THE POVERTY OF THEORY AND PRACTICE IN PUBLIC LAW SCHOOL AFFIRMATIVE ACTION PROGRAMS

INTRODUCTION

> It shall be a misdemeanor to maintain or operate, teach or attend a school at which both whites and colored persons are enrolled or taught. . . . [T]his section shall not apply to programs of instruction leading to a particular degree given at State owned and operated colleges or institutions of higher education of this State established for and/or used by the white race . . .; provided further, that said programs of instruction . . . shall be given at such colleges or institutions of higher education upon a segregated basis.[1]
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> *The Law School seeks to produce a student body that is diverse in its members' backgrounds, perspectives and career goals. . . .*[2]

Admission to institutions of higher education, particularly professional schools, represents a right of passage into the world of the elite. University and college graduates generally enjoy rights and privileges that the remainder of the population do not enjoy.[3] Application for admission to state colleges and universities[4] by minority[5] students presents numerous problems for the administrators who "allocate" this scarce public resource.

Minority communities suffer from "societal handicaps and discrimination traceable to America's racially divided past and its

1. 70 OKLA STAT. ANN. (1950) §§ 4455, 456, 457. This law typified laws adopted by many states prior to 1960. *See e.g.*, McLaurin v. Oklahoma State Regents For Higher Education, 339 U.S. 637 (1950); Sweat v. Painter, 339 U.S. 629 (1950).

2. *Changing Faculty Rules*, UCLA School of Law Admissions Task Force, November 21, 1978. This policy typifies admissions regulations many state colleges and universities have had in effect since 1978. For the historical background surrounding minority admissions at UCLAW, *see* Flores, *The Struggle For Minority Admissions: The UCLA Experience*, 5 CHICANO L. REV. 1 (1981); Daily Bruin, Ap. 13, 1982.

3. Professionals generally have the power to control and discipline over themselves. Self-regulation is allowed so that the profession can require its members to observe higher standards than would be required by people outside the profession. *But see* Abel, *Why Does The ABA Promulgate Ethical Rules*? 59 TX. L. REV. 639 (1981).

4. This Comment is restricted to discussion of state admission programs because state educational institutions, unlike private institutions, have an obligation to allocate a scarce public resource, education subsidized by taxpayers, in a just manner.

5. The term minority recognizes four groups: Asian/Pacific Islanders, Blacks, Chicanos/Latinos, and Native Americans.

persistent racism."[6] Affirmative action programs represent institutional responses to this fact. Since 1978, the general framework for these programs has been shaped by Justice Powell's opinion in *Regents of University of California v. Bakke*.[7] *Bakke* invalidated the University of California at Davis Medical School's special admissions program and in its place used Harvard College's "diversity" admissions program as a model.[8] Justice Powell's alternative represents the status quo in many state colleges and universities.

This comment provides an alternative view of the Constitution and affirmative action. Part I examines the predominant view of the Constitution known as process theory as it applies to racial minorities. It explores the weak connection between theory and reality in disenfranchised minority communities, and it focuses on the manipulability of the theory that undermines the goals of redressing current injustice in minority communities and of providing some form of reparation for the societal handicaps and discriminations traceable to America's persistent racism. Part II considers the theoretical inconsistencies in the *Bakke* decision and illustrates how diversity admission programs perpetuate the dependency of minority communities that these programs were designed to eliminate. Part III examines how traditionally used admission criteria are inappropriate for use in diversity admissions programs in law school. Part IV provides an alternative admissions criteria for use in law school diversity admission programs that reunites in a meaningful fashion the goal of eliminating racial discrimination in our society and the realities of minority communities.

I. *BAKKE* TO THE BEGINNING: THE GRAND THEORY OF CONSTITUTIONAL LAW

A. *Participation As Our Most Cherished Constitutional Value*

The *Bakke* decision relies upon an account of constitutional law known as process theory. Generally, process based theorists maintain a view of the Constitution whereby:

> the selection and accomodation of substantive value is [sic] left almost entirely to the political process and instead that document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes, and on the other, . . . with ensuring broad participation in the process and distribution of government.[9]

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6. Regents of University of California v. Bakke, 438 U.S. 263, 369 (1978).
7. *Id.*
8. *Id.* at 315-324.
9. J. ELY, DEMOCRACY AND DISTRUST 87 (1980) (footnotes omitted) [hereinafter cited as ELY].

This theory protects the meaning and function of democracy. Judicial intervention is justified by revealing the inadequacies of the political process.[10] Thus, the Constitution permits the judiciary to strike down legislative acts without making policy judgments about substantive issues.

The most celebrated formulation of process-based theories appears in footnote four of *United States v. Carolene Products*.[11] Basically, judicial review is justified when "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."[12] However, the "process theme determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values."[13]

Implicit in the process theme is the premise that participation is highly valued in our notions of democratic government. Accordingly, participation is what the Constitution is about as a necessary condition for the proper functioning of democracy. Without participation, the democratic process fails. The difficulty arises in identifying the instances where participation has been thwarted.

B. *Judicial Protection of Minorities*

When dealing with racial minorities, process theorists' underlying idea is that the judiciary should decide whether minorities should be protected by some immunity from the political process and the limits of that immunity. The legitimacy of this notion lies in the fact that "prejudice is the lens that distorts reality."[14] Hence, the typical American legislature will undoubtedly act upon the "positive myths about the groups to which they belong and the

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10. The earliest example of this view appeared in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435-36 (1819) where the state was held not to have power to tax federal instrumentality because it would thereby act on national population ot represented in its legislature.

11. 304 U.S. 144, 152 n.4 (1938):

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities, . . .; whether prejudice against discrete or insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

12. ELY, *supra* note 8, at 103.

13. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 83 YALE L.J. 1063, 1064 (1980).

14. ELY, *supra* note 8, at 153.

negative myths about those to which they don't. [L]egislators, like the rest of us, are likely to assume too readily that not many of 'them' will be unfairly deprived, nor many of 'us' unfairly benefitted by a classification of this type."[15] Classifications of this type do not assure fair evaluation of constitutionally protected interests of minorities.

C. *Grand Theory Meets the Reality of Minority Communities*

The voting rights cases of the sixties represent a convenient illustration of participation. In those cases, participation became indexed under the right to vote. "One person, one vote"[16] is the assertion of the constitutional right to be counted equally with other individuals in elections.[17]

Given the opportunity to vote, we must acknowledge the fact that we also have the opportunity not to exercise this right. This would appear to give maximum deference to individual autonomy. Symbolically, this is very significant in minority communities. Voter participation in disadvantaged minority communities. Voter participation in disadvantaged minority communities has traditionally been very low.[18] If this is so, then it is by choice. From this decision we can infer that the right to vote is not an effective means of fostering sensitive representation in the political process of those who had previously been excluded.[19]

For disadvantaged minority communities, lack of sensitive representation in the political process personifies itself in the oppression that these communities must confront every day. Civic duty has little significance in this context. Alexis de Tocqueville pointed this out almost 150 years ago:

> It must not be forgotten that it is especially dangerous to enslave [people] in the minor details of life. For my own part, I should be inclined to think freedom less necessary in great

15. *Id.* at 158-59.

16. Reynolds v. Sims, 377 U.S. 533 (1964).

17. Citizens do not have the right to vote in all government elections. A number of restrictions exist. For example, a person registered in Los Angeles could not realistically expect to be allowed to vote in the mayoral election in Chicago. In addition, when special districts are created which do not perform general governmental functions, the right to vote can be restricted. *See, e.g.*, Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) where a special water district was allowed to malapportion voting power in favor of large landowners; Ball v. James, 451 U.S. 355 (1981) where the court applied *Salyer* to a quasi-private water and power district limiting voting to land-holders and apportioned voting power to relation to the amount of land owned.

18. *See* K. PHILLIPS AND P. BLACKMAN, ELECTORAL REFORM AND VOTER PARTICIPATION 1-9, 23-34 (1975).

19. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 151-173 (1970).

> things than in little ones, if it were possible to be secured of the one without possessing the other.
> Subjection of minor affairs breaks out every day, and is felt by the whole community indiscriminently. [I]t crosses [people] at every turn . . .; whereas that obedience, which is exacted on a few important but rare occasions, only exhibits servitude at certain intervals, and throws the burden on a small number of [persons]. It is vain to summon a people, which has been rendered so dependent on the central power, to choose from time to time the representatives of that power; this rare and brief exercise of their free choice, however important it may be, will not prevent them from gradually losing the faculties of thinking, feeling, and acting for themselves and thus gradually falling below the level of humanity.[20]

Quite simply, if people do not feel that they have the power to change their situation, they do not think about it. The most important thing in the lives of these people is survival. They must constantly struggle to obtain employment, food, shelter, clothing, health care and legal aid. Accordingly, it is a bit naive to talk about equality of opportunity under such circumstances. However, the psychology of disadvantaged minority communities goes one step further than this. That is, as with any oppressed group of people, there are limits to what they will endure. The civil rights struggles of the sixties illustrate this point.[21]

Two conclusions can be drawn from these observations. First, the most we can expect from voter participation is its symbolic value. It is doubtful that people really believe that their votes are determinative in elections. It may be more that they regard their vote as symbolic evidence of public esteem and participation.[22] Second, once we recognize the fact that the right to vote cannot assure disenfranchised minority communities meaningful participation in the process and distribution of government, then we must develop a broader interpretation of participation in society.[23]

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20. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1945) (citation omitted).

21. A more current example is the civil war in El Salvador.

22. "Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engated in a common venture." L. HAND, THE BILL OF RIGHTS 73-74 (1958); *cf.* "[W]hat matters to me is not whether its true or not but that I believe it to be true, or rather, not that I *believe* it but that *I* believe it." R. BOALT, A MAN FOR ALL SEASONS 52-53 (1962) (emphasis original).

23. Consider for a moment the Constituent Assembly elections of March 28, 1982 in El Salvador. The Reagan administration ballyhooed these elections as a victory for democracy—1.5 million Salvadoreans voting despite the threat of guerrilla violence. Yet it is difficult to see how this could be a victory for political community and participation therein when two-hundredths of one percent of the population owns 39% of the land; over half of the people subsist on a per capita income of less than $15 per month; unemployment is 40%; approximately 50% of the children die before the

D. *Grand Theory Meets Legal Realism*

An examination of other claims of equality that seek to foster greater participation in American society for minority communities also leaves us unsatisfied. Minorities who week to hold states accountable for inferior school systems are left without a remedy.[24] On a local level, school boards cannot be held accountable for neighborhood segregation.[25] Minorities who seek to attack racially biased civil service exams are similarly left dissatisfied.[26] Unemployable welfare recipients likewise have no claim against states that deny their children minimum welfare assistance.[27] Minorities also have no claim against suburban communities whose zoning ordinances bar them from their communities.[28]

All of these cases reflect a value judgment by the judiciary proscribing the limits of certain claims to equality. As Professors Karst and Horowitz point out:

> What needs emphasis is not that legislative bodies classify . . . but that judges also classify, when they define the issue of equality.
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> Each societal institution can be conceived schematically as a circle with lines across it at various angles to form an irregular patchwork pattern. Each institution potentially can be represented by several circles of varying, sizes and locations. The judge aided by the claimant's own assertion must select the appropriate conceptual circle to represent one meaningful "whole" for purposes of analysis, and must select at least one artificial line to represent the distinction (classification) which exists within the whole. The resulting scheme of classification is not something to be found in nature but an invention of the judicial mind.[29]

Another way of seeing this point emphasizes the dialectical nature of judicial decision making.[30] For example, the fact that someone supports legislation that makes abortion criminal does not necessarily imply that she has "considered whether the concept of dignity presupposed by the Constitution, consistently applied supports [her] position . . . [I]t is not to be taken for granted

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age of 5. This clearly suggests that there is much more to the concept of participation than just voting. *See* L.A. Times July 15, 1982; N.Y. Times, June 3, 1982.

24. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

25. Swann v. Charlotte-Meckelburg Bd. of Educ., 402 U.S. 1 (1970).

26. Washington v. Davis, 426 U.S. 229 (1976).

27. Dandrige v. Williams, 397 U.S. 471 (1970).

28. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

29. Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 957 (1974).

30. Professor Dworkin elaborates this point in great detail. To accomplish this task, he has created "a lawyer of superhuman skill" named Hercules. *See* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1082 (1975).

that [her] political preferences, expressed casually or in the ballot, have been subjected to that form of examination."[31] Therefore, a judgment that strikes down abortion legislation is suspect if it has not emerged from such a process. If so, then we must also see that the structure of principles by which one would describe the community's morality must emerge from the same process. For this reason, judges engage in creative activity when they articulate principles that explain their judgments. They are making choices that the community has not yet confronted.[32]

The idea that judges engage in creative activity when they make decisions is reinforced by the view that constitutional values represent the "evolving morality of our tradition."[33] There is not a close link between contemporary constitutional values and those which the framers had intended. The societal values of the present, not of the past, determine the content of constitutional law.[34] This observation was made clear by Justice Douglass in *Harper v. Virginia Bd. of Education*:[35] "[W]e have never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."[36]

The elastic nature of constitutional values and the dialectical nature of judicial activity also underscore another problem of which process theorists are unable to take account. That is, why should the American judiciary whose demographic composition is not different from the typical American legislature be more capable of overcoming the "prejudicial lens" than the legislature? Anyone who has read *The Brethren*[37] would be convinced that judicial decision making is no less political than legislative decision making.

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31. *Id.* at 1107-1108.

32. *See* Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1170-1172 (1980).

33. A. BICKEL, THE LEAST DANGEROUS BRANCH 236 (1962).

34. Sandalow, *supra* note 31, at 1180.

35. 383 U.S. 663, (1966).

36. *Id.* at 686 (emphasis original).

37. WOODWARD & ARMSTRONG, THE BRETHERN (1979). Regardless of The Brethern's factual accuracy, it makes very clear that the Justices of the United States Supreme Court, in making law exhibit human frailities as everyone else. "Grand theory must be seen as rationalism run wild. On the level of individual psychology, liberalism sees us all as creatures of unbound desire who can accept the infliction of harm on everyone else as we pursue our own ends. . . . Constitutionalism asserts that there are in principle limits on what governors can do. The more to Grand Theory attempts to escape the arbitrariness of the governors by providing reasoned grounds for limiting their power. The difficulty, then, is that those to whom Grand Theory is addressed—in the United States, the judges—are as wilful as any other governors. The rationalist move thus denies what liberal psychology assumes." Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L. JN. 411, 413 (1981).

These observations can be terribly unsettling because they tend to support the legal nihilist's belief that there is no theoretical cohesiveness to the law.[38] Hence, law represents, in its most extreme fashion, an accumulation of cases decided one by one. Put another way, Oliver Wendell Holmes believed that law could not be neutrally derived. The reason for this, he asserted, was that "an identity of interest between different parts of the community . . . [did] not in fact exist."[39] No single theory could account for the development of the common law as a whole. Likewise, no single theory can account for constitutional law as a whole. More importantly, Holmes argued that "multiplicity on the intellectual level resulted from a lack of unity on a social level."[40] That is, the inability of intelligent people to develop a unified theory of law stems not from intellectual limitations but from social limitations.[41] Accordingly, we must examine social structures before we develop our theoretical structures. Such an examination reveals that social fragmentation undercuts the liberal theory of law that general rules applied even-handedly will produce effects that benefit all. The social basis upon which process theory's acceptance must rest does not exist.

Perhaps the best way to illustrate these points is with the following dialogue:

> THE LAW: Black Americans rejoice! Racial discrimination has now become illegal.
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> BLACK AMERICANS: Great, we who have no jobs want them, we who have lousy jobs want better ones. We whose kids go to black schools want to choose integrated schools if we think that would be better for our kids, or want enough money to make our own schools work. We want political power roughly proportionate to our population. And many of us want houses in the suburbs.
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> THE LAW: You can't have any of those things. We can't assert your claim against society in general, but only against a

38. Legal Nihilism can be seen as legal realism taken to the *nth* degree. *See, e.g.*, G. GILMORE, THE AGES OF AMERICAN LAW, (1977); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); "[A]ll we can understand, and not very well, are the games we ourselves generate and eventually, but predictably, lose. Ultimately, the law is not something we know, but something that we do."

All right, all right, amen. But at least there is this: on the way to those final defeats, there are, at least for some, more beautiful innings." Leff, *Law and*, 87 YALE L.J. 989, 1011 (1978) (footnote omitted); Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553 (1974); Tushnett, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TX L. REV. 1307, 1340-1342 (1979).

39. Comment, *The Gas-Stoker's Strike*, 7 AM. L. REV. 582, 583 (1873). For a discussion of Holmes' comment, *see* Tushnett, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 1029-31 (1977); Tushnett, *supra* note 37 at 1307-1308.

40. *Id.*

41. Tushnett, *supra* note 37, at 1307.

> named discriminator, and you've got to show that you are an individual victim of that discrimination and that you were intentionally discriminated against. And be sure to demonstrate how that discrimination caused your problem, for any remedy must be coextensive with the violation. Be careful that your claim does not impinge on some other cherished American value, like local autonomy of the suburbs, or previously distributed vested rights or selection on the basis of merit. Most important, do not demand any remedy involving racial balance or proportionality; to recognize such claims would be racist.[42]

The concept of equality thereby takes on quite different dimensions depending on what community from which you come. For the members of disadvantaged minority communities, the meaning of legal conclusions that racial discrimination is illegal would encompass an expectation that the conditions of life that they had come to associate with racism would change significantly.[43] Thus, in the context of affirmative action, the proper question is not, "Are there more minority lawyers than there were 20 years ago?" but rather, "Has the quality of life in disadvantaged minority communities improved in the past 20 years?"[44]

Social fragmentation of minority communities, by definition, excludes them from effective control over the means to affect their interests. Moreover, the idea that affirmative action programs should be founded on the notion of improving the quality of life in minority communities has deep social and theoretical implications. "[C]onstitutional law is an important repository of our national experience."[45] Any theory of constitutional law that fosters greater claims to equality thereby providing a broader distribution of government power in society must recognize this fact because:

> a theory that calls for massive repudiation of [our national] experience is not likely to be heeded, nor should it be. The object of a theory of judicial review is or should be, to achieve substantial consonance between the body of decisions that compose constitutional law and generally accepted principles governing the distribution of governmental authority.[46]

The problem with this criticism is that it fails to recognize that racism has been and continues to be part of our "national

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42. Freeman, *Legitimizing Racial Discrimination Through Anti-discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1049-150 (1978) (footnote omitted).

43. *Id.* at 1052-1053.

44. In law school admissions, this translates into a program designed to recruit students from these communities, to equip them with the skills to deal with the problems in their communities and ultimately to place these students back into their communities.

45. Sandalow, *supra* note 31, at 1195.

46. *Id.*

experience"[47] thereby preventing "substantial consonance."[48] Alleviating racial discrimination cannot be accomplished simply by removing past barriers from the paths of racial minorities. To do so is analogous to half-time at a basketball game in which team A has a 50 to 0 lead over team B because they have cheated and the referee tells the teams: "Okay, in the second half we will play by the rules." Experience teaches us that the notion of equality of opportunity is meaningless to individuals who have struggled for survival throughout their lives, whose families have struggled for survival for generations, who have had to attend inadequate public schools, or had to work while in school and did not complete high school because of economic or social conditions imposed on them. To reconcile the discrepancy between reality and theory, we must repudiate our "national experience" *and* simultaneously adopt principles governing the distribution of government that are not "generally accepted."

II. THE SUBSTANCE OF *BAKKE* AND THE SUBSTANCE OF AFFIRMATIVE ACTION

A. *"The Shortest Distance Between Two Points Is Not a Straight Line"*[49]

The above quote neatly characterizes the political philosophy that underlies Justice Powell's opinion in the *Bakke* decision. When allocating a scarce public resource, in this case medical school seats, fairness in the individual competition for that resource is the ultimate concern.[50] Hence, the denial to Bakke of his "right to individualized consideration without regard to his race [was] the principal evil of [Davis Medical School's] special admission program."[51] Fair treatment was equated with individualized treatment thereby prohibiting the setting aside of a certain number of places for minorities.[52]

Justice Powell's political philosophy becomes apparent in his suggestion of race-conscious admissions criteria in diversity admissions program. Normally, process theory does not mandate substantive results as long as the individual is accorded fair treat-

47. In the court system, a more subtle way of seeing this point is to wonder where the plaintiffs in Shelly v. Kraemer, 334 U.S. 1 (1947) and Barrows v. Jackson, 346 U.S. 249 (1953) now live? Perhaps they now live in Penfield, New York. And what of the plaintiffs in Warth v. Seldin 422 U.S. 490 (1975), and Arlington Heights, Illinois, Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977)?

48. *See* Tushnett, *supra* note 38.

49. Tribe, *Perspectives in Bakke: Equal Protection, Procedural Fairness, or Structural Justice?* 92 HARV. L. REV. 864, 865 (1979).

50. 438 U.S. 265, 319 n.53 (Powell, J.).

51. *Id.* at 318 n.52.

52. Tribe, *supra* note 48, at 867-877.

ment. However, race-conscious admissions criteria are clearly result-oriented. It is clear that the opinion sought to appease hostile whites and prevent *blacklash* by admitting Allan Bakke and simultaneously further affirmative actions efforts by allowing racially weighed criteria for admission as long as the educational institutions involved were not so blunt about doing so.[53]

B. *The Crooked Line: Educational Pluralism*

For Justice Powell, educational pluralism is the cornerstone of Harvard's diversity admissions program. If an admissions program were based solely on scholarly excellence, "Harvard College would lose a great deal of its vitality and intellectual excellence[.]"[54] The quality of effectiveness of a student's education is affected by a wide variety of interests, talents, backgrounds and career goals.[55] Race as one factor in the admissions process recognizes that "a black student can usually bring something that a white person cannot offer."[56]

The problem that is inherent in this system is that members of disadvantaged minority communities are somehow no different from ballet dancers, persons who possess advanced degrees or other diverse characteristics.

This observation is illustrated as follows:

> The Admissions Committee . . . might find itself forced to chose between A, and the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up an an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students just like A but few like B had already been admitted, the committee might prefer B, and vice versa.[57]

The concern for diversity outweighs other considerations. Specifically, the doctor's son's promise of superior academic performance is directly related to his socio-economic status.[58] More importantly, diversity criteria fail to take account of the critical observation that the illegality of racial discrimination, in order to have meaningful content, necessarily entails elimination of the

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53. *Id.* at 865.
54. See *Bakke*, *supra* note 49, at 321.
55. *Id.* at 322.
56. *Id.* at 323. This notion emphasizes what the student can do for the school. There is no corresponding obligation emphasizing what the school can do for the student, in particular, those students who come from a disenfranchized minority community.
57. *Id.* at 324.
58. *See* Part III.

conditions that members of minority communities generally associate with racial discrimination.[59] Recognition of these facts would give preference to applicant B regardless of the diversity of the applicant pool. Application B appears to be pre-disposed and better equipped to utilize his education to address the needs of his community.

Diversity's inability to adequately take into account such considerations makes sense when set against the Supreme Court's worldview. Decisions like *Washington v. Davis*[60] and *Arlington Heights v. Metropolitan Housing Development Corp.*[61] emphasize "discriminatory purpose" as the pre-requisite for judicial relief for minority plaintiffs. Implicit in such a requirement is the belief that we really do live in a colorblind society wherein racial discrimination has somehow been conquered.[62] This view is reinforced in Justice Powell's rejection to the "pliable notion of [racial] stigma."[63] Those who have this worldview, have never lived in the world of disenfranchised minority communities.[64]

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59. *See* notes 41-43 and accompanying text.

60. 426 U.S. 229 (1976).

61. 429 U.S. 252 (1977).

62. *See* Freeman, *supra* note 41. Professor Freeman shows how the presuppositions of antidiscrimination law depicit racial discrimination as taking place in a virtually historical realm thereby reducing the problem to one of tort. In a more general context Professor Freeman has observed that "[M]ost legal scholarship rests on the presupposition that there exists a community with a harmony of interest sufficient to give rise to identifiable shared values. All one need do then is regard problems of doctrine as political-legal-ethical issues to be tested against some core of widely held or shared values—reflected somewhere in the Constitution or elsewhere. . . . Such an approach necessarily demands an assumption of unity, of harmony, of interest, and of virtual classlessness. What happens if only simply presupposes the world of harmony and shared interest and replaces it with one of conflict, domination, and hierarchy? When shared values are offered by winners to rationalize the plight of the perennial losers, their presuppositions offer little solace." Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1233-1234 (1981).

63. *See Bakke*, *supra* note 49, at 397. Justice Powell's analysis of Brown v. Board of Education, 347 U.S. 483 (1954) and the school desegregation cases emphasizes "specific instances of racial discrimination." Hence, "[t]hat goal was far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in realm in the past.

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of . . . findings of constitutional or statutory violations."

64. Perhaps Justice Powell's world is one in which the following letter, written in 1865 from a recently freed slave to his former master exists:

> I have often felt uneasy about you . . . Although you shot me twice befire I left you, I did not want to hear of you being hurt, and am glad you are still living. It would do me good to go back to the dear old home again . . . .
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> . . .
>
> Mandy say she would be afraid to go back without some proof that you are sincerely disposed to treat us justly and kindly—and we have concluded to test your sincerity by asking you to send us our wages for the time we served you. This will make us forgive and foreget old scores, and rely on your justice and friendship in the future. . . . We trust the good Maker has

Another problem inherent in the scope of diversity is equality of opportunity. This ideal "incorporates the twin universals of personal dessert (self-fulfillment) and societal advantage (Maximize the product)."[65] Two premises are operating here. The first is that we live in a world of distinct individuals unencumbered by class structures as well as racial boundaries.[66] Second, we live in a world wherein some objective reality exists that allows us to conceive of and measure merit or qualification. As such, equality of opportunity becomes an ideology whereby personal failure is directly linked to lack of ability.[67] Therefore, wherever a disadvantaged minority applicant would be admitted but for her grades and test scores, this ideology is reinforced. Even where societal barriers are recognized, the denial of admission reinforces the objection notion of merit and, in effect, tells the applicant, "There is some societal barriers that we cannot allow you the chance to overcome."

These observations demonstrate how diversity criteria perpetuate the dependency of minority communities that Justice Powell believes he is eliminating. As long as diversity criteria fail to impose any obligation on educational institutions to allocate seats in a manner aimed at elleviating the conditions of life in disenfranchised minority communities, the conditions will continue to exist and the goal of eliminating racial discrimination will continue to be thwarted.

C. *Defining Affirmative Action*

A comprehensive diversity admissions program must:

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opened you eyes to the wrongs which you and your fathers have done to me and my fathers, in making us toil for you for generations without recompense . . . .

. . . .

P.S.—Say howdy to George Carter, and thank him for taking the pistol from you when you were shooting at me.

From your old servant
Jourdan Anderson

L. LITWICK, BEEN IN THE STORM SO LONG, 333-35 (1979); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1056 (1980); *See* R. ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (1981).

65. Freeman, *Antidiscrimination Law: A Critical Review* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, 112 (D. Kairys ed. 1982).

66. Freeman, *supra* note 41, at 1054, "[B]ut for the conduct of . . . misguided ones, the system of equality of opportunity would work to provide a distribution of the good things in life without racial disparities and where deprivations that did correlate with race would be 'deserved' by those deprived on the basis of 'insufficient merit.' It is a world where such things as 'vested rights,' 'objective selection systems,' and 'adventitious decisions' (all of which serve to prevent victims from experiencing any change in conditions) are matters of fate, having nothing to do with the problem of race discrimination."

67. *Id. see* W. RYAN, BLAMING THE VICTIM (1970).

1) meet the needs of the individual minority applicant, 2) impose an obligation on public educational institutions to provide reparations for past discriminations and current societal handicaps, and 3) define merit as a function of the current social needs of minority communities.

First, if an individual has managed to overcome personal past disadvantage and discrimination, s/he should be afforded every opportunity for social and economic advancement. Examples of past discrimination and disadvantage include racial prejudice, economic, social and educational disadvantage. An applicant would be alotted bonus points for having overcome lack of role models, working to support a family while in school, attending substandard schools with inadequate facilities, high student:teacher ration, or outdated materials, being placed in a non-college prep-track as well as lack of role models within the family in terms of level of education and career of parents. Although this is an important and legitimate purpose of affirmative action, it is important to go beyond it.

Second, diversity criteria must emphasize the obligation of public institutions to serve the needs of all people. This obligation necessarily includes the needs of minority communities which, for example, account for over half of the people who pay the "progressive" sales tax that supports UCLA Law School.[68] Ignoring or underemphasizing the needs of these communities is an unjust method of allocating a scarce public resource. Moreover, this point addresses the power distribution in the society. It is not enough to pull a few individuals out of the barrio or the ghetto if the community remains effectively disenfranchised. We must recognize that minority/disadvantaged communities have a right to access to the legal system and an interest in shaping a legal system that will create viable rights for their communities. Thus, beyond the need to have representation of minority groups in the corporate, judicial and political spheres in the need to have someone representing the day to day legal interests and rights of the poor, and providing them with with tools they need to operate within the legal and political systems. Those best suited to do these tasks are representatives of these communities. Members of minority/disadvantaged communities know best the needs of their constituencies.

Finally, it must be emhasized that both regular and diversity admission criteria define merit as a function of social needs:[69]

> Whether "merit" be defined in terms of demonstrated achievement or of potential achievement, in includes a large and hard-

68. This includes undocumented persons.
69. *See* Karst and Horowitz, *supra* note 29, at 961-66.

> to-isolate ingredient of native talents. These talents resemble race in that they are beyond the control of the individual whose "merit" is being evaluated. If racial classifications are "suspect" partly for this reason, then it may be appropriate to insist that public rewards for native talents be justified by a showing of compelling necessity. Since such a justification cannot be found in the principle of rewarding effort, it must be found in the social purpose of encouraging the production for social goods.[70]

Thus, while both regular and diversity admissions criteria attempt to respond to the social need of bringing the most talented individuals to positions of power and responsibility, only diversity admission programs attempt to respond to the current social needs of disenfranchised minority communities. However, as previously noted, Justice Powell's pure diversity approach fails to meet these needs. In order to correct this flaw, diversity criteria must attempt to define merit in terms of demonstrated involvement in minority communities (past commitment to the needs of these communities), and in terms of potential ability to provide legal representation for minority community members (future commitment to the needs of these communities). Anything less than this will fail to meet the needs of minority communities.

III. TRADITIONALLY USED ADMISSIONS CRITERIA ARE INAPPROPRIATE FOR USE IN THE DIVERSITY PROGRAM

> History is filed with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has decreed the common sense proposition that they are not to become masters.
>
> Chief Justice W. Burger[71]

A. *The LSAT is Biased Against Persons Who Suffer the Effects of Past Discrimination*

The existing biases of the Law School Admissions Test (LSAT)[72] flatly contradict the premises of the diversity admissions

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70. *Id.* at 962 (footnote omitted).

71. Griggs v. Duke Power, 401 U.S. 424, 433 (1971). Sections III and IV of this comment originally appeared as part of the *U.C.L.A. Admissions Coalition Proposal*. Raj Seshu wrote section III. Keith Borjón, Elena Popp, Barry Rosenbaum, Raj Seshu, Jim Uyeda, Hector Yépez and others developed section IV.

72. Although the point scale of the LSAT has been changed from 200-800 to 10-50, it is unlikely that this will affect most of the analysis in this section which is based on the old point scale. As the "new" point scale has been used only once at the time of this writing, no reliable statistics exist.

program. Because the LSAT is biased against the persons who have been victims of past discrimination, it is an unjustifiable basis for distinguishing among applicants so situated. If we are to accept the legitimacy of the test in general, we must also accept the limitations of testmakers themselves impose on its validity. Insofar as the LSAT is being used to discriminate *among* the very persons whom it discriminates *against*, its use is unacceptable.[73]

Although the Educational Testing Service (ETS) has not analyzed the relationship between LSAT scores and parental income, such studies do exist for the SAT. ETS is quite open about the similarity between the tests, and indicates that one's score of the verbal portion of the SAT should be close to one's LSAT score. Tables I and II (Appendix A) illustrate the results of a 1973-74 ETS study. It is not clear why disadvantaged and minority applicants to the diversity program should be distinguished on this basis.

The significant linguistic and cultural biases of the LSAT are similarly well documented. For example, ETS studies indicate that the test measures *learned* skills and, therefore, that users of the test should consider the extent to which the applicant is disadvantaged.[74] The LSAT measurers values and acquired capabilities consistent with the "mainstream" standards of middle and upper middle class white America.[75] As between persons who have not, as a class, had the exposure to the values that the test stresses, heavy reliance on LSAT scores squarely contradicts the testmakers' own assessments.

Like all standardized tests, the LSAT is heavily biased in favor of those with experience in taking such examinations. Exposure to standardized tests is significantly greater in exclusive college preparatory schools as well as middle and upper middle

73. Some have argued that: "Since the LSAT discriminates equally against all disadvantaged/minority applicants, it may be used in discriminating among them." First, the LSAT is obviously still discriminatory against disadvantaged/minority applicants to the regular or "60%" admissions program. Second, the LSAT does not discriminate equally against all disadvantaged/minority applicants; the same factors which differentiate disadvantaged/minority applicants as against other applicants operate to discriminate among disadvantaged or minority applicants (e.g. rich minorities do better than poor ones). Finally, if the selection criteria are themselves illegitimate, equal application hardly justifies their use. For example, suppose we admitted diversity applicants on a basis which combined parental income with ethnicity and darkness of skin pigmentation. Surely the fact that the proportions of minorities and disadvantaged persons remained enhanced would not justify the use of the such facially illegitimate selection criteria.

74. Reply by ETS to article by Steven Brill (unpublished mimeograph available through ETS).

75. Rose, *Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Critiera*, U. TOL. L. REV. 321, 329 (1970).

class suburbs than it is in inner city schools.[76] In fact, the ETS acknowledges that the mean gain for persons who took the LSAT a second time was 43.6 points.[77] Commercially available courses (in the $200 to $800 range) can simulate a number of successive examinations, as well as give students important tips on examination strategy. Given the LSAT's standard deviation of plus or minus 30 points, one can infer that a difference of 100 points between two applicants is not statistically significant.[78]

B. *The LSAT is Insufficiently Related to Performance in Law School to be Used in the Diversity Program*

> Teachers often feel it necessary to warn precisely their intellectually liveliest students not to think too precisely or deeply when taking mechanized tests. The causes of corruption of education by merchandized tests are many. Among them are such things as the use of ambiguity as a substitute for worthwhile difficulty, the fostering of intellectual dishonesty, the ignoring of taste, style, and the quality of reasoning, the rewarding of superficiality, the penalizing of depth, and so on.[79]

Given the above, it is not surprising to find that the LSAT's significance in predicting performance in law school is less than remarkable. The Educational Testing Service (ETS) openly concedes that:

> Prediction based on scores and undergraduate grades is far from perfect. These will be a great number of cases where prediction misses the mark by a moderate amount, and a *sizeable*

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76. Shudson, S. *Organizing the 'Meritocracy': A History of the College Entrance Examination Board*, XLII, HARV. ED. REV. 54 (1972).

77. *LSAT Score Increases For Repeaters*, ETS Research Abstract dated 3/72, note 20.

78. This is so because on applicant may be "lucky" (have a reported score 30 points above her "ideal" score), and also be the beneficiary of a preparation course (40 points). The other applicant may be "unlucky" (with a reported score 30 points below her "ideal" score). Notice that this method assumes that the *standard deviation is no smaller than the average difference*. This is a mathematically verifiable relation which uses the definitions of "standard deviation" (squre root of the sum of the squares over the number of individuals) and the "average difference" (some of the absolute values of the differences over the number of individuals), and the Cauchy-Schwartz inequality:

Let D = absolute value of the true score minus reported score.

$$\text{The standard deviation} = \frac{\sqrt{\sum D_i^2}}{N} \text{. We must show } \frac{\sqrt{\sum D_i^2}}{N} \leq \frac{\sum D_i}{N}$$

Squaring both sides and eliminating the denominator yields

$$\sum D_i^2 \leq \left(\sum D_i \right)^2$$

79. B. HOFFMAN, *Psychometric Scientism*, PHIO DELTA KAPPAN (Ap. 1967).

> number where actual performance will be *directly opposite* from predicted performance . . . The point here is one that has been made repeatedly *but which cannot receive too much emphasis*; the scores must be used in the light of *all available information* about applicants and there will be many occasions where the evidence of the scores should be discounted because it is overwhelmed by contrary evidence from other sources.[80]

In 1975, Professor E. Scott of the Berkeley Statistics department conducted a study of the relationship between various applicant characteristics and academic performance at Boalt Hall. The Scott Report indicates that the most significant factors for whites were GPA and LSAT, with a correlation coefficient of .32. This means that a person predicted to be in the top fifth of the class has a 1/3 chance (slightly greater than random) of fulfilling that prediction. However, using age and marital status as the primary factors, the correlation coefficient was higher (.35). For blacks, the most significant factors were GPA and marital status.[81] In short, the LSAT is not necessarily any more valuable than other indicators such as marital status.

Experience at UCLAW has been no better. In Table III (Appendix B), the grades of first year UCLAW students in 1979 were summarized. The source of this Table is a memorandum by Professor S. Yeazell, which contains a suggestion that was ultimately adopted by the Admissions Committee: that persons with LSAT scores of over 700 be treated as if their scores were 700 because the performance of students over 700 was so erratic.

Anomalies are not limited to the "over 700 group." Of the students with LSAT's between 650 and 674, 46% were in the top half. A greater percentage (47%) of students with LSAT's between 600 and 624 were in the top half of the class. In fact, approximately the same percentage of individuals were LSAT scores under 500 were in the top third as persons with scores between 550 and 599. Oddly enough, the group of students with scores *under* 500 has fewer members, as a percentage, in the bottom 1/10, the bottom 2/10's and the last 1/3 than the group of students with scores between 500 and 549.

If the preceding pecularities are not entirely the result of a series of statistical flukes, it suggests something about the LSAT which has not been indicated: *AS BETWEEN GROUPS OF APPLICANTS, THE TEST MAY ONLY BE SIGNIFICANT WHEN THERE IS A DIFFERENCE EXCEEDING ONE HUN-*

80. *Law School Validity Study Service*, Study done by ETS for the University of California, Berkeley Law School, p. 19 (1973) (emphasis added).

81. *Testimony by Steven Raikin, President of the Boalt Hall Student Association, before the Ways and Means Permanent Subcommittee on Education, California Assembly* (March 2, 1976).

DRED POINTS.[82]

Because the LSAT is biased against the very persons who are in the class of the diversity program's beneficiaries, it is irrational to use the examination results to distinguish between applicants who may be victims of past discrimination. Because differences of up to 100 points between individuals and groups of applicants are statistically insignificant, the LSAT can be of little value in distinguishing between applicants to the diversity program.

C. *Use of Undergraduate School Attended and "Weighed" G.P.A.'s is Inconsistent with the Objectives of the Diversity Program*

Professor S. Yeazell, the originator of the LCM (Least Common Mean) system of weighting applicants' GPA's, compiled the information in tables IVa (Appendix C) and (Appendix D) IVb. Each undergraduate school is ranked according to its "least common mean" LSAT score, and the purpose of the table is to demonstrate the distribution of students from the so-called "feeder" schools. After classifying schools into 4 groups (over 600, 550-660, 530-550, below 530), Professor Yeazell then calculated the percentage students who came from each group of undergraduate schools. He observed:

> Group 2 accounts for more than half (53.6%) of the 60% [non-diversity] Group. Group 2 schools are in general moderately selective institutions with somewhat better than average students. On the minus side, we seem to take a surprising large proportion of our students from mediocre [530-550] or substandard [below 530] schools—about 30%. If the 60% Group is supposed to represent students chosen solely on the basis of their academic excellence, it seems at least questionable that 30% of the group were educated in poor [under 500] schools and only 17% were educated in very high quality [600+] schools.[83]

Although we do not agreed with Professor Yeazell's characterization of the relevant institutions, it seems unmistakable that the purpose of the LCM system was to make UCLAW easier to enter for students of exclusive private schools. Use of this methodology

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82. We are aware that numerous studies have been done on the efficacy of the LSAT as a predictive measure of law students' first year grades. One could spend endless hours developing the relative merits of each study. We think the *raw data* at UCLA is most persuasive. If applicants over 700 have an *equal change* of being in the top half as applicants between 600 and 624, the LSAT is a crude measure at best. If it is facially illegitimate because of systematic discrimination against minority and disadvantaged applicants, its minimal predictive value cannot justify its use.

83. *A Discussion Paper on 60% Admissions*, Memorandum to the UCLAW Admissions Committee by Professor S. Yeazell, p. 21 (November 10, 1980) (unpublished report).

stands the policy of the diversity admissions programs effectively on its head.

Furthermore, the existing inequalities brought about by different degrees of grade inflation (including so-called "over 600" schools), are exacerbated by the LCM system. Students with low GPA's from high-LSAT schools with grade inflation are given an unnecessary and inequitable advantage over students with high GPA's from a low-LSAT schools with stricter evaluation standards.

The LCM method looks to the ratio between the school's LSAT and the average LSAT score in the nation. This ratio is used to multiply the student's GPA provided that it is greater than one (*viz*. students from schools with below average LSATs are not penalized). For example, a student from Harvard with a 3.0 GPA would have a 3.68 GPA for index purposes. With an LSAT of 600, she would receive a total score of (200 x 3.68) + 600 = 1336, a substantial increase over the 1200 points she would receive without the LCM method. If a student from the University of Maryland had a 650 LSAT, she would require a GPA of 3.43 in order to remain competitive with the Harvard student.

Whatever may be the merits of such discrimination in the "60%" category, the currently declining availability of financial aid makes use of use a formula invidiously unconscionable in distinguishing between persons who have been the victims of past discrimination.

Not all schools have the same distribution of GPA's. By emphasizing average LSAT performance, the LCM method blows the existing inequalities in numerical grades totally out of proportion. Table V (Appendix E) illustrates the significant anomalies.

For example, student #4 (3.3 GPA, 700 LSAT) who attends school 2 (low LSAT, strict grading), has an index score of 1360, which is substantially less than student #2 (3.3 GPA, 600 LSAT) attending school #3 (high LSAT, grade inflation). Even though student #2 comes out 62 index points ahead, her LSAT is 100 points lower. Further, her class standing is no better than the top third, whereas student #4's class standing is at least in the top 10% (and probably in the top 5%). Similarly, student #3 (3.8 GPA, 700 LSAT) attending school #2 (low grades, strict grading policy), has an index score of 1460, vs. the same student #4 as in the previous example (1432). Student 3's GPA is .5 higher, her LSAT is 100 points higher, he class standing is probably top 5%, and yet her index score is merely 28 points greater. Or consider student #1 (3.8 GPA, 600 LSAT) who attends school #3 (high LSAT, grade inflation, who receives in index score of 1480. This is 20 points higher than the 1460 earned by student #3 (3.8 GPA, 700

LSAT) attending school #2 (low LSAT, strict grading policy). Again, student #1 may not be in the top 15%, whereas student #3 is in the top 5%. Moreover student #1's LSAT is 100 points lower, and yet, she receives 200 extra index points.

It should be emphasized that the inequalities fostered by the LCM method in combination with differential degrees of grade inflation are present at *every level*. If we were to consider students with GPA's that were 1.0 points lower, or LSAT's that were 100 or 200 points lower, *the differentials would remain constant*.

Finally, it should be clear that the inequalities fostered by the LCM system are indeed systematic, as illustrated by Table VI (Appendix F). The National Conference of Black Lawyers, in the study which Table VI is drawn from, concludes:

> Seen in this light, both the positive correlation between LCM and UGPA of colleges and the perennial inability of grade adjustment systems to improve validty becomes understandable. In a sense, the faculties of colleges across the country have internalized a standard of excellence which is reflected in individual college grading practices. High status schools award relatively high grades, low status schools preserve their academic reputation by refusing to inflate grades.[84]

D. *The LSAT Must be Eliminated and Grades Must be Adjusted Only For Differential Grade Inflation*

The ethnic, social, cultural, linguistic, and economic biases of the LSAT are each strong arguments for its elimination as a basis for selecting candidates for both regular ("60%") admissions as well as diversity admissions. The low level of predictive value fails to justify its discriminatory impact.

This may be accepted by most observers, "Because many applicants who get 700s do better than applicants with 500s, the LSAT has sufficient predictive value." This argument is so consistantly made with such vehement certainty by defenders of the LSAT that it deserves special attention.

Let us assume that the LSAT is accurate within 65 points between groups of applications. Supposing we divide applicants into eight groups:

GROUP	POINT SCALE
I	200-275
II	276-350
III	351-425
IV	426-500

84. Study by the National Conference of Black Lawyers entitled *Towards a Diversified Legal Profession: An Inquiry into the LSAT, Grade Inflation, and Current Admissions Policies*, David M. White, ed. Available from NCBL at page 160.

V	501-575
VI	576-650
VII	651-725
VIII	726-800

This 8-part division among applicants initially appears to be a plausible system. However, a cursory examination yields its faults. Diversity program applicants have scores primarily in groups 3, 4 and 5. Regular admissions applicants have scores primarily in groups 6, 7 and 8. What we really have is a 3-point scale. Since any two applicants could be near the "borders" (*e.g.*, an applicant with 725 and an applicant with a 726), the hypothetical 8-part division only works for groups of applicants with 2 points difference between them. This is hardly a satisfactory basis for instituting a series of distinctions between applicants. But it is no solution to simply evaluate applicants on a 600 (200-800) or a 40 (10-50) point scale. Whether we choose to make the "categories" small or large, the same randomness prevails.

The conclusion in the preceeding paragraph boils down to one assertion: *the LSAT cannot divide the applicants to either program down into more than 2 groups*. It has an accuracy range of 100 points between individuals or groups (differences of less than 100 points are not significant, *and* the score distributions between applicants to the two programs are within 200 points (600-800) for regular admissions and 400-600 for regular admissions and 400-600 for diversity admissions).

The fact that grades are not a perfect measure of predicting applicants' first-year grades is hardly justification for using a more inaccurate supplement to undergrade GPA's. As B. Lerner, formerly of the ETS has pointed out:

> In 1961, the median LSAT score of students at 81% of the nation's law schools was below 485. In 1975, not one of the 128 ABA-approved law schools had an entering class with a mean below 510. Seventy percent of them had means between 572 and 693. *What this means in comparative terms is that most American lawyers and judges practicing today would never have gotten into law school at all if they had to compete against the inflated standards which now govern admission.*[85]

The simple fact is that we need not cling to the LSAT merely because it provides us with some extra information. To do so is to imply that the attorneys who now practice are inferior to today's law students because they received lower LSAT scores.

Secondly, the LCM method of weighting GPA's must be eliminated. Again, we have the same problem which has lead administrators to rely heavily on the LSAT: because grades alone

85. *Id.* at 422.

are ineffective, some other measure must supplement them. But the LCM method is hardly a solution, for it discriminates systematically against individuals with lesser access to so-called "selective" undergraduate institutions.

It must be emphasized that the LCM process is used only in "60%" or "regular" admissions. Since the presumption is that regular admissions should be based on "academic quality," we agree that the use of the GPA as a basis for distinguishing applicants is legitimate. But the LCM method, which rewards non-diversity applicants for their degree of socioeconomic advantage is hardly justifiable in a public institution. Instead, UCLAW should adjust non-diversity applicants' GPA's for the degree of grade inflation. This would be equivalent to admitting applicants by class standing. Although this would create a slight bias in favor of individuals at the top of their classes in institutions where the competition is less stiff, ". . . this adjustment system affords some advantage to lesks prestigious colleges and deemphasizes the advantage enjoyed by prestige institutions. This adjustment is in keeping with the spirit of Mr. Justice Powell's recognition that cultural bias in grading procedures may justify race-conscious admissions."[86] For the diversity program, applicant's GPAs should be useful only as a minimum floor, to determine whether an applicant is capable of becoming a competent attorney.

IV. ALTERNATIVE ADMISSIONS CRITERIA TO BE USED IN AFFIRMATIVE ACTION ADMISSIONS

In order to effectuate the purposes of Affirmative Action, the following criteria should be applied to determine whether or not an applicant is qualified for admission under the UCLAW Affirmative Action Program.

A. *Race and Ethnicity of Applicant*

Twenty percent weight should be given to applicants belonging to a racial/ethnic group which has historically suffered discrimination and currently continues to face racial/ethnic discrimination. The recognized groups include Asians, Blacks, Chicanos/Latinos and Native Americans.

Special consideration should be given to applicants who are recent immigrants or are from groups which suffer from severe legal underrepresentation. The standard should be set at 1 attorney per 2,500 of the groups in question. The ratio for whites is currently 1 attorney per 500 persons. The recognized subgroups include Pilipinos, Koreans, Vietnamese, Pacific Islanders, and Na-

86. *Id.* at 250.

tive Americans. Those applicants will additionally be credited automatically with the 20% weight given applicants who have in the pst significantly contributed to addressing the concerns of their communities. Their status as recent immigrants, and the fact that their communities are still forming, generally have rendered them less able to serve their communities than applicants who come from more established and identifiable communities.

B. *Disadvantaged Background*

The second weighted criterion evaluates an applicant's socioeconomic disadvantage. Applicants who come from economically, educationally, and socially disadvantaged backgrounds will be given 40% of the admissions criteria weight. Of the five factors listed under this criterion, no single factor is determinative of the level of disadvantage that an applicant shall demonstrate. Rather, these factors should be viewed as they interrelate with each other in the individual applicant's case. In addition, the level of disadvantage of each applicant should be viewed in comparison with the levels of the other applicants. Each of the five factors will be weighted equally. Each factor will be worth 8 points. The five factors are:

Economic Disadvantage—8%

1. Total family income and capital assets during his/her childhood with particular emphasis placed on the years of applicant's primary and secondary education.
2. Whether the applicant was responsible for the financial support of his/her family, in whole or in part, while simultaneously attending school.
3. Whether the family received public financial aid during the above periods, *e.g.*, AFDC, Social Security, SSI, Unemployment or Disability Insurance.

Educational Disadvantage—8%

1. Whether the applicant attended segregated and/or substandard schools, *e.g.*, inadequate facilities, high student/teacher ratio.
2. Whether the applicant was placed on a non-college preparatory educational track during a portion of his/her schooling.
3. Whether the applicant underwent constant re-enrollment in different schools and/or school systems, *e.g.*, bussed to and from segregated schools.

Social Disadvantage—8%

1. Parents' level of education.
2. Occupational history of applicant's parents, spouse, siblings and other persons living in the household.
3. Size of applicant's household (including extended family) during his/her childhood and up to present.

4. Immigration status of the applicant and his/her family.
5. Transiency of the applicant's family during childhood and up to present.
6. Single-parent households during applicant's childhood and up to present.
7. Whether the applicant and/or members of his/her immediate household had chronic physical and/or mental health problems. Physically handicapped applicants may be given a percentage proportional to the degree of difficulty he/she will encounter in law school.

Linguistic Disadvantage—8%

1. Whether applicant learned English as a second language.
2. Whether the applicant was from an environment where nonstandard English was prevalent, *e.g.*, Black English, Hawaiian Pidgin English.
3. Whether applicant had access to EASL and/or bilingual educational programs.

Geographical Environment—8%

1. Socio-economic make-up of the applicant's neighborhood during his/her childhood to present, *e.g.*, barrio, ghetto, rural community, Indian reservation.

C. *Commitment to Community*

UCLA, as a public institution must recognize its responsibility to the community at large. We must also offer more than lip service to the principle of guaranteeing access to the legal system for all people regardless of race and income level. For this reason, commitment to community should be made a criterion. Forty percent weight should be given to applicants who can demonstrate commitment to serving underrepresented communities. Commitment can be measured in three ways:

(1) *Past commitment—20%*

Past commitment to community can be used as an indication that the applicant will return to his or her minority or low-income community after passing the bar. Previous community involvement also indicates that the applicant has acquired the skills that he or she will need in order to meet the needs of these communities. These skills include organizational and administrative ability, leadership qualities, advocacy, and language skills.

Previous community involvement can include:

a. Work experience;
b. Volunteer experience;
c. Community oriented extra-curricular activities; and
d. Independent student academic studies related to community problems.

(2) *Future commitment—15%*

Recognizing the difficulty of measuring this criteria a one semester externship for graduation should be required. This type of requirement is not unusual and is required by other universities. In addition to the obvious goal of insuring that the commitment is real, the externship would provide students with the skills needed to fulfill their stated goal. The university would also be providing an immediate service to the community. Exceptions to this requirement should be made if enforcement would be a hardship to the student.

(3) *Knowledge and sensitivity—5%*

Consideration should be given to applicant's demonstrated knowledge and sensitivity to the social, political, educational and economic problems of disadvantaged/minority communities. This sensitivity can be measured through applicant interviews that request that the applicant answer questions on current issues affecting the communities they allege to represent.

V. CONCLUSION

The foregoing criteria fill in many gaps left behind by Justice Powell's diversity model without giving any unfair advantage to minority applicants to law school. The criteria represents the first step in a process that seeks to make public law schools politically and morally responsible institutions. Further steps in the process would be to develop support services, placement services, recruitment services and curriculum that are more sensitive to the needs of minority communities. These considerations clearly imply a different vision of law schools and the role they play in society. More important, however, is the fact that this vision is born out of a world that Justice Powell and most law school faculty members, because of racial, cultural, social and generational differences, will never quite understand. For them, it will suffice to say: "The shortest distance between two points is a straight line."[87]

KEITH H. BORJON

87. The difficulty of course, is implementation of this "line." Anyone interested in working on affirmative action issues should contact Elena Popp c/o Chicano Law Review, U.C.L.A. School of Law, 405 Hilgard Ave., Los Angeles, CA 90024 (213) 825-4841. After May of 1985, contact Elena Popp c/o El Centro Legal de Santa Monica, 1320 B Santa Monica Mall, Santa Monica, CA 90401 (213) 394-3269.

Appendix A

PARENTAL ANNUAL INCOME BY SAT AVERAGE, BOTH SEXES COMBINED (1973-74)

Table I

SAT Average	Mean Income
750-800	24,124
700-749	21,980
650-699	21,292
600-649	20,330
550-599	19,481
500-549	18,824
450-499	18,122
400-449	17,387
350-399	16,182
300-349	14,355
250-299	11,428
200-249	8,639

Table II

Income	Mean Score
under 6,000	403
6,000-8,999	435
9,000-11,999	455
12,000-13,499	464
13,500-14,999	469
15,000-17,999	473
18,999 or over	485

E.T.S. Question No. 27 (647,031 students responding)

Appendix B

FIRST YEAR UCLAW STUDENTS' CLASS STANDING BY LSAT SCORE

Table III

Group	No. Students Group	Top 10%	Top 20%	Top 33 1/3%	Top 50%
800	15	27%	33%	47%	47%
749	25	16	28	44	68
724	42	19	36	52	67
699	86	10	24	38	64
674	46	4	13	26	46
649	36	8	11	31	42
624	27	12	29	29	47
599	21	None	5	10	24
549	15	None	None	None	None
500	11	None	None	9	9

Group	No. Students Group	Bottom 10%	Bottom 50%	Bottom 33 1/3%
800	15	None	None	27%
749	25	None	4%	16
724	42	None	10	19
699	86	1%	3	16
674	46	7	22	33
649	36	14	22	39
624	17	18	35	47
599	21	24	43	62
549	15	67	87	100
500	11	36	73	82

Source: A Discussion Paper on 60% Admissions (note 83 *supra*)

Appendix C

LEAST COMMON MEAN FOR LSAT SCORES OF FEEDER SCHOOLS IN UCLAW

Table IVa

60% Group

LMC	LMC Band	College and Number of Students from Each	Total Number of Students
650-800	24	Harvard (1) MIT (1)	2
640-649	23	Chicago (1) Stanford (15)	16
630-639	22	Dartmouth (1)	1
620-629	21	Cornell (3) Brown (2) Pomona (3) Reed (1) Duke (2) Johns Hopkins (2) Rice (1)	14
610-619	20	Oberlin (1) Penn (1)	2
600-609	19	Wheaton (1) Brandeis (1)	2
590-599	18	Northwestern (4) Illinois (3) Michigan (3) Notre Dame (4) SUNY (Binghamton) (2) Claremont (3) Georgetown (1)	20
580-589	17	Wisconsin (1)	1
570-579	16	Miami (Ohio) (1) SUNY (Albany) (3) BYU (1) WSU (2) UCB (15) UCD (11) UCSD (6) Eckhard (1) Iowa (1) Minnesota (3)	44
560-569	15	Case (1) Indiana (1) New Hampshire (1) Montana (1) UCSB (3) UCLA (30) Colorado (1)	38
550-559	14	Principia (1) Drew (1) PSU (1) Arizona (2) Santa Clara (2) UCI (5) Walla Walla (1) GWU (1) Georgia (1)	15
540-549	13	ASU (3) UCR (2) Maryland (1) Augustana (1) Moorehead (1)	8
530-539	12	Syracuse (3) BC (2) BU (1) Loma Linda (1) Mills (1) USC (13)	21
520-529	11	Rutgers (2) Pacific (1)	3
510-519	10	Capital (1) Illinois (Chi.) (1) Cal Poly (Pomona) (4) CS Fullerton (2) CSSD (1) Nevada (LV) (2) Hawaii (1)	12

500-509	9	Quincy (1) CSLB (4) Loyola (2) CSSF (2) CS Northridge (3) U of SF (1) Whittier (2)	15
Under 500	8 and below	CS, Dominguez Hills (Band 4) (1)	1
			215

Source: A Discussion Paper on 60% Admissions (note 83 *supra*)

Appendix D

LEAST COMMON MEAN FOR LSAT SCORES OF FEEDER SCHOOLS IN UCLAW

Table IVb

40% Group

LMC	LMC Band	College and Number of Students from Each	Total Number of Students
650-800	24	Princeton (1) Harvard (1) MIT (1) Yale (1)	4
640-649	23	Chicago (1) Stanford (10)	11
630-639	22	Dartmouth (1)	1
620-629	21	Brown (2) Wellesley (1) Pomona (3)	6
610-619	20	Penn (1)	1
600-609	19	Bucknell (1) Smith (1)	2
590-599	18	Illinois (3) Notre Dame (2) Vanderbilt (1) Claremont (6) Georgetown (1)	13
580-589	17	Scripps (2) UCSC (1)	3
570-579	16	Miami (Ohio) (1) Occidental (1) UCB (13) UCSD (1) Minnesota (2) Missouri (1)	19
560-569	15	Toronto (1) Indiana (1) Columbia (1) Clark (1) UCSB (7) UCLA (25) Washington (1) Texas (1)	38
550-559	14	Stonybrook (1) NYU (1) Pitzer (1) Arizona (1) Santa Clara (4) UCI (3)	11
540-549	13	ASU (1) UCR (1) TCU (1)	3
530-539	12	BU (1) Simmons (1) Cal Poly (SLO) (1) New Mexico (1) USC (6)	10
520-529	11	Rutgers (1) Pacific (1) Nevada (Reno) (1)	3
510-519	10	Cal Poly (Pomona) (1) CS Fullerton (2) CSSD (3)	6
500-509	9	Baruch (1) Russell Sage (1) CS Fresno (1) CSLB (4) Loyola (2) CSSF (2) San Jose (1) CS Northridge (4) U of SF (2) Arkansas (Little Rock) (1)	19

Under 500	8 and below	CS Bakersfield (1) CS Dominguez Hills (2) Puerto Rico (1) CSLA (3) Western New Mexico (1) Oklahoma City (1) Mt. St. Mary's (2)	11
			161

Source: A Discussion Paper on 60% Admissions (note 83 *supra*)

Appendix E

DISTORTIONS CAUSED BY THE SYNERGYSTIC EFFECT OF THE LCM METHOD AND DIFFERENTIAL GRADE INFLATION

Table V

	SCHOOL #1: Low LSAT High GRADES (grade inflation)		SCHOOL #2: Low LSAT Low GRADES (strict grading)		SCHOOL #3: High LSAT High GRADES (grade inflation)		SCHOOL #4: High LSAT Low GRADES (strict grading)	
STUDENT #1: G=3.8 L=600	760	(G)	760	(G)	880	(G)	880	(G)
	600	(L)	600	(L)	600	(L)	600	(L)
	1360		1360		1480		1480	
STUDENT #2: G=3.3 L=600	660	(G)	660	(G)	832	(G)	832	(G)
	600	(L)	600	(L)	600	(L)	600	(L)
	1260		1260		1432		1432	
STUDENT #3: G=3.8 L=700	760	(G)	760	(G)	880	(G)	880	(G)
	700	(L)	700	(L)	700	(L)	700	(L)
	1460		1460		1580		1580	
STUDENT #4: G=3.3 L=700	660	(G)	660	(G)	832	(G)	832	(G)
	700	(L)	700	(L)	700	(L)	700	(L)
	1360		1360		1532		1532	

EXPLANATION OF TABLE:

A. SCHOOLS:
Schools are classified into four groups. They are either "high" LSAT (630) or "low" LSAT (530). According to the LCM method, the GPA of a student who graduated from a "high" LSAT school is to be multiplied by 1.16 before it is multiplied by 200. Schools are also "high GPA" or "low GPA." This is an index of grade inflation. Typical profiles are:

G.P.A. RANGE	% of CLASS IN CATEGORY High GPA	Low GPA
3.5 - 4.0	25%	10%
3.0 - 3.5	25%	25%
2.5 - 3.0	40%	45%
under 2.5	10%	20%

B. STUDENTS:
Students are likewise classified into "high LSAT" (700), "low" LSAT (600), and "high GPA" (3.8) and "low GPA" (3.3). Multiply student's GPA by the appropriate multiplier for LCM status (either 1.16 or 1.00) and then by 200 to obtain the GPA (G) contribution to the total index score. Then add the LSAT (L) score.

C. GENERAL APPLICABILITY:
This table is applicable to students with much lower GPA's and LSAT's. THE DIFFERENTIAL BETWEEN STUDENTS WILL ALWAYS REMAIN THE SAME.

Appendix F

G.P.A. Distribution at 3.0 Level or Above: All Schools

Table VI

School Classification	No. of Schools	Mean	Median	Lowest	Highest	Standard Deviation
Small colleges and universities 0-3000 students	545	51.905	51.905	11.2	95.0	13.487
Medium colleges and universities 3000-6000 students	115	47.058	46.017	17.0	78.0	11.442
Large colleges and universities 6000+ students	160	46.499	45.990	19.6	85.0	9.605
Highly selective institutions	65	63.856	65.012	31.1	93.0	13.621
Private institutions	557	52.720	52.400	11.2	95.0	13.260
Public institutions	260	44.663	44.950	15.9	72.0	9.610
Non-sectarian institutions	445	48.399	46.700	15.9	93.0	13.460
Protestant institutions	226	51.061	50.550	11.2	83.1	11.127
Roman Catholic institutions	138	53.405	53.983	22.600	95.0	11.695
Jewish institutions	3	62.333	64.000	43.0	80.0	18.556
Men's institutions	19	44.737	43.267	23.0	95.0	17.571
Women's institutions	61	58.315	57.400	24.400	89.4	12.015
Coed institutions	739	49.642	48.542	11.2	93.0	12.444
Black institutions	45	40.869	39.900	11.2	72.0	13.351
All schools	821*	50.187	49.250	11.2	95.0	12.764

* The total number of cases by classification (4150) is obviously much greater than the total number of schools. This is because many of the classifications cannot be mutually exclusive. For example, one institution may be classified as a Small Highly Selective, Private, Non-sectarian, Predominantly White, Coeducational college or university. Within each bracket, however, the classifications are, of course, mutually exclusive. There are 3 missing cases in the subset of private/public institutions; 8 missing cases in the religious affiliatioin subset; and 1 missing case in the gender-based classification subset. The missing cases occurred when the college did not provide any information by which to assign a classification.

Source: National Conference of Black Lawyers (note 84 *supra*)