Alzheimer Symposium Lecture

Higher Education Admissions and the Search for One Important Thing: What I Would Do if I Were President For The Day

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What I Would Do if I Were President For The Day

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Although I would certainly like the chance to find out if I am any good at this kind of benevolent despot wishgranting, I suspect I am not very good at it. First, I do not get to make many wishes, and, being a Democrat, I have very few opportunities to hone my wish-skills. I am also, by temperament, more of a dissenter. The remarks and essay that flow from this wonderful occasion may solve this puzzle once and for all. The real reason that this kind of thinking is difficult for me is because I know that most serious social problems are complex, longstanding, and intractable. Simply waving a political or financial “wand” will not eradicate evil, poverty, injustice, or civil/criminal wrongs. Because the roots of
most problems run deep, solutions must do the same: they must be comprehensive, longlasting, and nuanced to be effective.

My remarks are in three parts, with the first part being substantially longer than the remaining two sections. Part I examines admissions as social science, and reviews the considerable strengths and significant weaknesses of current admissions criteria and policies. I investigate the extensive research literature on several of the more commonly-employed admissions practices. I evaluate the differential validity of admissions criteria (that is, whether they are equally successful in predicting the performance of different groups) in predicting student “success,” as it is usually defined, and the “success” of different graduate and professional student populations, such as women, minorities, or older students. Based upon this review, I conclude that standardized tests are relatively weak predictors, ones that both over-and under-predict for different students. For many elite professional schools -- particularly ones that rely more upon the LSAT or MCATs or GMATs than upon the other markers, such as undergraduate grade point average (UGPA), rank in class, or the other available pieces of information that are used -- these tests measure very imperfectly. A very thorough study conducted at The University of Pennsylvania Law School, for example, found correlations of only .14 for a first year class,¹ while Hopwood testimony showed that University of Texas Law School’s first year class the year Cheryl Hopwood applied had only a .24 correlation between LSAT’s and first year GPA (FYGPA).² What’s all the fuss about? Having reviewed social science findings, I will respond to several legislative suggestions that have surfaced in the various states to address selective
admissions. Finally, in the third and last part, I suggest additional legislative approaches that lawmakers should consider, review several recommendations made by a recent ABA Committee on which I served, and make my one wish.

I. **Admissions as Social Science**

This section focuses upon law school and other professional school admissions decisions, in part because of the bounded nature of professional education, in part because several major court challenges arose in this arena, and in part because virtually all law schools and professional schools require the same admissions materials and employ the same standardized exam and application criteria. Elite undergraduate institutions, highly regarded graduate programs, and competitive professional schools are more alike than they are different: selecting among many qualified applicants requires similar procedures that cut across types of schools. I will use examples from selective institutions and refer to undergraduate colleges, post-baccalaureate programs, and graduate and professional schools.

In general, virtually all graduate and professional schools require their applicants to submit an application form, transcripts showing undergraduate and graduate coursework, a current standardized test score [Law School Admission Test ("LSAT"), Graduate Management Admission Test ("GMAT"), Medical College Admission Test ("MCAT"), Graduate Record Examination ("GRE"), Miller’s Analogy Test ("MAT"), or the like], an essay setting out the applicant’s qualifications for admission, letters of recommendation, and other pertinent institutional information requirements (for example, financial aid forms, proof of eligibility to sit for the bar,
attestation of residency or domicile, parental data). Many dental and medical schools continue to employ personal interviews as a formal part of the process, as do some elite undergraduate colleges, which often employ alumni as interviewers. However, most law and business schools and graduate programs do not use interviews to differentiate applicants. While the weight accorded these admissions materials may vary by institutions, admissions committees overwhelmingly rely upon previous cumulative GPAs and standardized test scores to make their admissions decisions.

Underlying this use of scores and grades are an administrative purpose and two basic, unspoken assumptions. First, scores and grades can be reduced to shorthand measures, which are extremely useful in sorting out applications. The standardized test score can be reduced to a number to fit all applicants, and grades can be measured on a 4.0 scale that provides rough equivalence among the applications. Thus, a 3.5 undergraduate grade point average ("GPA") on a four-point scale and a 160 LSAT, which in 1997 was the eighty-third percentile, can be algorithmically combined by a commercial service to produce an index of 212 on a scale of 220. All things being equal, a 220 predicts the applicant will finish her first year of law school with a better GPA than will an applicant with an index of 200. The Law School Admissions Council has begun to report its scores in "band scores," or ranges, so that committees will be able to see more clearly the small differences in scores, especially in the median ranges, where the differences are so slight. Thus, a 160 indicates that the applicant’s true score is between a 157-163, with a 68% confidence level; the band reported for a particular test contains
the testtaker's true score at a reasonable statistical level of confidence. Second, this administrative convenience is buttressed by two widely held assumptions: that previous academic achievement and performance on a standardized test are fair predictors of a candidate's likely academic performance in the graduate or professional program, and that the behavior and skills essential for graduate and professional schools are but extensions of the behaviors and skills necessary for successful academic achievement in college.

Admissions committees use UGPAs and standardized test scores in order to predict how students will do in the first-year of study. There are several reasons why admissions committees are especially concerned with first-year academic performance. If professional schools are to retain their students, it is obviously important that students succeed in their first year. However, the low attrition in professional schools shows how deep the talent pool is, and reflects the more modern view that professional screening is not sink-or-swim. This accounts for the broad array of remedial and supplementary programs. Earlier practices of open or less-selective admissions relied upon higher failure rates to do this screening.

Although it is possible to predict first-year professional and graduate school grades, albeit imperfectly, several questions arise. Is the predictive validity (the statistical relationship between a standardized test and first-year grades) equally distributed across groups, and is the prediction of first-year grades a desirable result? Is the criterion of first-year grades a good measure of the efficaciousness of the admissions process?
The most disconcerting feature of the LSAT (and of other such measures) is that, by itself and in conjunction with UGPAs, it predicts different groups’ first-year graduate/professional school performances with varying success, and the accuracy of its predictions only improves slightly overall, beyond the first-year. For example, at the University of Texas, during the Hopwood litigation, the correlation between LSAT scores only and first-year grades was .24 for white students. For blacks, it was .28 when combined with undergraduate grades. At the University of Pennsylvania Law School, for all students the correlation was .11 for first-year, .15 for second-year, and .21 for third-year grades. In sum, the LSAT is a weak predictor, performing less well for certain schools and for later years in school. Similar problems exist for the GRE, the test required for admissions to graduate schools. A recent reanalysis of thirty previously published validity studies revealed statistically insignificant correlation coefficients between first-year graduate school GPA and GRE scores. In other words, the overall finding was that the GRE did not predict graduate school first-year academic performance with any meaningful statistical certainty. And graduate programs often rely upon attrition (especially failure to complete a dissertation) to thin their ranks.

For minority students, moreover, studies by several admissions scholars reveal small or no meaningful statistical relationships between test scores and academic performance. Psychologist Richard Duran, for example, has noted: “Taken in toto, the results cited [in my review of predictive validity studies] suggest that Latinos’ college grades are less well predicted than [are] those of Whites but that the reasons for this difference are not allied with a consistent bias
in the direction of prediction." He found that predictive validity for Latino populations sometimes underpredicted college grades and sometimes overpredicted them, at a level statistically more significant than the tests predict the over-or-under error of white students' grades. Such unevenness is evidence that, for Latino students, the usual practice of combining a test score with UGPA is less justifiable than it is for white applicants, because the predictive validity of test scores and UGPA is so variable. It is likely that English language fluency, Spanish language fluency, and other ethnic and socioeconomic variables affect the predictive validity of test scores and UGPA for Latinos.

For older students and women, standard predictors of first year performance are often inaccurate. Older students (that is, those who complete undergraduate studies beyond the age of twenty five) comprise more than one-third of all U.S. baccalaureate recipients, and an even higher proportion of graduate and professional students, and studies show that their test-taking skills, perhaps rusty from infrequent or long-ago use, result in their test scores consistently underpredicting graduate and professional school grades. Women enter law school with academic records similar or superior to those of men. However, legal education so favors aggressive, competitive learning styles that women often perform less well academically than do men. A review of this rich literature makes clear that the predictive validity of test scores and UGPA for first-year graduate/professional school GPA does not apply equally to all groups. In other words, everything is not equal, nor is it measured equally. After all, this is human behavior being predicted here.
But suppose, for argument's sake, that the predictive validity of test scores and UGPA were higher than it is in predicting first year graduate/professional school GPA, say, by improved psychometrics or exam design, and were equally good at predicting the performance of different subgroups within the general graduate/professional school population. Would that make the use of those admissions criteria more fair? More efficacious? More acceptable? What about an elite law schools, where virtually all the enrolled students scored high? At Yale Law School in 1998, 75% of the students averaged a 175 LSAT score, while the lowest 25% averaged a 168. The band score of 175 includes the 99th percentile, predicting the highest possible first year performance, yet surely Yale had a bottom half of the class that year, and most years.

An important problem is that first-year GPA, while an intuitively compelling consideration, is of questionable value when examining the purposes of post-baccalaureate education: producing good graduates and professionals. In other words, what do first-year grades have to do with being a good doctor, lawyer, veterinarian, or English professor? Indeed, do first-year grades even correlate with subsequent grades, so that there is a strong and positive effect of the uniform first-year regimen upon the second and third year of law school, of the second through fourth year upon medical residency, or of classroom work upon the completion of a Ph.D. dissertation? Such correlations are even weaker than those between UGPA and test scores and first-year graduate/professional school GPA. J.C. Hathaway's study of Columbia Law School found statistically significant differences between the predictive validity of UGPA and test scores for males and females in the first
year, with these differences increasing by the final year of law school.\textsuperscript{18} Psychologist Maria Pennock-Roman, after a careful review of validity studies, concluded: "[G]rades of black and Chicano students improved much more than [did] the grades for white students between their first and third years of law school. The mean difference in grades between minority and white students narrowed by the third year."\textsuperscript{19} After reviewing minority and white grade patterns, Donald Powers summarized that "the differential improvements of minority students [by the end of their studies] would seem to provide further justification for admitting minority and other disadvantaged students with lower admission credentials."\textsuperscript{20}

While the research literature seems to point to group differences and differential validity measures, do any of these make a difference? What exactly is it that is being measured? Although there are many troubling aspects to the concept that fair measurements can be made for groups (or within groups, as every group has its own curve of measured achievement),\textsuperscript{21} even more troubling are the admissions criteria themselves. Moreover, predicting first-year grades, as problematic as it is, pales in comparison with the difficulties with other outcome variables, which are important to graduate/professional schools, including third-year GPAs, performance on the state bar examination, ability to obtain a position in practice, performance in practice, bedside behavior, treating patients, acting in an ethical fashion, and interacting with clients. For admissions purposes, first-year grade prediction may be a useful desideratum, but it surely cannot be the only marker.
With a movement to integrate more practice skills into the legal curriculum, law schools have signaled the importance of increased client contact, practical and didactic instruction, and clinical, or hands-on, experiences for which students can receive academic credit.\textsuperscript{22} There is no evidence that first-year class rankings have decreased in importance for employment purposes, clerk-hiring, or law review competitions. However, the movement in skills training, practical experience, and out-of-class advocacy experience is a step away from purely classroom academic achievement. Thus, law schools can, with good reason, emphasize interpersonal skills measures and other non-cognitive criteria in their admissions process. For example, exceptional skills in debate, expository writing, and meaningful experiences in student government or other leadership positions may provide the desired evidence of an applicant’s ability to perform well as a lawyer, provided that these experiences have been properly evaluated or documented by supervisors. Doctors have always been graded upon practice skills.\textsuperscript{23} Nothing is more useless in reading an admissions file than an application whose laundry list of student accomplishments lacks any evaluation or attestation. However, without interview data, committees will have an impossible task to measure these abilities.

As noted earlier, a second assumption underpins the reliance upon GPA and standardized tests like the LSAT as predictive criteria for successful graduate and professional studies. This assumption is that graduate and professional studies are an extension of undergraduate study. Seen this way, more specialized graduate or professional academic achievement is a natural continuation of undergraduate knowledge acquisition. Stated differently, there is a strong assumption in relying
upon UGPA that the cognitive and non-cognitive experiences of undergraduates are so similar to or predictive of continued study that applicants' performance in the undergraduate years can strongly predict similar performance in the graduate or professional school arena. Despite the discontinuities between the two, this assumption holds a powerful place in post-baccalaureate admissions.²⁴

Admissions committees assume that college and graduate/professional schools simply lie along a continuum of knowledge and skill, and often do not take into account the increased specialization, the narrowing of the curriculum, the inculcation of students into a discipline or professional field, the gap in time that often exists between college completion and further studies, the intervention of work or family obligations, and the financial obligations that now fall upon an independent student rather than upon the parents of an undergraduate dependent student. For example, if a student has been out of school for a number of years, her standardized testing and study skills may be rusty; even with increased desire and resourcefulness (to use Richard Duran’s apt description),²⁵ the transition from college to graduate/professional study may be difficult. When nearly everyone has done well in college—a prerequisite to post-baccalaureate study—small differences in experience, motivation, and resources can be magnified in class results. Even with the increasing age of the undergraduate student body, professional/graduate school admissions procedures often reward those who do not have to relearn what it is like to be a student or what it takes to study effectively. Moreover, graduate/professional school curricula hold students to higher academic standards and require a much more focused concentration upon studies than do most
undergraduate programs. Therefore, admissions practices that concentrate upon undergraduate achievement may overlook or de-emphasize the tortoises in the group whose earlier records may not reflect their current learning styles, study habits, and life experiences. A student's learning style is a dynamic characteristic that is likely to be more adaptive and focused by maturity. Overlooking this aspect of intellectual growth and change may inhere in admissions committees' overreliance on the academic achievements occurring in applicants' youth, especially their test taking abilities.

This review has shown the care necessary in employing admissions criteria or practices that may tend to predict performance differentially for different categories of students. Because the quantitative ("statistical") treatment of universal indices or variables is also flawed or laden with covert social values, one cannot feel any more comfortable with admissions committees' present reliance upon these criteria. 26 While the burden of persuasion no doubt rests upon those, such as myself, who wish to see movement away from the numbers approach, any fair and thorough review of current admissions practices will reveal that the status quo, so seemingly statistical and quantifiable, is grounded upon weak assumptions, weaker statistical relationships, and questionable criteria. The status quo has an intuitive and appealing symmetry to it, one that defines "meritocracy" by most majoritarian measures. The correlations between grades and first-year performance are modest but positive for many successful students, and characterizing the process as fair and impartial reassures the gatekeepers that those selected for admissions have the wherewithal to undertake the field of study. Moreover, so few
low scorers are admitted to elite fields of study that the record of their school success is scant. Even though poor testtakers might do well if they were allowed to enroll, most schools will not admit them and provide the data that would corroborate their achievements in thwarting the predictive measures.

A review of fair-selection statistical models, nonetheless, reveals that they have different values, attributes, and consequences. In truth, this aspect of admission—how one treats the variables statistically—is not widely known or examined, even by those committees who rely upon the statistical or arithmetic calculations used in their institutional validity studies. I do not review these models here, as I have done so in excruciating detail elsewhere, but suffice it to say that if you watch these models or chorizo being made, you will likely not want to consume either. In addition, major demographic changes, recalculation or revisions of testing, practice, and other variables can cause serious problems in continuity. For example, the SAT recently "re-centered" its percentile measures to take into account the increasing heterogeneity of the test taker pool. In 1965, there were nearly 45,000 LSAT test takers, trying to fill 24,000 first-year places. In 1975, there were more than 133,000 LSAT test takers to fill nearly 40,000 places. By 1985, this number had declined to 92,000 competitors for 41,000 seats. In 1995, 115,000 applicants vied for 42,000 spots. Between 1965 and 1995, the LSAT changed its scale format several times, and the exam itself was overhauled many times, as were other graduate and professional tests. For example, the new computer-adaptive GRE not only can be taken at each applicant's convenience in a centralized testing office, but each test is paced to provide
individualized (not standardized) versions, depending upon the test taker’s speed and accuracy in responding to the questions. Given the response differential that is attributed statistically to students’ "speededness" (that is, how well they perform under timed testing circumstances), this development alone—which has spread to other "standardized" examinations for graduate and professional schools such as the MBA test, the GMAT—should cause concern to faculty in programs that do not take these rapid changes into account.

II. Legislative Proposals

Given this essentially critical review of the social science of admissions, and my analysis of predictor models, one would probably expect me to be enthusiastic about any legislation that eliminated GRE’s, LSAT’s, MCAT’s or GMAT’s, such as has been proposed in Texas by influential legislators. Here, I have to say, I do not agree with such plans, although my first personal instinct is to embrace such statutes. However, my experience on admissions committees guides me here more than does the research literature. In a nutshell, I wish schools would minimize the use of standardized tests in post-baccalaureate admissions, but I do not support legislation aimed at requiring this process. Moreover, even if I were to support the increased legalization of admissions, it would not extend to eliminating the tests.

Let me explain myself. Notwithstanding its modest predictive validity, the LSAT (as one example) does increase its predictive validity when it is combined with an UGPA. Most schools do this by arranging for the LSAC to combine them with a relative weighting algorithm, as in the one that resulted in the "Texas
Index." As I have noted, even this has its problems, especially when reviewers are confronted with hundreds of such numbers, bunched up in the middle or at the some midpoint. LSAC has began to issue scores in bands, to show how little psychometric weight can be attached to such small differences, but these do not translate to the indexing process, which still arrays applicants across a numerical scale. Many applicants and reviewers alike still do not grasp that a 209 is really no different than a 210. Indeed, depending upon the weight built into the indexing process, the difference between a 209 and a 210 could be one or two answers on the LSAT or one or two grades of the 130+ credit hours taken in college. Also, I believe the LSAT gets a "second bite" when reviewers see both the combined index and the test score. Naturally, one's mind registers them both, even though the index already subsumes the test score and GPA. In my own file reading, I have noticed this phenomenon.

Further, I supported and testified on behalf of the Texas "Top-10%" legislation that limited the use of the SAT and ACT in undergraduate admissions. High school students present portfolios of limited utility in admissions, with only a morning's test and four years of high school work. This, combined with the more forgiving nature of collegiate work (students can switch majors, stop in and out, and combine work and college) led me to believe that admissions can be legislated at the undergraduate level.

However, I believe that at the graduate and professional level -- the post-baccalaureate level -- admissions screening committees have fuller records of information and data on applicants, and that suitability for study can be more
accurately and fairly assessed. In addition to four (or more) years of undergraduate coursework, there is a portfolio of professors’ letters of recommendation, the deepening of curricular choice through a defined major, and often additional data such as job performance and summer work experiences. Thus, when I assess a UHLC applicant’s file, I have a transcript of coursework, statistical information on the college(s) attended, a completed application form with all kinds of personal data, a longish essay on why she wants to become a lawyer, detailed letters about her academic or job performance, and the statistical information, broken down into disaggregated components such as each year’s GPA, and the results of each LSAT taken. These pieces are essential for gauging the applicant’s proclivity for law study, and as a professor who has read tens of thousands of files over the years, I need all these pieces to render a thorough judgment on whether the applicant can successfully complete the UHLC curriculum and become a good attorney. Because all the pieces, including the moderate use of the LSAT and UGPA, contribute to my reading of the file and forming this judgment. I do not want a Legislature limiting which pieces I must ignore or emphasize. All, in their way, contribute to my judgment, and I am willing to accept all, flawed as any one piece may be.

But do not misunderstand me: I am against professors making uninformed or prejudicial judgments based on the data they have. For example, Cheryl Hopwood was judged downwards by the University of Texas committee chair for her having attended California State University – Sacramento, because it was assumed to be not an elite college. However, I would highly value someone who attended such a working class and racially-diverse institution, for the experience she would bring to
UHLC. On the other hand, I would have voted against one of the Hopwood plaintiffs who had above-average LSAT scores but was deemed to be a “mediocre student” by one of his recommending professors.\textsuperscript{35} I also think that schools should require full files and only require information they will use. Cheryl Hopwood’s application was considered by UTLS, even without an essay or letters of recommendation.\textsuperscript{36}

Flawed as my judgments may be, I believe the Legislature has to let faculty make them, without restricting the degrees of freedom. The American Association of University Professors (AAUP), for whom I was recently privileged to serve as General Counsel for four years, defends the concept of academic freedom in higher education; one of the four important tenets of academic freedom is the freedom to select those who will be admitted to study.\textsuperscript{37} This important foundation of higher education is, in my judgment, particularly appropriate and crucial for postbaccalaureate professional studies and graduate programs.

Finally, eliminating the LSAT by statute would put public law schools in accreditation jeopardy, as ABA standard 503 provides: “A law school shall require all applicants to take an acceptable test for the purpose of assessing the applicants’ capability of satisfactorily completing its education program. A law school that is not using the Law School Admission Test sponsored by the Law School Admission Council shall establish that it is using an acceptable test.”\textsuperscript{38} I believe the Miller’s Analogy Test could serve as an efficacious standardized measure, and I urge law schools to try alternatives on an experimental basis. This exam, which I took in the 1970’s to be admitted into a PhD program at the
University of Michigan, is offered by institutions, and measures analogy reasoning, a major component of the LSAT. Even so, no law school would want to be the guinea pig in an such experiment, especially with US News and World Report ranking schools by LSAT scores. No law school in the U.S. has attempted to develop such a alternative, and I fear that any schools would be at risk for continued accreditation should legislation be adopted, much as Hopwood itself and Texas Attorney General Dan Morales’ excessive interpretation of the case have put Texas public schools at a considerable disadvantage in competing for students of color and Anglo students who wish to study in diverse communities. 39

III. Suggestions for Legislation and Practice and My Make-a-Wish

I have given this much thought, particularly since I floated a top 10% proposal for the University of California in Fall, 1996,40 and supported legislative language for Texas public college admissions at the undergraduate level.41 In part II, I said why I think the high school to college transaction could be legalized, but why postbaccalaureate studies should not be legislated. Where does this leave us?

First, I would urge states to consider legislation to establish a statewide “CLEO-type” program that would provide summer law school preparation programs, enable test practice and improvement, and assist in the application process. For example, in Texas, I could see such a program, whether located near an urban law school or in the Valley, that would serve as a prelaw talent search and preparation, which could assist the participating law schools in recruiting economically disadvantaged students. Perhaps a common application form could
be developed, and law schools could contribute their time and resources as a supplement to a state appropriation. I would expect that a modest amount of state money, perhaps $200,000 - $250,000 would be needed to prime this pump.

I believe this entity, either established at a current law school, free standing 501(c)(3) organization, or other non-profit, could significantly improve the quality of pre-law instruction for state residents and level the playing field for disadvantaged students and first generation college applicants – those less likely to have the resources that more highly educated families possess and transmit to their children. Indiana has established such a program on a small scale. 42

My advice that follows is for law schools. It is taken directly from the ABA Section on Legal Education and Admission to the Bar/Committee on Diversity in Legal Education. 43 This advice is not to abandon standardized tests, but to rely less upon the LSAT (while the advice is for law schools, it is also applicable to other graduate and post-B.A. professional programs). The ABA Committee report detailed several plans, intended to de-emphasize the reliance upon the LSAT. For example, the Committee selected the public law schools from California (whose Regents passed a resolution abolishing affirmative action) and the Fifth Circuit (Texas, Mississippi, and Louisiana) and undertook a study about broadening their pool by using a score that was tenth from the lowest score (Alt. A), or 5 LSAT points below their previous lowest LSAT (Alt. B).

After reviewing the data described above, the Committee focused on an analysis that compared the proportion of admits to total applicants with the proportion of actual minority admits to qualified minority applicants. The purpose
of this analysis was to determine whether using the LSAT as a qualifying credential might give schools an opportunity to expand minority admissions. We hypothesized that a school would expand its pool of qualified applicants by using the LSAT as a qualifying credential if the ratio of its actual minority admits to its qualified minority applicants was greater than the proportion of total admits to total applicants.

Given this hypothesis, the Committee expanded its analysis to include 31 law schools, public and private, from across the country and across the spectrum of schools, including the original ten. As noted above, the Committee used two “baseline” LSAT scores in defining “qualified”: (1) [Alternative A]: a 1997 applicant is qualified for admission if the applicant’s LSAT score is equal to or higher than the 1996 admitted student’s score which was 10\textsuperscript{th} from the lowest LSAT score in the school’s admitted pool for 1996; and (2) [Alternative B] a 1997 applicant’s LSAT score was within five points of the LSAT score which was 10\textsuperscript{th} from the lowest LSAT score in the admitted pool for 1996. Using these two definitions of “qualified” as the criteria for being eligible for consideration for admission to each individual law school, the following results were achieved:

The number of schools that would expand the subset of qualified minority applicants in their pool though using Alternative A are:

\begin{center}
\begin{tabular}{|l|c|}
\hline
Minority Applicants & Number of Schools \\
\hline
Black/African-American & 6 \\
Chicano/Mexican-American & 14 \\
Hispanic/Latino & 7 \\
\hline
\end{tabular}
\end{center}

20
Further analysis reveals that there is little overlap among these schools across the different ethnic identity groups. The total number of schools that would expand their pool of one of these four ethnic identity groups was 20. When Asian/Pacific Islanders are not counted, 18 schools would expand their pool for at least one of the remaining three groups. When all four minority groups were added together, however, *i.e.*, when summing the estimated number of qualified applicants across all four groups and comparing that total to the number from these groups that actually were admitted in 1997, only one law school expanded its pool. (Four schools did so when Asian/Pacific Islanders are omitted from the cumulative totals).

The results from using “Alternative B”, which would include virtually all applicants admitted to any of these schools in 1996, as applied to the applicant and admissions data for the same schools in 1997, were as follows:

<table>
<thead>
<tr>
<th>Minority Applicants</th>
<th>Number of Schools</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black/African-American</td>
<td>19</td>
</tr>
<tr>
<td>Chicano/Mexican-American</td>
<td>18</td>
</tr>
<tr>
<td>Hispanic/Latino</td>
<td>20</td>
</tr>
<tr>
<td>Asian/Pacific Islander</td>
<td>14</td>
</tr>
</tbody>
</table>

The total number of schools that expanded their pool of qualified minority students for at least one of these four ethnic identity groups through using “Alternative B” was 30 of the 31 schools. When Asian/Pacific Islanders are omitted, 29 of the 31 schools did so for at least one of the remaining three groups.
In summing the estimated number of qualified applicants across all four
groups and comparing that total to the number from these groups that actually
were admitted in 1997, fourteen law schools expanded their pools with this
approach. Using the same analysis, but omitting the Asian/Pacific Islanders,
sixteen schools did so.

It thus appears to us that nearly half the law schools might give themselves
a better opportunity to broaden the subset of eligible applicants in their pool and to
improve their minority admissions if they utilized "Alternative B ". In addition to the
analysis described above, the Committee asked the LSAC to run several other tests
to determine whether the use of other factors might broaden the pool. We inquired
about whether factors, such as age or undergraduate major, might correlate with
either minority status or gender in a fashion that would enhance a school’s ability
to achieve a diverse student body. We learned that minority status and gender do
not strongly correlate with these factors.

Committee Findings and Recommendations

The work that the Committee has done leads us to offer several
findings and recommendations:

(1) Purpose of the LSAT. The LSAT can be used for two purposes: (1) to
provide evidence that an applicant can succeed in the first year of law
school; and (2) to allow the school to compare one applicant to
another applicant. Schools have most frequently used the LSAT for
the second purpose, and have mistakenly assumed that small
differences in scores indicate great differences in individual ability. In
order to correct this mistaken assumption, the LSAC has begun to report LSAT scores to schools in bands that show the margin of error surrounding a particular score an applicant who score. An applicant who scores 159, for example, should be viewed as falling within a band of 156-162.

(2) Achieving diversity. For the vast majority of law schools, the most effective way to achieve diversity is to take into account the diversity that applicants from racial and ethnic minority groups bring with them. As noted above, this approach is solidly grounded on the Bakke decision.

(3) Achieving diversity when race and ethnicity cannot be taken into account. Public schools in California and the Fifth Circuit are prohibited from using race and ethnicity as factors in admissions. The challenge of maintaining significant diversity is more difficult in these jurisdictions for highly selective schools with large applicant pools. Under these circumstances, the smaller numbers of minority applicants are vastly outnumbered by other applicants at all levels of the pool. The use of Alternative B may prove quite helpful to some schools in this category, and we recommend that such schools request appropriate data from LSAC to make this determination for themselves.

(4) Overreliance on the LSAT. Even those schools that would not expand their pools by using Alternative B should scrutinize their current
processes to eliminate overreliance on the LSAT and to incorporate more individualized assessment of candidates. We share the view repeatedly voiced by the Law School Admission Council that many schools use the LSAT incorrectly in the admissions process.

(5) **Experiments recommended.** The Committee urges schools to develop their own unique admissions processes to achieve the mix of students they desire. We found that there is no uniform standard that identifies a single measure of "merit" in evaluating numerical indicators in the admissions process. Schools should feel free to experiment with the numerical indicators in relation to each other and to other, non-numerical, indicators in making their admission decisions. Schools that wish to experiment with alternatives A or B described above may instruct the LSAC to report only that an applicant is "qualified" and to omit the specific LSAT score or scores. A school using this approach will, of course, be expected to disclose fully to prospective applicants and the ABA how uses the LSAT. The schools will still be able to participate in the annual correlation study performed by the LSAC to permit evaluation of the propriety of using the LSAT in this manner. ⁴⁴

In closing, I use my wish – gift to make a modest wish. But first, I have to tell one last story. My niece and goddaughter is very good in math, and is still young enough (12) not to know she isn’t supposed to not be good at math. For her, it is fun and challenging. She was identified as talented in this area, and was recommended to take the SAT, which was used by Duke to identify gifted math
students for a special summer program. She was four years from taking the PSAT, the exam that is designed for juniors in high school, as a “trial run” for the real thing, the SAT, which is widely taken by high school seniors. Remember, she is 12, a seventh grader at a local public middle school.

The week before she was scheduled to take the exam, I spoke to her on the phone to see how she was doing and to ascertain that the tutoring my wife and I had offered to pay for was progressing. Her parents, neither of whom attended college, however, had read the Duke program application and decided that they would not coach or tutor her, as recommended by the program’s materials. So she was studying a practice SAT and looking up words and mathematical terms she did not understand in a dictionary. I asked her to tell me some words she had looked up, and when she said, “integers,” “functions,” and “prime numbers,” my heart sank as I realized that she would not be going to Duke next summer. Needless to say, she scored only a combined 800 on the verbal and math, of the 1600 possible. Moreover, she would now likely have test anxiety over her performance when she takes it five years hence, with all the other seniors. At least she will have taken algebra, trigonometry, geometry, and calculus by then, and I predict she will do well.

I know, the SAT taken as a 12 year old is not like taking the LSAT. But the disadvantage so many students face – not being tutored, not being in a school where such test preparation is de rigueur in class or in homeroom, taking time out from school, having English as a second language, or being in schools that do not challenge or prepare (for example, not having Advancement Placement courses or
honors classes) disproportionately affect students of color and poor white students. And the advantages multiply beyond society’s ability to remedy the gaps. In Texas, 20% to 30% of students admitted to Texas A&M University received alumni privilege points, derived from one or the other of their parents or siblings having graduated from TAMU.\(^45\) The Fifth Circuit specifically singled this practice out as an acceptable criterion, despite the policy’s clear racial bias towards white applicants, in Hopwood.\(^46\)

My intent in telling this story? Testing should not as highly regarded as it is in U.S. admissions policies, and it should count a lot less than it does at present. Even so, I could live with it if my one wish were granted: that Bakke\(^47\) be upheld by the Supreme Court. If I were President, Roe v. Wade\(^48\) would not be my litmus test, but rather, adherence to this case. I never was much of a wish-maker, so I make this one modest wish, the legacy of being one of ten children. I am used to modest wishes, on the grounds that modest wishes are more likely to be granted. When I was a boy, we got to have one wish granted on our birthdays, and to choose one Sunday meal. Not knowing any better, I always chose fried chicken, corn on the cob (frozen, as my birthday falls in February), and a strawberry chiffon pie my late mother used to make, with a recipe that died with her. Our gifts were usually increased privileges -- to be able to go to the library on the bus, to be allowed to bike to the local swimming pool, to be granted permission to go to the movies by myself. Thus, as today, my wish is modest, but for my next birthday I would like to create that long-ago chiffon pie or learn to make a flan that has no calories. At my age, I am upping the wish-stakes.

26
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2 Id., at nn. 68-69.

3 The research for this section draws upon a more comprehensive study, and is supplemented by more recent data. See Michael A. Olivas, Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education, 68 U. COLO. L. REV. 1065 (1997).

4 There is a rich literature in this field. For two of the more recent and balanced studies, see ELIZABETH DUFFY and IDANA GOLDBERG, CRAFTING A CLASS, COLLEGE ADMISSIONS & FINANCIAL AID, 1955-1994 (1998); CHARLES CLOTFELTER, BUYING THE BEST: COST ESCALATION IN ELITE HIGHER EDUCATION (1996).

5 While this is true of most legal admissions, the University of Texas has begun to offer interviews for applicants who wish to discuss their applications, partly as a result of Hopwood. See, Testimony of UTLS Dean Michael Sharlot before Texas

6 There are many problems inherent in measuring grades across high schools or colleges. First, not all grading policies or practices are the same. Nicholas Georakopoulos, *Relative Ranks: A Remedy for Subjective Absolute Grades*, 29 CONN. L. REV. 445 (1996). Second, many high schools allow students to get better than 4.0 grades through Advanced Placement or honors coursework. For one extreme example, in 1996, the University of California-Berkeley had more than 9000 applicants with GPA’s of 4.0 or better (on a 4.0 scale) vying for 3000 freshman slots. Carol T. Christ, Affirmative Action and Freshman Admissions at Berkeley, Remarks at the Association for the Study of Higher Education Annual Conference, (Nov. 2, 1996) (unpublished paper, on file with author). [10-12 lines blank]

7 The Law School Admissions Service also weights the scale to emphasize either the LSAT or the GPA more, according to a school’s preference. Some schools
weight the LSAT as much as 70%, while other schools accord as little as 50% to this criterion. Thus, a 220 at one school may not be the same 220 at another.

8 See infra note _____ and accompanying text.

9

10 Sturm and Guinier, supra note 1, at nn. 68-70.


14 Id.


16 See generally Sturm and Guinier, supra note 1; Guinier, supra note 11.

17 AMERICAN BAR ASSOCIATION, APPROVED LAW SCHOOLS (1998) at _____.

29

19 Maria Pennock-Roman, Fairness in the Use of Tests for Selective Admissions of Hispanics, in *LATINO COLLEGE STUDENTS*, *supra* note 13, at 246-248.


21 *See generally*, Olivas *supra* at note 3, at 1080-1089 (reviewing statistical models of fair testing).


23 Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978) (medical school has academic authority to dismiss medical student due to poor hygiene in hospital clinical course setting).


25 “Some Hispanic students may be quite resourceful in overcoming [difficulties in preparation], while others may not be so resourceful. The resulting variation in this
accommodation could affect the interpretation of high school grades (and also test scores) as predictors of college achievement.” Duran, supra note 13, at 229.

26 Olivas supra note 3, at 1080-89.

27 Id., at 1080-89.


30 In a related development, the Graduate Management Admission Council, which administers the GMAT -- the test used for MBA admissions in Business Schools -- will employ computer programs to evaluate written essays on the GMAT. Kelly McCollum, Computer Will Help Grade Essays on Graduate Management Admission Test, CHRON. OF HIGHER EDUC., Jan. 29, 1999, at A-30.


32 Discussions with LSAC Executive Director, Dean Phillip Shelton, Fall, 1998. The LSAC President, Dean Leo Romero, described this development in recent testimony before the Texas House Committee on Higher Education, Sept. 24, 1998 (unpublished report, on file with author). Under this system, a 160 band score would certify that, within 65% confidence, a 160 test score is similar to a 157-
163. That is, schools can confidently treat a 160 the way they would any score from 157-163.

33 V.T.C.A. Education Code Sec. 51.801 ff (1997); see App.II. See also Testimony of Michael A. Olivas before Texas House of Representatives, Committee on Higher Education, April, 1997 (report on file with author). Here, I feel the need to correct the record, or at least elaborate upon it. In September, 1996, a Texas state senator convened a forum in Austin to formulate policy as a response to Hopwood. Many Latinos and other educators were present, where several legislative plans were drafted. As it was in conflict with my UHLC teaching obligations, I was unable to attend, although I spoke with several persons in attendance, and reacted to some of the ideas being advanced. At that point, the 10% Plan had not
surfed. I did not speak with any of the participants after the meeting, as I knew that other forums would be arranged before the 75th State Legislature would convene in January, 1997. In the Fall of 1996, I was asked by persons with the Association for the Study of Higher Education (ASHE) to respond to a paper by UC-B’s Carol T. Christ, where she reported on the crush of applications at the UC’s flagship campus, and the problems that were appearing in the implementation of the Regents Policy that eliminated race as a modest “plus-factor” in UC admissions. Reading from her paper, sent to me in October, that a disproportionate number of UC-B and UCLA applicants came from no more than 30 California high schools, I suggested in my public response that a “small frogpond” plan could be put into effect, where the top 5%-10% of all high school graduates could be made U.C.-eligible, and that this would be both efficacious and more broadly-representative, while still preserving the quality inherent in such a competitive process. I likened it to the Olympics, where each county can only send three athletes to the Games, even though Kenya may have more than three marathoners who could qualify. I did not, however, suggest that the others be ineligible, only that they not be given automatic admission. This talk, given in November, 1996, was my own remarks, assisted by Ed Apodaca (UH Association President for Enrollment Management) and Manual Gomez, Vice Chancellor for Student Affairs, UC-Irvine. In his otherwise-complete rendition of the legislation, University of Texas History Professor David Montejano claims to have authored the 10% Plan, while jokingly noting that “it was a document [he] had found outside [his] office door in an unmarked envelope.”
It was actually drafted by Legislative Counsel, with whom I reviewed two versions. I discussed my idea twice on the phone with him, and once in person. David Montejano, On *Hopwood*: The Continuing Challenge, in Neil Foley, REFLEXIONES 1997 (1998) at 133, 140. The moral of this story: Successful legislation has many parents, while failed legislation is an orphan.


35 *Id.* at 566.

36 *Id.* at 564.

37 “It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”

*Sweezy v. New Hampshire*, 354 U.S. 234, 263 (Frankfurter, J., concurring) (citing a statement of a conference of senior scholars from the University of Capetown and the University of Witwatersrand, South Africa)

38 AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS (August 4, 1998), Standard 503, at 57.

39 Then-Texas Attorney General Dan Morales expansively read *Hopwood* to extend beyond the University of Texas Law School to other Texas public colleges. He also said the decision governed college recruitment and financial aid programs, and he
even opined that it would reach private colleges. Private colleges in Texas, despite a long history of independence from the AG, bailed out of affirmative action admissions, leading Rice University even to rescind several admissions offers made to Black applicants under pre-Hopwood criteria. See The Short History of Race-Based Affirmative Action at Rice University, J. BLACKS IN HIGHER EDUC., Autumn 1996, at 36, 38. In a particularly feckless decision, the AG of Georgia -- not a state in the Fifth Circuit -- announced he would abide by Hopwood rather than by Bakke, the controlling U.S. Supreme Court precedent. Regents of the University of California v. Bakke, 438 U.S. 265 (1978). See Georgia College Ordered to Drop Racial Preferences, WASH. POST, Apr, 10, 1996, at A20.

40 See Olivas supra note 33.

41

42 App. III

One legislative proposal that I have not commented upon, in part due to its having just become known to me, is a promising statute recently enacted in California, which allocates money to schools to offer SAT test-preparation courses. My first thought is that this would be more effective if it were implemented by non profit, 501(c) 3 centers. See App. IV; see generally, Tony Schwartz, The Test Under Stress, NYT MAGAZINE, Jan. 10, 1999, at 30, 51, 56.

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44. As a variation on this theme, the University of Houston Law Center Admissions Committee receives its LSDAS-prepared files without any racial/ethnic references evident to readers. They are tabulated by another office for eventual identification, but readers receive all admissions information with this code masked. While I believe this to be an excessive overreaction to *Hopwood*, it clearly reveals that schools can make decisions without the information, and that they could do the same for applicants with (say) LSAT’s over 500 or some other point. These files, under the proposal above, would simply indicate that the score is or is not over a threshold, not report the score itself.

45. “A study by Texas A&M in 1996-97 found that 2,000 to 3,000 students had received “legacy” credit on their applications, out of the 10,7000 who were admitted. . . Ties to alumni were the deciding [emphasis added] in admitting only 200 students in 1996-1997 . . . .” Kenneth Ma, *Texas Bill Would Bar Admissions Preferences*, CHRON. OF HIGHER EDUC., Feb. 5, 1999, at A38.

46. The Fifth Circuit panel would allow public law schools to take into account an applicant’s “relationship to school alumni” and could consider “whether an applicant’s parents attended college,” although it is not clear if these characteristics could work for or against applicants. *Hopwood*, 78 F 3d at 946. In my understanding of the traditional use of the criteria, one would reward college-going (alumni preference) while the other would reward *non*-college-going (first generation preference). These contradictions, as well as others in the *Hopwood*
panel's criteria, suggest they did not comprehensively consider the various criteria they listed.

47 Bakke, 438 U.S. 265 (1978)

48 Roe v. Wade, _____ U.S. _______ (19__). 

Appendices

I. Texas Bill (1999)

II. Texas Legislation (1997)

III. Indiana Legislation

IV. California Legislation