism and sexism, among other things, are proliferated, and protected class disparities are magnified.<sup>4</sup>

The recent college admissions scandal that rocked Hollywood (and U.S.C., among others) and dominated the headlines<sup>5</sup> has all the makings of a splashy, made-for-TV movie. But was it the tip of an enormous iceberg that has permeated legal education and practice, creating hierarchies that privilege not only the well-to-do, but the ruthless and the unscrupulous? Just how widespread is ambition that swallows morality and corruption, and the complacency that enables it all? How is the academic climate and the legal profession impacted by this silent, all-but-invisible hierarchy? Since law school attendance, possibly even more than grades or courses taken, is often used in the profession and by the public for social sorting, these effects go way beyond graduation.

While it is difficult to capture, with any real precision, the true frequency and the depth of dishonesty in the admissions process (although one could imagine creating a random sample of admitted students and having every material fact on their applications verified in an attempt to quantify how widespread this embellishment may be), it is possible to thoughtfully examine the current procedure for applying to law school, as well as what is known about how schools arrive at determinations as to who will fill the seats in their classes. It is possible to identify opportunities for those who have some combination of more resources and less honesty to exploit holes in the system where no checks or follow-up exists. And it is possible to posit some proposals for shoring up some loopholes, creating more accountability, and deterring acts of dishonesty that could cost an honest student his or her seat in a law school class—or even in the profession.

This piece will attempt to do all of the above, addressing opportunities for corruption in the law school application and admissions process, academic and professional dishonesty, and social promotion throughout the law school application process, law school itself, and bar admission. It will discuss the ways in which these opportunities have been enabled to take root, and it will attempt to make some recommendations to the Law School Admissions Council (“LSAC”) administrators, law schools, and state bars to grapple with what might be an enormous, unseen problem.

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<https://www.buzzfeednews.com/article/anonymousadmissions/college-admissions-scam-felicity-huffman-lori-loughlin-ivy>.

<sup>4</sup> Kylie Thomas & Tiffane Cochran, *Aba Data Reveals Minority Students Are Disproportionately Represented in Attrition Figures*, ACCESS LEX INST. (Sept. 18, 2018), <https://www.accesslex.org/xblog/aba-data-reveals-minority-students-are-disproportionately-represented-in-attrition-figures>.

<sup>5</sup> Jennifer Medina, Katie Benner & Kate Taylor, *Actresses, Business Leaders and Other Wealthy Parents Charged in U.S. College Entry Fraud*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/college-admissions-cheating-scandal.html>; Jacob & Kelly McLaughlin, *Here’s the Full List of People Charged in the College Admissions Cheating Scandal, and Who Had Pleaded Guilty So Far*, INSIDER (Dec. 9, 2019, 3:52 PM), <https://www.insider.com/college-admissions-cheating-scandal-full-list-people-charged-2019-3>; Madison Park & Faith Karimi, *Here’s What Universities Are Saying About the College Admissions Scandal*, CNN (Apr. 25, 2019, 3:01 PM), <https://www.cnn.com/2019/03/14/us/college-admission-cheating-universities-react/index.html>.

## The College Admissions Scandal (“Operation Varsity Blues”)

In March of 2019, news broke of a federal criminal investigation into a conspiracy to sway college admissions decisions at multiple prestigious colleges and universities.<sup>6</sup> Nicknamed “Operation Varsity Blues,” the investigation would result in over fifty people being indicted<sup>7</sup> on charges that included felony conspiracy to commit honest services mail fraud, money laundering, and mail fraud.<sup>8</sup>

The indicted included famous individuals in the worlds of entertainment, law, and finance.<sup>9</sup> They included thirty-three parents of prospective college students/applicants who stood accused of making payments that totaled in excess of twenty five million dollars to William Rick Singer,<sup>10</sup> known widely as a “fixer” who could broker arrangements to do everything from helping students cheat on college entrance exams to artificially inflate test scores, to helping students pose as athletic recruits to curry favor with college admissions committees. Of the thirty-three parents, fourteen have agreed to plead guilty as of the time of the writing of this piece, while another nineteen seem bent on fighting the charges.<sup>11</sup> The schools implicated include Yale University, Stanford University, the University of San Diego, the University of Texas at Austin, Wake Forest University, Georgetown University, and UCLA.<sup>12</sup>

Worse still, Singer was alleged to have masked the bribery with a phony charitable organization, to provide cover to his clients. The investigation concluded that these sums had been paid to Singer, who controlled the two firms central to his scheme, the Edge College & Career Network and the Key Worldwide Foundation from about 2011-2018. Singer, it was alleged, used these funds to do everything from hiring others to facilitate the cheating to bribing college admissions officials. He would later reveal that he helped to broker admissions aid for children in more than 750 families.

On March 12, 2019, Singer pled guilty to charges of racketeering conspiracy, money laundering conspiracy, conspiracy to defraud the United States, and obstruction of justice.<sup>13</sup> He now faces up to 65 years of imprisonment and a fine of 1.25 million dollars.<sup>14</sup> He then proceeded

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<sup>6</sup> Moriah Balingit, Susan Svruiga, & Emily Yahr, *The People Charged in College Admissions Scandal Operation Varsity Blues*, WASHINGTON POST (Mar. 13, 2019, 4:00 PM), [https://www.washingtonpost.com/local/education/actors-designers-distillery-owners-here-are-some-of-those-charged-in-the-college-admissions-scheme/2019/03/12/3c2f5316-4500-11e9-8aab-95b8d80a1e4f\\_story.html](https://www.washingtonpost.com/local/education/actors-designers-distillery-owners-here-are-some-of-those-charged-in-the-college-admissions-scheme/2019/03/12/3c2f5316-4500-11e9-8aab-95b8d80a1e4f_story.html) [hereinafter *People Charged in College Admissions Scandal*].

<sup>7</sup> *Id.*

<sup>8</sup> U.S. Attorney’s Office District of Massachusetts, *Additional Charges Filed Against Parents in College Admissions Case*, DEP’T OF JUSTICE (Oct. 22, 2019), <https://www.justice.gov/usao-ma/pr/additional-charges-filed-against-parents-college-admissions-case>.

<sup>9</sup> *People Charged in College Admissions Scandal*, *supra* note 5.

<sup>10</sup> Douglas Belkin & Jennifer Levitz, *The Man Behind the Alleged \$25 Million College-Admissions Cheating Scandal*, WALL STREET J. (Mar. 12, 2019, 4:31 PM), <https://www.wsj.com/articles/the-man-behind-the-alleged-25-million-college-admissions-cheating-scandal-11552422678>.

<sup>11</sup> Bill Hutchinson, *Actress Felicity Huffman Among 14 to Plead Guilty in College Admissions Scandal*, ABC NEWS (Apr. 8 2019, 4:25 PM), <https://abcnews.go.com/US/14-defendants-including-felicity-huffman-plead-guilty-college/story?id=62247364>.

<sup>12</sup> *Id.*

<sup>13</sup> Kate Taylor & Patrick J. Lyons, *Williams Singer, the Man in the Middle of the College Bribery Scandal*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/william-singer-admissions-scandal.html>.

<sup>14</sup> Meg Wagner, Brian Ries, & Veronica Rocha, *Actresses Charged in College Admissions Cheating Scheme*, CNN (Mar. 14, 2019, 5:43 AM), [https://www.cnn.com/us/live-news/college-admissions-cheating-felicity-huffman-lori-loughlin/h\\_fc991fc0a651a371ea863edc7b253c1f?utm=newsbreak](https://www.cnn.com/us/live-news/college-admissions-cheating-felicity-huffman-lori-loughlin/h_fc991fc0a651a371ea863edc7b253c1f?utm=newsbreak).

to cooperate with the FBI as law enforcement set about procuring the evidence it would need against his alleged co-conspirators. The list of alleged co-conspirators proved to be a veritable who's-who of prominent American business and entertainment figures. They included famous actresses Felicity Huffman and Lori Loughlin, as well as Loughlin's designer husband, Mossimo Giannulli. Giannulli's daughters became infamous in the wake of the scandal's breaking for their (successful) attempts to procure entrance to the University of Southern California by posing as rowing recruits for the crew team, even going so far as to take photos of themselves on rowing machines for submission to the institution. Specifically, one of the daughters, Olivia Jade Giannulli, who had been a YouTube influencer and personality, faced a very public backlash, shunning, and exile, once the word of what she was accused of got out.<sup>15</sup> Both daughters, one of whom was already at the University of Southern California and Olivia Jade, who had just been admitted to the school, felt forced to withdraw in the wake of the scandal.<sup>16</sup> Honest services mail fraud and mail fraud carry a maximum term of 20 years in prison, supervised release of three years, and a \$250,000 fine.<sup>17</sup> The more serious charge of money laundering carries a maximum sentence of 20 years in prison, supervised release of three years, and a \$500,000 fine.<sup>18</sup> At the time of the writing of this piece, some parents, like Felicity Huffman, have pled guilty to the charges they were facing (Huffman was sentenced to fourteen days in prison and ordered to pay a \$30,000 fine and serve 250 hours of community service),<sup>19</sup> while others, like Loughlin, Giannulli, and others, had pled not guilty and were still awaiting word of their ultimate disposition, even as the charges were ratcheted up to include money laundering in certain cases like theirs.<sup>20</sup>

### **The Operation Varsity Blues Scandal Conceptualized as Theft by Deceit**

What is particularly striking about the scandal, once you get past the salacious headlines and the fact that it is playing out on such a public stage with some very famous people about to face these most serious allegations, is how much of an insight it yields into exactly what has been going on in powerful wealthy, and elite circles, and how little has been known about it for so long. Perhaps the single most intriguing thing about the scandal is how very *unlikely* it is that it *isn't* the tip of a very large iceberg. As one scholar put it, "Evasion of rules by the wealthy highlight differential experiences of those with plenty and those with less."<sup>21</sup>

We have long known about wealthy magnates' large donations to educational institutions, and it is squarely within the public zeitgeist that along with the naming rights to buildings and chaired professorships, these donations often net their donors admission to these schools for their

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<sup>15</sup> Josh Duboff, *The Perfect Face of the College-Admissions Scandal*, VANITY FAIR (Mar. 22, 2019), <https://www.vanityfair.com/style/2019/03/olivia-jade-college-admissions-scandal-vlogger-influencer-lori-loughlin>.

<sup>16</sup> Kelly McLaughlin, *Olivia Jade Dropped Out of USC and Left Her Thriving YouTube Career Amid the College Admissions Scandal*, INSIDER (Dec. 2, 2019, 10:37 AM), <https://www.insider.com/olivia-jade-giannulli-no-longer-attending-usc-year-later-209-9>.

<sup>17</sup> Jenni Fink, *Felicity Huffman to Plead Guilty in College Admission Scam, Here's Who Pleaded Not Guilty*, NEWSWEEK (Apr. 4, 2019, 4:19 PM), <https://www.newsweek.com/felicity-huffman-plead-guilty-college-admission-scandal-who-not-guilty-1389657>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Kate Taylor, *Lori Loughlin Pleads Not Guilty to New College Admissions Scandal Charge*, N.Y. TIMES (Nov. 1, 2019), <https://www.nytimes.com/2019/11/01/us/lori-loughlin-not-guilty.html>.

<sup>21</sup> Olufunmilayo B. Arewa, Investment Funds, Inequality, and Scarcity of Opportunity, 99 B.U. L. Rev. 1023, 1035 (2019).

children.<sup>22</sup> There also seems to be an awareness of the public of the fact that in many cases these children who obtain admission do not possess the requisite test scores, grades, or other extra-curricular service or accomplishments under their belts to merit admission and occupy a hard-won place in one of these highly elite and competitive classes. But this—this was something different, entirely. Or was it? Once the scandal broke, so did debate break out on the issue of just how many shades of moral distinction there were between procuring a spot at a school for one’s child via a straight cash donation and obtaining admission via a payment to a “foundation” like Singer’s that helped “win” the student the spot by feigning credentials that he or she didn’t have.<sup>23</sup> Loughlin was famously quoted as claiming that she did not realize that she was doing anything unlawful when she acted.<sup>24</sup>

And this is all to say nothing of other wholly lawful activities like hiring tutors, paying for expensive lessons, essay coaches, and others to help one’s child put her best foot forward in the applications process. Many have long made the powerful argument that between legacy admissions for kids whose parents attended a given school, to the advantageous tutors, coaches, and lessons that can be purchased, afford a class of largely white, privileged students a “leg up,” on other students.<sup>25</sup> Many have long balked at the fact that affirmative action based on things like race are so often criticized when these advantages confer so much upon white students and have been, until recently, seldom remarked upon. One might even consider these ways in which candidates play the game to be within the bounds and even encouraged, since there might be an actual spillover to the student’s knowledge and base of experiences.

The legal distinction between admission via donation and admission via “foundation,” however, was and is crystal clear. Despite the moral grey cloud that hovers over admission via donation, this type of admission is nonetheless transparent in that, ostensibly, nothing in the student’s record is feigned, and the school is, however dubiously, exercising its discretion to admit whomever it wishes. Whereas, in contrast, the acts alleged in the indictments that came out of Operation Varsity Blues sound in fraud and deceit. Conceptually, they may be envisioned as a kind of theft from the institution.

Interestingly, at Huffman’s sentencing, where she accepted responsibility for her misdoings as she pled guilty in such a repentant and sincere manner that it prompted commentators to refer to her as exemplary when it came to taking responsibility for one’s own actions and crimes, the judge rebuked those embroiled in the scandal for, rather than being content with the fruits of their wealth, wielding their power and wealth in order to take “the step of obtaining one more advantage to put your child ahead of” others.<sup>26</sup> While many agreed with this sentiment, they could not help but note the irony in a professed wrongdoer like Huffman

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<sup>22</sup> Laura Newberry, Hannah Fry, *The Legal Way the Rich Get Their Kids into Elite Colleges: Huge Donations for Years*, L.A. Times (Mar. 22, 2019, 9:10 AM), <https://www.latimes.com/local/lanow/la-me-ln-college-admissions-scandal-legal-ways-20190318-story.html>.

<sup>23</sup> See Pitt News Editorial Board, *Editorial: Admissions Scandal Not Surprising*, THE PITT NEWS (Mar. 18, 2019), <https://pittnews.com/article/145786/opinions/editorial-admissions-scandal-not-surprising/>.

<sup>24</sup> Kenzie Bryant, *Lori Loughlin Thought She Was Scamming the Regular-Rich-People Way*, Vanity Fair (Aug. 22, 2019), <https://www.vanityfair.com/style/2019/08/lori-loughlin-college-admissions-scandal-legal-sources>.

<sup>25</sup> See Valeria Strauss, *The Rich Have Always Had a Leg Up in College Admissions. How Different Then, Is This New Scandal?*, WASHINGTON POST (Mar. 12, 2019), <https://www.washingtonpost.com/education/2019/03/13/rich-have-always-had-leg-up-college-admissions-how-different-then-is-this-new-scandal/>.

<sup>26</sup> Karen Weintraub, Joelle Renstrom & Nick Anderson, *Felicity Huffman Gets 14 Days in Jail in College Admissions Scandal*, WASHINGTON POST (Sept. 13, 2019, 6:15 PM), <https://www.washingtonpost.com/education/2019/09/13/felicity-huffman-be-first-parent-sentenced-college-admission-scandal/>.

getting away with a mere two weeks in prison, while others who lacked her wealth and privilege had been treated much more harshly by the system for doing things like fibbing about an address to get their children into a better school. Two weeks seems like a slap on the wrist when you think about the harm of eliminating a spot for another student, who may, as a result, have a different career path, make significantly less money over time and not enjoy the lifetime of social status privileges associated with attending certain schools.

Williams-Bolar, an African American single mother, used her father's address in order to render her children eligible for enrollment in a better school district than the one for which they were zoned.<sup>27</sup> For this transgression, she was sentenced to five years in prison in 2011, though her sentence was later reduced.<sup>28</sup> Indeed, as the lead prosecutor in Huffman's case said at her sentencing in September of 2019, "If a poor single mom from Akron who is actually trying to provide a better education for her kids goes to jail, there is no reason that a wealthy, privileged mother with all the legal means available to her should avoid that same fate."<sup>29</sup> Prosecutors at Huffman's proceeding alluded to more such stories of parents and of color being sentenced with for the same transgression in the name of trying to aid children in getting into better schools and scoring higher on tests.

Is the American dream and social and professional mobility for sale? Worse still, are we just realizing that those with the wealth and audacity to do it have been and will readily use their ample resources to misappropriate the opportunities, and ultimately the limited seats in these elite entering classes, that theoretically belong to others? Indeed, documents filed in these cases allege that Singer was able to bribe everyone from exam administrators charged with executing the administration of sacred college entrance exams, to elite university administrators and coaches who lined their programs' and perhaps their own pockets in exchange for their endorsements of unqualified students as talented athletic recruits.<sup>30</sup> While it's hard to say that any one person would have gotten into a given school but for the scandal, it is relatively easy to conceptualize the transgressions recited in the scandal's indictments as thefts of sorts, displacing qualified students so that those with the resources and disregard for the law could claim their spots.

Further reinforcing the conception of the college admissions scandal as a series of thefts are class action lawsuits filed in the Spring of 2019, in which students sued Singer to recoup their college application fees after realizing that the scheme that Singer masterminded meant that, as recited in their Complaint, "Those students who played by the rules were denied admission."<sup>31</sup>

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<sup>27</sup> Andrea Canning & Leezel Tanglao, *Ohio Mom Kelley Williams-Bolar Jailed for Sending Kids to Better School District*, ABC NEWS (Jan. 25, 2011, 11:57 PM), <https://abcnews.go.com/US/ohio-mom-jailed-sending-kids-school-district/story?id=12763654>.

<sup>28</sup> *Id.*

<sup>29</sup> *Kate Taylor, By Turns Tearful and Stoic, Felicity Huffman Gets 13-Day Prison Sentence*, N.Y. TIMES, <https://www.nytimes.com/2019/09/13/us/felicity-huffman-sentencing.html> (last updated Oct. 22, 2019).

<sup>30</sup> Gregory Korte, *The Rise of Rick Singer: How the Mastermind of College Admissions Scandal Built an Empire On Lies, Exploited a Broken System*, USA TODAY (June 24, 2019, 4:21 PM), <https://www.usatoday.com/in-depth/news/nation/2019/06/19/college-admission-bribery-scandal-rick-singer-exploited-broken-system-loughlin-huffman/1133729001/>.

<sup>31</sup> Nicole Einbinder, *A Group of Students Rejected by Elite Universities Tied to the College Admissions Scandal Are Suing the Schools Over Their Application Fees*, BUSINESS INSIDER (June 19, 2019), <https://www.businessinsider.my/students-rejected-universities-college-admissions-scandal-suing-application-fees-2019-6>

The students also alleged that the universities involved were negligent in their failure to maintain the integrity of the admissions process.<sup>32</sup> The class seeks to include everyone who applied to certain specified implicated schools because, the theory goes, they failed to receive what they paid the application fee for—fair consideration under an application process untinged with fraud.

At the end of the day, the very existence of people like Singer, false charitable “foundations” like his, and the years of “assistance” he was able to provide to so many, not to mention the sheer number of people that he was able to find charged with important roles in the testing and/or admissions/recruitment process who were able to be bribed to pervert those processes, seems to make it a pretty safe bet that what has been uncovered is likely the tip of a very large, very unsightly iceberg. This iceberg, to continue what I hope doesn’t become too tortured of an analogy, appears to be on a collision course with not only the admissions process nationwide, but the public’s perception of its and its integrity.

It thus seems pretty reasonable to wonder about the law school admissions process and about the “honor system” applicants enjoy as they self-report things like their job histories, college/resume activities of note or distinction, criminal or disciplinary incidents, and even anecdotes in their essays without much fact-checking or oversight. How and in what ways is complacency with this honor system and any blind eye we may turn toward suspicions of its abuse actually creating a hierarchy in which those with resources and audacity and disregard for the integrity of the process are privileged?

### **Getting In: Why it Matters:**

Grades and school rankings and prestige are the currency with which young graduates transact in the “real world” upon graduation and in their attempts to gain admission to even higher education or graduate school, or obtain employment. They are the coin of the realm when it comes to securing the kinds of professional, educational, and social opportunities that accrue wealth, power, and influence for individuals and families over generations. Admission to elite schools and the obtaining of one of a very few coveted spots in a college or graduate school class, highly prized by most seeking social and professional advancement, may be seen as more valuable than any material possession. In the words of a contemporary scholar commenting upon the 2019 College Admissions Scandal:

Many people also prize credentials from elite schools because of the social connections that they afford students. Many claim that the networking opportunities and social exposure at elite, often expensive schools, pay “dividends” of sorts to graduates steadily across the span of their lifetimes, with access to elite social circles, job opportunities, and even potential spouses often limited to the small concentric circles of those who had the time and exposure to one another during their formative years. This college admissions and bribery scandal struck a chord for many because access to education can be a key, even life-defining opportunity. . . . The college admissions and bribery scandal reflects a type of opportunity hoarding that has implications for scarcity of opportunity. Access to education at elite universities is a scarce resource that has consequences that extend beyond an initial admission decision. How we allocate these and other opportunities determines not only who gets access but also who experiences scarcity. The college

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<sup>32</sup> Eric Levenson, *Students and Parents File Lawsuit in College Admissions Scam Asking for Application Fees Back*, CNN (June 19, 2019, 5:11 PM), <https://www.cnn.com/2019/06/19/us/college-scam-class-action-lawsuit/index.html>.

admissions and bribery scandal lays bare that the same opportunities may not be available to all.<sup>33</sup>

## **The Importance of Honesty in the Legal Profession and in Legal Training**

The significance of honesty in the legal profession and in the practice of law cannot be overstated. The law is a self-regulating profession, and the American Bar Association (“ABA”) promulgates Model Rules of Professional Conduct that states employ to ensure the integrity of the bars that they oversee. These rules are rife with directives to attorneys to be truthful across contexts and they mandate candor and honesty with virtually all with whom lawyers deal professionally, from their clients to the tribunals adjudicating their disputes. For example, Rule 8.2 mandates that:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.<sup>34</sup>

Indeed, a candidate for admission to a state’s bar is made to pass not only their chosen state’s bar exam, but the MPRE, or Multistate Professional Responsibility exam,<sup>35</sup> and virtually every law school graduate in the country was required to take a Professional Responsibility class in law school. Moreover, once a candidate has passed these exams, he or she must typically pass a character and fitness inquiry conducted by his or her state of admission.<sup>36</sup> Applicants are made to fill out comprehensive questionnaires and to reveal extensive and often highly personal information from their pasts,<sup>37</sup> including, but not limited to their mental health medical histories, delinquent debt, traffic stop histories, work histories, criminal and arrest histories, and academic misconduct. Data collection may be followed by an interview, as well as a verification and/or investigation phase. A candidate’s failure to disclose something initially, once brought to light, is, naturally, looked upon with a fair amount of suspicion during these processes.

For many candidates, however, some of the negative information in the questions that they either answer honestly or about which they have the truth discovered subsequently by their state’s Board of Bar Examiners, is information that they should have disclosed on their law school applications, but failed to.<sup>38</sup> While it seems like law schools generally ask students to make disclosures that could impact their bar applications to the schools after admission has been granted, it is very rare that a law student, once accepted, is dismissed from law school for the initial failure to disclose.

According to the National Conference of Bar Examiners’ Comprehensive Guide to Bar Admission Requirements, there are thirteen categories or acts of “relevant conduct” that should cause state bars’ character and fitness committees to pursue an investigation. These are:

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<sup>33</sup> Olufunmilayo B. Arewa, *Investment Funds, Inequality, and Scarcity of Opportunity*, 99 B.U. L. Rev. 1023, 1035–38 (2019).

<sup>34</sup> MODEL CODE OF PROF’L RESPONSIBILITY r. 8.4 (AM. BAR ASS’N 1983).

<sup>35</sup> National Conference of Bar Examiners, *Jurisdictions Requiring the MPRE*, <http://www.ncbex.org/exams/mpre/> (last visited Jan. 23, 2020).

<sup>36</sup> David L. Hudson, *Honesty Is the Best Policy for Character-and-Fitness Screenings*, ABA J. (June 1, 2016, 2:20 AM), [http://www.abajournal.com/magazine/article/honesty\\_is\\_the\\_best\\_policy\\_for\\_character\\_and\\_fitness\\_screenings](http://www.abajournal.com/magazine/article/honesty_is_the_best_policy_for_character_and_fitness_screenings).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

unlawful conduct, academic misconduct, false statements, including omissions, abuse of legal process, disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency in any jurisdiction, misconduct in employment, acts involving dishonesty, neglect of financial responsibilities, neglect of professional obligations, violation of an order of a court, evidence of mental or emotional instability, evidence of drug or alcohol dependency, denial of admission to the bar in another jurisdiction on character-and-fitness grounds, and fraud, deceit or misrepresentation.<sup>39</sup>

Interestingly, while many jurisdictions have shaped or reformed their standards so that things like having sought help for mental health problems, or even having committed crimes that may be remote in time are not used, in a committee's discretion, to deny an applicant admission to the bar, a candidate's lack of candor can be fatal to her attempt to gain admission. Indeed, in a 2016 interview with the ABA Journal, Phoenix-based ethics counsel Keith Swisher observed that, "Committees occasionally have used applicants' arguable lack of candor, even relatively minor instances, as an excuse to deny applicants whose pasts bother the committee members. Conversely, complete candor tends to assure the committees that the applicants are trustworthy and fully accept responsibility for their past conduct."<sup>40</sup> Suffice it to say that from an attorney's initial point of entrée into the profession, candor is critical.

As mentioned, candor is, and ought to be, of critical importance to and in legal training. But beyond a class in professional responsibility that most students take, how much is candor emphasized by and in law schools? As will be discussed, there are numerous opportunities for dishonesty, ranging from omissions, to exaggerations, to outright fabrications in the process of applying to law schools. And while it is nearly impossible to ascertain exactly what each school is doing to stave off or punish dishonesty (this is clearly not information that most schools would want to make public), it is clear that there are very few mandatory, across-the-board checks on dishonesty in the application process.

## **Law School Applications and Admissions-Opportunities for Dishonesty**

Law school applications typically ask students for everything from their complete educational history and records to their Law School Admissions Test ("LSAT") score, to their work history, to their resume, to a personal essay with a narrative that portrays important aspects of themselves. In the summer of 2019, the website [abovethelaw.com](http://abovethelaw.com) reported that "Although the number of applications to U.S. law schools declined slightly by 1.5 percent to 379,696, we're seeing an increase of 7.1 percent over a two-year period. The average number of schools to which candidates apply has remained stable for several years at around six."<sup>41</sup>

According to a late 2018 report by the American Bar Association (ABA), the 203 American ABA-approved law schools reported a combined J.D. enrollment of 111,561 for the

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Kathryn Rubino, *The Number of People Applying the Law School is Up Again This Year, Proving The "Trump Bump" is More Than Just A Fleeting Trend*, ABOVE THE LAW (Aug. 5, 2019, 1:13 PM), <https://abovethelaw.com/2019/08/the-number-of-people-applying-to-law-school-is-up-again-this-year-proving-the-trump-bump-is-more-than-just-a-fleeting-trend/>.

Fall 2018 term, representing a 1.2 percent increase from the prior year.<sup>42</sup> This was in addition to the 18,523 students reported enrolled in law schools' LL.M., masters and certificate programs, representing an 8.2 percent increase from the prior year.<sup>43</sup> The report further explained the Fall of 2018 saw some 38,390 1L students commence their legal studies, representing an increase of 2.9 percent from the prior year.<sup>44</sup> In 2019, U.S. News reported that as per the 192 ranked law schools reporting acceptance rates to it, the national average acceptance rate was 45.8%, but the top ten most selective schools, applicants had, overall, only about 15.1% average chance of gaining acceptance.<sup>45</sup>

Schools generally start receiving applications for the subsequent school year each fall, and set about deciding whether a student will be accepted, rejected, deferred for consideration at a later date, or waitlisted. Some schools offer some sort of early decision program, like many undergraduate schools have, whereby students apply early to just one school in exchange for early consideration and potential early acceptance. Most of the top twenty law schools have deposit deadlines from mid-April to mid-May, and it is around that time that many borderline candidates come under consideration by schools, who now know just how many spots they have left to fill. The precise mechanism by which students move up and off of a waitlist may vary drastically from school to school as well. Some schools rank their waitlisted students and move them up the list that way, but not all do. According to U.S. News:

In a recent survey by the BARBRI Group, about 60% of admissions deans stated that the impact that an applicant's LSAT score or undergraduate GPA will have on their overall admissions statistics is the most significant factor when deciding which applicant to admit off of the waitlist. Other responses included the strength of the applicant's letter of continued interest and intent to immediately commit to the school if offered admission. This survey result means a multitude of new factors come into play after the deposit deadline. For example, maybe the school admitted many "splitters" with low GPAs and high LSATs, and when admitting off the waitlist, it will focus on students with higher GPAs to pull that stat up. Therefore, the implication is schools can't really know what they would be targeting, making ranking candidates very difficult.<sup>46</sup>

It is impossible to capture with any real certainty the nuanced and complex calculus that goes into any one law school's admissions process. On one hand, to the extent that popular metrics like U.S. News and World Report rankings factor heavily into many students' perceptions of prestige and to the extent that U.S. News and World Report weighs heavily students' LSAT scores and grade point averages, it is easy to surmise what may be critical to schools when filling a class. On the other hand, however, most schools will publicly, aloud

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<sup>42</sup> American Bar Association, *2018 Standard 509 Information Report Date Overview* (Dec. 14, 2018), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2018-509-enrollment-summary-report.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2018-509-enrollment-summary-report.pdf).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Josh Moody, *10 Law Schools That Are Hardest to Get Into*, U.S. NEWS (Apr. 16, 2019), <https://www.usnews.com/education/best-graduate-schools/the-short-list-grad-school/articles/law-schools-that-are-hardest-to-get-into>.

<sup>46</sup> Daniel Waldman, *When, How Law Schools Use Waitlists*, U.S. NEWS (May 27, 2019), <https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/2019-05-27/when-how-law-schools-use-waitlists>.

and/or in their written materials describe their desire for or tout their recruitment of students who are well-rounded, diverse, and skilled at a variety of things, from the arts to athletics.

Most schools have or would claim to value students who have availed themselves of a variety of experiences, professional and volunteer, risen to leadership roles at school and in the workplace, and garnered accolades and awards in their respective endeavors. It is safe to say that since schools typically ask about things like prior disciplinary action taken against a student, academic dishonesty, and run-ins with the law, among other things, these schools likely give applicants who are flagged as answering “yes,” to one of these sorts of questions at least a second, more scrutinizing look-over.

But how do schools optimize their limited resources, time, and staffs to make the best possible decisions? What percentage of students are accepted as so-called “auto-admits”—without resort to much more than their grade point averages and standardized test scores? What goes on behind closed doors, however, the precise process by which students are sorted into those who are accepted, those who are rejected, those who are deferred, and those who are waitlisted, is understandably, sensitive and considered proprietary. Schools must engage in a nuanced calculus, taking into account everything from their desired class size to the diversity of their entering class to their financial situation and ability to extend scholarships to accepted students to the value that they assign to high metrics that will cause them to rise in the rankings. There is simply no way to know precisely how each school sets about sifting through the copious number of applications that it receives, assessing how much to factor in each data point, personal narrative, and set of experiences that comprise each prospective student’s candidacy, reduced to paper. Families of alumni and donors (any maybe even other prominent people) presumably also frequently get a bump up.

Here is what we do know. As per its website, the Law School Admission Council (“LSAC”) “a not-for-profit organization committed to promoting quality, access, and equity in law and education worldwide by supporting individuals’ enrollment journeys and providing preeminent assessment, data, and technology services.”<sup>47</sup> LSAC provides a service called the Credential Assembly Service (“CAS”), that is designed to streamline and organize law school admissions.<sup>48</sup> Essentially, CAS compiles and condenses candidates’ information, such as recommendation letters, academic transcripts, and LSAT scores, into an Academic Summary Report, which is sent to the law schools to which candidates apply.<sup>49</sup> Candidates subscribe to the service through their LSAC accounts, and because of this, their information is consolidated under their LSAC number, and information about them can be easily disseminated to multiple schools.<sup>50</sup> Information beyond this basic, critical information, however, like a student’s relevant work experience, honors and awards, extra-curricular activities—largely things that would answer questions on the application or show up on an applicant’s resume, is left to the applicant to provide to the schools.

There is currently no requirement that law schools do background checks on any aspect of a law school application. However, as will be discussed, in light of the fact that there is reason to think that dishonesty with respect to relevant background experience and accolades might be more widespread than originally thought, even though a small percentage of people may be

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<sup>47</sup> LSAC, *About the Law School Admission Council*, <https://www.lsac.org/about> (last visited Jan. 23, 2020).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

caught, even a modest background check commitment or requirement may chill and deter dishonesty.

### **The Effect of a Student Claiming a Seat in a Class that Should Have Gone to Another**

The Character and Fitness assessment is essentially the same query in every state, but the processes vary from state to state in terms of certain substantive requirements and their scopes. Applicants need to demonstrate sound moral character, and they do so through the vehicles of a questionnaire that they fill out with their application to the bar (which asks primarily about disciplinary actions in and out of academia and employment, criminal history, and mental health or substance abuse issues, among other things). Applicants are expected to adhere to their state's professional rules of conduct, which are all, essentially, premised on the ABA's Model Rule of Professional Conduct 8.1, which states that:

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

States in receipt of a bar application will then conduct an investigation of the candidate by an authorized committee. Nearly half of the states use NCBE to investigate, while the others utilize their own internal review boards. This investigation typically entails outreach to people and institutions referenced in the application for verification, and it generates a report that concludes with a determination of whether the candidate has met the Character and Fitness requirements or whether they are being subjected to a protracted investigation.

This protracted investigation, where it occurs, centers on a determination of whether an applicant can demonstrate some form of rehabilitation since the questionable conduct. The candidate may be summoned before the committee, or they might be required to file supplemental documentation. At that point, a candidate may be admitted to the state bar, provisionally admitted to the state bar, licensed subject to their compliance with treatment or supervision requirements, or rejected by the bar. A surprisingly low percentage of applicants are denied admission to the bar, however, with denial rates across the country quoted as low as .05%, indicating, as one commentator says, "that even if an applicant is further investigated, it is highly unlikely they will actually fail Character and Fitness."<sup>51</sup>

It is interesting, then, to note that while law schools do not screen resumes or any other parts of law school applications on the front end of the admissions process to law school, every state bar has character and fitness committees that screen bar applicants' bar applications on the back end, as attorneys are headed into licensure and practice. As discussed, the ways in which this is done vary (sometimes wildly) from state to state, but it is relatively safe to assume that to the extent that a prospective law student omitted to mention an arrest or academic disciplinary action in their past, or fabricated job experience that they never had, the background checks that exist will ferret them out.

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<sup>51</sup> Lindsey Ruta Lusk, *The Poison of Propensity: How Character and Fitness Sacrifices the "Others" in the Name of "Protection"*, 2018 U. ILL. L. REV. 345, 356–61 (2018).

Attorneys in every state are held to maintaining standards of conduct and character throughout their careers. This starts with the bars' character and fitness assessments, which may consist of in-person interviews, lengthy disclosures and applications that survey everything from work history to criminal history, and extensive background checks, among other things, depending on the state. One thing that most states do (or reserve the right to do) is to compare applicants' law school applications with their bar applications, and discrepancies can result in a failure to gain admission to the bar. For this reason, many law schools inform incoming first year students of this fact and entreat them to file application addenda that would preemptively resolve these discrepancies. Interestingly, while numerous students file such addenda upon clarifying their understandings of what was being asked on the applications and the consequences of having been less than forthright, it appears, anecdotally, at least, to be somewhat rare that a first year law student is dismissed from their law school after disclosing to the school the need for an addendum.

What this means is that students are matriculating and graduating from law school consequence-free, when, in reality, if they had been honest initially on their applications about various things they would either have looked less impressive to admissions committees, or would have had their applications red-flagged (a common practice among law schools) and more heavily scrutinized, either of which could have resulted in a failure to gain admission. Some of these students may have had trouble with their state bars later on; others would not have, due to the discretionary nature of character and fitness assessments. At least some would have been rejected by their law schools, and even among those whose misdeeds or lack of experience that would have been revealed by a background check would not have affected admissions committees' attitudes toward their candidacy, the sheer act of their dishonesty might have moved the needle on their perceived desirability.

### **A Hierarchy of Dishonesty...and Some Proposals**

The failure of law schools to conduct background checks in order to ascertain that applicants are being aboveboard when it comes to their relevant experiences and accolades is creating a hierarchy of dishonesty in law schools (where those who are dishonest may be advantaged over those who are honest due to the lack of a checking mechanism and substantial consequences), which, in turn, engenders a similar hierarchy in the profession. There is no real way to know a few key premises of this notion. To be sure, we do not know with any real precision how many people embellish, omit, or otherwise fabricate things to their applications.

We similarly do not know precisely how many students are asked to leave law school after disclosing the need to amend their applications, although law schools do fill out a Standard 509 information chart that provides the numbers and percentages of students that leave school prior to graduating. We also know, as per the American Bar Association's website, that "Standard 308 requires that law schools adopt, publish, and adhere to sound academic standards, including those for good standing, academic integrity, graduation and dismissal," but "[t]he Council does not review law school decisions on academic dismissal," and that students are advised to "work directly with the law school to resolve any questions."<sup>52</sup>

There are several big things that are not truly knowable due to schools' individual and typically proprietary methods for conducting the admissions processes. One is how much of a

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<sup>52</sup> American Bar Association, *Frequently Asked Questions*, [https://www.americanbar.org/groups/legal\\_education/resources/frequently\\_asked\\_questions/](https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions/).

difference outstanding work or extra-curricular credentials make to an admissions committee on the fence about a candidate. Another is how detrimental a legal or other disciplinary run-in is to a given committee with respect to a given candidate's being eliminated from contention for acceptance, especially if that student is considered borderline to begin with, with respect to key metrics like grade point average or LSAT score. Finally, there is no way to know how many students are considered borderline, or at what point they are considered borderline, such that a plus or minus factor would affect them at all in the admissions process. It is somewhat impossible, in light of all of this, to ascertain how much harm really accrues to schools, the profession, or to honest candidates due to dishonesty.

This piece nonetheless proposes that the Association of American Law Schools and/or the ABA recommend or impose some minimal standard for law schools with respect to conducting background checks on a certain percentage of candidates—even if that percentage is quite low—like 5 percent of candidates. The fact of the matter is that schools can share discrepancies with one another due to the centralization of students' identification numbers through LSAC. Further, since different schools will presumably background check different students (probably along their individual "fault lines" of borderline applicants—which will vary from school to school), more than 5 percent of applicants would wind up being checked. The checking can be done by professional background checking agencies, and applicants, themselves, can facilitate the process by listing one or more people who may be contacted to verify, for example, that they organized a charity dance-a-thon in college, or served as President of their college's Undergraduate Law Society. Job experience, disciplinary action, and run-ins with the law are easy enough for professionals to verify. A computerized system could also be jointly developed, possibly using artificial intelligence and publicly available information.

At the end of the day, a change like this is not at all likely to cure the problem of undiscovered dishonesty on law school applications. There is no way to catch all or even necessarily most of the people who omit or fabricate information that could influence their acceptance to a law school class. However, what a change like this can effect is a deterrence of dishonesty. With awareness that their applications may be checked and the results shared with multiple law schools that a candidate applied to, a candidate may find his or her behavior chilled when it comes to the temptation to play fast and loose to gain admission. This deterrence may go a very long way toward curbing the hierarchy of dishonesty that has, arguably, taken hold in so many professions where entrée is premised on bona fides, and dishonesty goes relatively unchecked.

In addition, cheating someone else out of the opportunity to attend an educational program, as well cheating the institution out of the opportunity to honestly select its incoming class, should be treated as the serious crime that it is. Students, parents and other third parties involved in admissions dishonest need to receive harsh punishments, thereby making the game a lot riskier.

## **Conclusion**

There are several very important conversations that we should be having in the wake of the college admissions scandal, and, in large part, no one is having them. While there may be widespread discord as to what factors colleges and universities *ought* to be weighing when selecting candidates to fill their class, or in what ratios, there is no question that too many facets of most schools' applications are left to the "honor system." Numerous commentators and

scholars, including *Dream Hoarders* author, Richard Reeves, have noted that there is a tendency among the wealthiest and most privileged in society to tend toward some of the most egregious cheating, corner cutting, and duplicity when it comes to securing things like educational opportunity.<sup>53</sup> As Professor Olufunmilayo B. Arewa wrote, “Evasion of rules by the wealthy highlight differential experiences of those with plenty and those with less. One study using experimental and other methods, suggests that the upper class may be more disposed to the unethical.”<sup>54</sup>

It will be interesting to see how the aftermath of “Operation Varsity Blues” plays out, and how the parents who did not accept plea deals are treated by the courts. More importantly, it will be fascinating to see whether educational institutions take their cues from current events and seek to tighten up potential vulnerabilities in the wake of the scandal. In an era in which the dismantling of hierarchies is being increasingly seen as necessary to dismantle racial, sex, socioeconomic, and other invidious societal inequalities, there seems like no better place to start than with dismantling the hierarchy of dishonesty that privileges duplicity and audacity in the law school admissions process. As the legal profession seeks to prize candor and dignity, so should law schools seek to be fit gatekeepers.

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<sup>53</sup> See RICHARD V. REEVES, *DREAM HOARDERS* (2017).

<sup>54</sup> Olufunmilayo B. Arewa, *Investment Funds, Inequality, and Scarcity of Opportunity*, 99 B.U. L. REV. 1023, 1035 (2019) (internal quotations and citation omitted).