The Requirement of Race-Conscious Evaluation of LSAT Scores for Equitable Law School Admissions

David M. White

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The Requirement of Race-Conscious Evaluation of LSAT Scores for Equitable Law School Admissions

David M. White‡

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I.

SUMMARY

The race conscious admissions program at the University of Michigan Law School does not involve a preference for less qualified minority students. This report conducts three main analyses. The first involves the appropriate evaluation of admitted students; the second demonstrates that the statistical procedures followed by Dr. Larntz, the expert offered by Barbara Grutter, fail to prove that less qualified minority students are admitted over more qualified white students; and the third explores the consequences of implementing Dr. Larntz’s approach.

First, accepted minority and white applicants to the Law School are all qualified, and minorities are not less qualified as a group than are white students as a group. The report takes account of the well-known discriminatory impact of the
LSAT, showing that the LSAT score gap cannot be fully explained by prior educational disparities or disparities in socioeconomic status, and describes the roles of patently biased questions, test development specifications, and psychological dynamics in creating and maintaining the LSAT gap. The existence and sources of the gap are known to law school admissions officials across the country, and most admissions processes do and should take them into account.

Second, the statistical analysis of Dr. Larntz fails to show that less qualified minority individuals are being admitted over more qualified white individuals even when the flawed parameters and methods of that analysis are accepted for the sake of argument. The proofs on which plaintiff relies do not reveal the presence of a "preference" or a "plus factor" or any other boost given to the applications of less qualified minority students, because Dr. Larntz's comparisons are all between students he characterizes as equally qualified.

Third, Dr. Larntz's approach to the admissions data produces logically untenable results and if operationalized would require the rejection of the highest-scoring minorities simply because they are members both of a minority and a minority underrepresented in the highest-scoring categories for reasons of bias and discrimination. It would also require the abandonment of efforts to enroll a class that is diverse along a range of axes, and thus the rejection of many qualified white and minority students whose strengths are not expressed only through numerical criteria. The ultimate outcome would be an all-white law school and an increasingly powerful though baseless stigma against minorities.

II.
INTRODUCTION

I have a B.A. in English from Boston College and a J.D. from Harvard Law School. Upon graduation from law school I began working as a Research Associate at Boalt Hall School of Law, three years before the now-famous Bakke case was decided by the California Supreme Court. I co-authored an amicus curiae brief to the U.S. Supreme Court on behalf of the Black Law Students Association at the University of California, Berkeley School of Law challenging the unquestioned assumption that minority students admitted to Davis Medical School were "less qualified" than majority candidates refused admission.

In the wake of the decision, I directed an investigation of the LSAT for the National Conference of Black Lawyers with support from the National Institute of Education and the Spencer Foundation of Chicago, Illinois. The investigation commissioned a number of research reports that were presented at a national invitational conference and published in a volume that I edited.

When the New York State "Truth in Testing" Act of 1979 required the first release of previously administered LSAT questions, I took the opportunity to analyze real LSAT questions, as I had previously analyzed sample LSAT items in my published conference report. I wrote an additional book analyzing the items, and wrote two additional books detailing strategies for taking the LSAT and GMAT.

1. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34 (1976).
In April 1985 I founded Testing for the Public, a non-profit educational research corporation, in Berkeley, California to continue research on standardized testing, and more particularly, to provide low cost assistance to students preparing to take these tests. The first LSAT class was introduced by Ralph Nader. The first GRE class was sponsored by the University of California School of Public Health, with enrollment limited to underrepresented minority group students.

In the ensuing 15 years, I have spent most evenings and weekend days in classroom settings with between one and twenty students, analyzing real LSAT, GRE, and GMAT questions with the students. Over the years I have conducted a number of classes for universities in the San Francisco Bay Area, as well as southern California, New York, and Delaware that were limited to students selected by the universities from underrepresented groups.

Once a year I attend the annual convention of the National Council on Measurement in Education and the American Educational Research Association. Throughout the year I continue to keep abreast of the literature on test bias, test development, and more recently, computerized adaptive testing. Over the years I have been invited to testify to various legislative committees, speak before legal associations, and consult for government and judicial task forces.

The opinions expressed herein are the result of my combined experiences both researching the LSAT and teaching students to prepare for it. Except for opinions formed in response to documents provided for the Grutter case, the opinions expressed have already been expressed in previous public and professional settings. Where possible, I indicate published sources that have prompted these opinions.

I have included a list of publications and presentations in my curriculum vita, attached as Exhibit A. I have not served as an expert witness in any other case in the preceding four years. I am not receiving compensation for preparing this report, nor for subsequent testimony. I consulted with my research associate, a law student at Boalt Hall, in preparing this report.

III.
THE RACE CONSCIOUS ADMISSIONS PROGRAM ADMINISTERED AT THE UNIVERSITY OF MICHIGAN LAW SCHOOL DOES NOT INVOLVE A PREFERENCE FOR LESS QUALIFIED STUDENTS FROM DESIGNATED MINORITY GROUPS: ALL GROUPS OF ADMITTED STUDENTS OCCUPY THE SAME UGPA RANGE, AND VARIATIONS IN LSAT RANGES ARE THE RESULT OF THE DISCRIMINATORY IMPACT OF THE LSAT ON MINORITIES.

Nearly a quarter century after the famous Bakke litigation, Grutter v. Bollinger, et al. is proceeding on the same underlying assumption that went unexamined in Bakke: that admitted minority students are being preferred over better qualified white students who were rejected. The evidence in this case shows that assumption to be false. The record does not show that less qualified minority applicants were preferred.
A. **Admitted minority students have UGPA's in the same range as admitted white students.**

The University of Michigan Law School admission grids from 1995, 1996, 1997, and 1998 clearly show that admitted minority students have GPAs at least as high as admitted white students.

Among African Americans, 417 of the 418 admitted students in these years had GPAs that were comparable to the GPAs of admitted Caucasian students. In 1996, all African Americans admitted had at least a 2.50 GPA, whereas the lowest GPA among Caucasians was between 2.25 and 2.49.

Among Mexican Americans, all 139 admitted students had GPAs that were at least .25 above the lowest GPA among Caucasian students. In 1997, all 30 admitted students had GPAs that were at least .50 above the lowest GPA among Caucasians.

Similar results occur at the top of the GPA range. In all four years, African American and Mexican American applicants applied with GPAs at 3.75 or above. In all four years, some of these students with top GPAs were rejected.

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From the available data, it is possible that the applicant with the highest GPA in each of the four years was an African American or Mexican American, whereas the lowest GPA in three of four years may belong to a Caucasian.

B. **The LSAT produces a discriminatory impact significantly greater than can be accounted for on the basis of prior academic achievement.**

Even a casual review of the data included in Dr. Kinley Larntz's report indicates that there is a significantly greater gap in LSAT scores among various

3. There are many reasons to believe that GPA is not itself a race-neutral qualification. The point of the current analysis is that LSAT scores have a discriminatory impact far beyond that of GPAs.

4. In 1995, one African American was admitted with a GPA between 2.25 and 2.49, but with an LSAT between 167 and 169, by comparison, four Caucasians were admitted with GPAs between 2.50 and 2.74, three with LSATS between 167 and 169, and one with an LSAT between 164 and 166. Given the ranges of [the] GPA grid, the actual GPAs could have been within .02 of each other. Distinctions among applicants' GPAs below the level of .25 would be unreasonable.

groups than in UGPAs. Dr. Larntz readily agreed to this obvious fact at his deposition during the following exchange:

Q. Do you conclude from that pattern that there is a greater gap in LSAT scores among ethnic groups than the difference that you show for GPA scores?
A: Oh, I certainly have concluded that and I think that — I think the data on these plots demonstrate that, yes.  

This inflated gap in LSAT scores among admitted students is not a quirk in the data at the University of Michigan School of Law that could be attributed to its recruitment, admission decisions, or the matriculation decisions among accepted students. Rather, this gap in LSAT scores is a permanent feature of the landscape of law school admissions. It has remained in place for at least twenty years and appears in a variety of data from a variety of sources.

The first display of national data revealing this significant gap appeared in the amicus curiae brief filed by the Law School Admission Council in the Bakke case. As the data from the 1976 national applicant pool shows, getting high grades or high test scores was a comparable feat for whites. For example, 40% of white applicants had college grades of 3.25 or higher, and 37% had LSAT scores above 600. In contrast, high test scores were much rarer for top black college students. While 13% had 325 or better averages, only 3% scored above 600 on the LSAT. When both high test scores and grades are required, half the top whites were eliminated, while the top blacks were literally decimated. Numerically, in 1976 there were more than twice the number of black applicants with 3.25 averages as there were black law students in 12 elite schools, but only half the number of black


7. A similar finding was recently reported by Dr. Larntz concerning the admissions year 1999, when he noted that among accepted applicants “[t]he LSAT scores show considerable separation.” Second Supplemental Expert Report of Dr. Kinley Larntz at 4, Mar. 20, 2000, Grutter v. Bollinger (E.D. Mich.) (No. 97-75928).


9. Brief for the Law School Admission Council as Amicus Curiae at 21, Regents of the Univ. of Cal. V. Bakke, 438 U.S. 265 (1968) (No. 76-811), see Exhibit B at 1 (The exhibit is not included in this publication).
applicants with 600 LSAT scores as there were black students admitted to these schools. The pattern remained quite similar at lower levels of grades and LSA scores.

A review of the national applicant pool for 1996-1997 shows a remarkably similar pattern. A 3.25 UGPA and a 155 on the LSAT are equally prevalent among white applicants, whereas black applicants are still much more likely to have good grades than good LSAT scores. Among white applicants, 46 percent have either a 3.25 UGPA or a 155 LSAT. Among black applicants, 17 percent of the applicants have a 3.25 UGPA, but only 8 percent have a 155 LSAT. When the two criteria are combined, 27 percent of white applicants have both, compared to only 3 percent of black applicants.\textsuperscript{10}

This is the national applicant pool that the University of Michigan encountered in selecting its entering class of 1997. Its admitted student body reflects this pattern in the national applicant pool.

The LSAT gap remains even when minority applicants are carefully matched with similarly successful white college graduates. During the Law School Admission Investigation conducted for the National Conference of Black Lawyers, I commissioned a study of the applicant pools for 12 law schools of varying levels of selectivity and reputation, limited to the top four feeder schools (those with the most applicants to the law school), to provide a sufficient data base. A total of 19,287 applicants were compared, including 1,636 applicants identified as members of minority groups.

Each minority applicant was compared with white applicants from the same undergraduate institution, but only if the white applicants' GPAs were very close to the minority applicant's. White applicants were considered comparable to minority applicants when their GPAs were within \( \pm .10 \) on a 4-point scale. When these graduates from the same colleges with the same grades were compared on the basis of their LSAT scores, the study's author, Dr. Joseph Gannon, concluded that "the minority-nonminority group differences in LSAT scores are staggering."\textsuperscript{11} When compared with white students who graduated from the same college with the same GPAs, black applicants scored an average of 110 points lower on the LSAT, Chicanos and Latinos scored 97 points lower, and Native Americans scored 78 points lower (score scale 200-800).\textsuperscript{12}

Recently, a similar analysis was conducted of the applicants to Boalt Hall during 1996, 1997, and 1998. As a highly regarded law school at a major public university, Boalt Hall is similar to the University of Michigan School of Law. Boalt Hall draws the most applicants from the Berkeley campus, next from traditional rivals Stanford and UCLA, and then from Harvard and Yale.\textsuperscript{13}

\textsuperscript{10} Exhibit C at 25 (The exhibit is not included in this publication).


\textsuperscript{12} See Exhibit B at 3 (The exhibit is not included in this publication).

\textsuperscript{13} By comparison the University of Michigan Law School draws the most applicants from the University of Michigan, Ann Arbor, Michigan State, Yale, Berkeley, Duke, Harvard, Dartmouth, Northwestern, University of Virginia, and UCLA.
Applicants from the five elite colleges who applied to Boalt in the years 1996-1998 included a total of 1,366 students from minority groups. Each student from a minority group was matched with all white students from the same college who also had four-year UGPAs that were nearly identical with the minority student's (within ± .10 on a 4.0 scale). The results were remarkably similar to those obtained by Gannon two decades earlier. When compared with white students who graduated from the same elite college with the same GPAs (± .10 on a 4.0 scale), black applicants scored an average of 9.30 points lower on the LSAT, Chicanos and Latinos scored 6.87 points lower, and Native Americans scored 3.77 points lower (score scale 120-180).14

Thus, the much wider gap on the LSAT encountered in the applicant pool to the University of Michigan Law School during the years 1995-1998 is consistent with the gap in the national pool. This LSAT gap persists even when applicants are matched with other applicants from the same college with the same GPAs. The LSAT gap apparently has persisted for at least two decades and shows no signs of abating. That gap cannot be dismissed as reflective only of past academic deficiencies, as even the best performing graduates from the most elite undergraduate institutions exhibit this gap among various racial and ethnic groups.

C. The LSAT produces a discriminatory impact significantly greater than can be accounted for on the basis of socioeconomic status.

One common reaction is to attribute the LSAT gap to the generally lower socioeconomic status (SES) of groups that have been the victims of discrimination.15 This is undoubtedly part of the explanation, as national data indicates that LSAT scores are related to the SES of candidates, while GPAs are not related to the SES of students.16

However, SES is not a complete explanation of the racial and ethnic gap on the LSAT, as national data makes clear. White students' LSAT scores vary according to socioeconomic status, with students from upper class SES scoring an average of 2.07 points higher on the LSAT than white students from lower middle class SES. Likewise, the SES advantage among students who are black or Mexican American over lower-middle class students of the same racial background is of a similar magnitude. Among black applicants, the SES advantage is 3.32 points on the LSAT, among Mexican American applicants, the SES advantage is 3.54.17

14. See Exhibit D (The exhibit is not included in this publication).


17. Id. At 44 (table 10); see Exhibit C at 18 (The exhibit is not included in this publication).
Yet, the same data indicates that upper class black applicants have LSAT scores that average 5.62 points below those of lower middle class white applicants. Similarly, Mexican American applicants from the upper class score 1.46 points below lower-middle class white applicants (score scale 10-48).  

In short, the LSAT data indicate that having an advantaged socioeconomic background can help on the LSAT, but so too can being white. More importantly, being advantaged socioeconomically does not offset being born black or Mexican American when it comes to taking the LSAT. What is interesting is the fact that GPAs, although they may reflect ongoing racial discrimination, do not also display such a dual disadvantage.

D. *The discriminatory impact of the LSAT can be partially explained by reference to obviously biased test items.*

During the post-*Bakke* investigation of the LSAT, my research assistant, a graduate of Howard University and then a Boalt Hall student, reviewed sample LSAT items included in registration materials (in 1979, no real LSAT items were available for public review). He identified a remarkable number of potentially biased items, reviewed in my final report.  

Our favorite involved a “servant who was roasting a stork for his master,” as it evoked a condescending portrayal of the actions and speech of a stereotypical servant. The mere reading of this passage may lower a black candidate’s motivation to do well on the test, or may at least break the concentration of black candidates.

It is important to note that the biasing factor associated with this passage is not related to the educational achievement of the black candidate. Blacks with excellent college records and relatively advantaged economic backgrounds nonetheless take offense at the passage.

Differences in responses to such items help illuminate potential sources of bias in testing. For example, when I presented the item to a small group at the National Institute of Education, the white female privately objected to associating the passage with the Old South, as storks are wading birds found in Europe. The black female confided that she had quietly endured the discomfort that the passage caused as I read it aloud. The representative of the Educational Testing Service kept her counsel.

This incident mirrored other reaction I received during more public presentations of the time. When I presented it to the Section on Minority Groups at the AALS convention in 1979, the reaction of law professors who were predominantly from minority groups convinced me that I had missed my true calling in comedy. When I read the same passage to a mostly white audience at the Section on Pre-legal Education and Admission to Law School at the AALS convention in 1996, the stony silence reassured me that comedy was not in my rendition, but in the ears of the audience.

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18. *Id.*


20. Exhibit B at 4 #3 (The exhibit is not included in this publication).
This item clearly demonstrated that the same item can be very different effects on students from different backgrounds. This, of course, was not the only item to produce such divergent reactions. However, in 1979 the hope remained that real LSAT items were somehow better than those in the sample booklet.

The passage of New York State's Truth in Testing law in 1979 dispelled such a notion. From the first LSAT released in 1980, items appeared that bore an eerie resemblance to sample items we had identified. These are analyzed in my final report for the National Conference of Black Lawyers.\(^{21}\)

For the last fifteen years I have taught the LSAT, the GMAT, and the GRE to small groups in highly interactive settings, and have trained other teachers to do the same. This experience has provided me with the opportunity to witness the effects of bias time and time again.

The supply of potentially biased items has not abated. In February 1986 students were startled to encounter an item set in "Evalsland, where it is legal to hold slaves" and dinner party debate occurs. "one of the guests contends that slavery is a cruel institution." The slaves clinched the dispute by agreeing with the host "that they do indeed find their condition not simply tolerable, but extremely pleasant."\(^{22}\) A number of black students quickly noticed that Evalsland could be spelled Slaveland: I could only think of storks.

Over the years, I have noticed patterns in the response to certain items associated with the individual candidate's background. Of course, not all students of a given race react similarly to any particular item, but items that adversely affect at least some minority students rarely affect white students similarly. This has necessitated the development of appropriate teaching techniques, and remains a continuous aspect of analyzing the LSAT in small discussion groups.

Some potential bias is evident to me simply by reading an item. However, I have often been completely surprised to encounter a reaction to an item from students of a given race, only to realize that the reaction I initially had found so surprising actually is quite predictable when new students in later classes express the same reactions.

This is to be expected, exaggerated problems such as items about slavery are rare. Most often an item will have an impact that involves various aspects of the item—only one of which is its subject matter.

On a multiple-choice item, there are a variety of ways to get an item "right" or "wrong." Some students quickly get the point of the question and search for the right answer. Other students routinely, or desperately, eliminate wrong answers because they are not quite sure of the question's point. Thus, a minority student could miss an item because they did not know the right answer, attributable to the subject matter of the item and the student's own cultural background.\(^{23}\) In addition, it is possible that a minority student could reject


22. Exhibit B at 4 #4 (The exhibit is not included in this publication).

23. For an example of an item likely to produce this result, see Exhibit B at 12 #22 (The exhibit is not included in this publication).
the right answer as factually wrong. It is possible that a minority student is attracted to a wrong answer. It is possible that a minority student begins with a prior assumption that is contrary to the prior assumption required to understand and decipher the item. Sometimes students' answer choices depend on their point of view, which may be related to their identity and background. These problems are not limited to obviously biased or insensitive items, but each can easily be demonstrated with such items.

When I have been invited to speak before a national audience of law professors or admissions deans, there have usually been official representatives of the Law School Admission Council or the Educational Testing Service prominent in the audience. There has been no dispute, either during the public forum afterwards in private correspondence or conversation, that these items display difficulties masked by terms such as "Reading Comprehension" or "Logical Reasoning."

Other researchers, including Professor Leslie G. Espinoza of Boston College School of Law, have also focused on content bias in LSAT questions. Professor Espinoza has published many of the reactions to LSAT items she has seen among her own students. As Professor Espinoza is herself one of the first Latinas to graduate from Harvard Law School, she is able to evoke and describe reactions to some items [that] capture both her background and the background of her students. In her 1993 article, Professor Espinoza draws on LSAT items administered from 1982 to 1989. Professor Espinoza has also personally presented such items to audiences of law professors and testing officials without demurrer of her findings.

24. For examples of an item likely to produce this result, see Exhibit B at 10 #1, #8; Exhibit C at 23 (The exhibits are not included in this publication).

25. For examples of an item likely to produce this result, see Exhibit B at 19 #9, 13 #18, 14 #25, and 15 #22; Exhibit C at 20 #4, 22 #22 (The exhibits are not included in this publication).

26. For examples of an item likely to produce this result, see Exhibit B at 11 #14, #27 (The exhibit is not included in this publication).

27. For examples of an item likely to produce this result, see Exhibit B at 5 #3, #12; 15 #22 (The exhibit is not included in this publication).

28. For examples of an item likely to produce this result, see Exhibit B at 6 #16 (The exhibit is not included in this publication).

29. Some of these explanations can be found in the Exhibit to the Brief of Amicus Curiae of Testing for the Public, Puerto Rican Legal Defense and Education Fund, United States Students Association, and The Equality in Testing Project, Association of American Medical Colleges v. Cuomo, 928 F.2d 519 (2d Cir. 1991) (No. 595, 690, 90-7269, 90-7309), in Exhibit C at 7-17 (The exhibit is not included in this publication).


31. For example, Section on Prelegal Education and Admission to Law School, Association of American Law Schools, (San Antonio, Texas, 1996).
E. Removal of such obviously biased items from future forms of the LSAT is unlikely to reduce the discriminatory impact of the LSAT, due to the test development specifications.

The discriminatory impact of the LSAT cannot be completely explained by the persistent presence of obviously biased or insensitive items. Nor can the LSAT cap be fully explained by the test development process itself. Rather the LSAT gap seems to be a combination of how the LSAT is made and how the LSAT is taken. Nevertheless, test development specifications are a possible source of bias and may actually preclude the elimination of bias.

The point of the foregoing discussion of obviously biased and insensitive LSAT items is that such items can persist in the test development process without detection and removal. They form a part of a consistent pattern among items, which in turn produces a persistent pattern of scores and score gaps. Likewise, such items appeared in the LSAT forms that comprise the evidence analyzed in numerous statistical studies produced by the Law School Admissions Council. Proper interpretation of these studies must recognize that such items are part of the tests.

The ultimate point is that removal of such obviously biased items is unlikely to reduce the score gap because the test development process that allows such items to appear on the tests will continue to produce the same score gap even if these items were removed.

All LSAT items are carefully written, edited, and reviewed. The obvious bias discussed above shows how differently different people can view test items. There is no indication, however, that there is a discriminatory intent to produce items that produce bias. “Each LSAT question individually and every LSAT test form is subjected to careful review by trained reviewers for fairness and sensitivity to all test takers. . . . Secondly, LSAT items, both when administered as part of an unscored pretest or preequating section and when administered as part of a scored LSAT, are subjected to special statistical analyses.”

The unfortunate fact is that such efforts are unlikely to reduce the LSAT gap because of the very statistical criteria the LSAT must fulfill. Quite simply, the LSAT is valued because it can consistently differentiate applicants. It is this very strength of the LSAT that makes bias its predictable weakness.

Before a carefully written, edited, and reviewed item appears on a scored section of a real LSAT, it is first pre-tested, by inserting the item in an entire section of experimental items that appears to be a real section to candidates taking the real LSAT. Candidates are told that one of the sections will be experimental, but the section is not identified during the test. It is the answers to these experimental items that determine which items will be included in a real test and which ones will be revised or discarded. The criteria for including or rejecting items contain the source of bias against minority groups.

One significant test specification is the requirement for consistent results among all test items.

In order to consistently differentiate applicants, the items on the LSAT must themselves produce consistent results. Overall, applicants who do better on the test should be more likely to do well on each individual question than applicants who do worse on the test. If a particular item favors low-scorers over high-scorers, it would be inconsistent with the overall test results. If it were included in the test, the test would not be as consistent in its overall differentiation. Accordingly, standard test development specifications eliminate such items from scored versions of the test.

When this search for consistent results is conducted in a diverse population, that search penalizes applicants simply because they are in the minority. Imagine an item on the LSAT that suffers one of the problems discussed above, and that causes students from the majority group to be confused or upset, but works quite well among students in the minority. The overall confusion among the entire group would cause the item to be discarded. On the other hand, if the majority of applicants understood the item as intended, but only a minority of students had trouble with the item because of its content, this confusion among students would probably go undetected and the item would be retained on the test.

As this process is repeated for more and more items, the penalty for being in the minority becomes an artificially low score. As students from the minority group make a mistake on an obviously biased item, their scores naturally go down. If that same group then gets lucky and finds an item that they find easier because of their background, this item will seem to prefer low scoring candidates and will be rejected. Thus, the penalty for being in a minority becomes an additional penalty of being identified as less able. As new tests are developed, they must reproduce results of the earlier versions. Once a small group of student becomes identified as less able, new versions of the test can only reinforce that label.

The reader may be able to appreciate the overall impact of this test specification by imagining an objective test given to a large audience. The objective test is Name That Tune. It has been developed with the requirement of consistent results among individual items to produce the final overall score. Before taking such a test would the reader want to know the proportional representation of people of different ages, of different races, and from different areas of the country in the original audience that took the first version of the test?

Minority students are often stigmatized as being less qualified and standardized test scores are typically cited as proof. Yet, the LSAT gap persists in spite of the GPAs of minority group students, even when carefully matched with equally successful white students. It is an unfortunate fact that standardized tests are actually proof that minority students are in a minority.

33. The selection of a particular test question depends on "whether or not it will consistently produce scores which rank candidates in the order of their ability on the function being measured. The most efficient test is one in which each question is separating good candidates from poor candidates to a marked degree." Coffman & Papachristou, Environmental Objectives Tests of Writing Ability for the Law School Admission Test, in (LSAC-55-1), 43, 50 (1955).

34. See Jay Rosner, Discrimination is Built into Standardized Aptitude Tests, 1 The Long Term View 14 (1993).
2. Another significant test specification is the requirement for diverse content to be included on the LSAT, particularly the inclusion of at least one reading passage related to the experiences of women or minority group students.

The Law School Admission Council ensures that the LSAT includes "a balance of material recognizing the diversity of our society and the contributions of women and minorities." This conscious attention to diversity in test development may also contribute to bias against the groups mentioned in the material.

Each current form of the LSAT contains at least one reading passage that concerns women or minorities. Yet several of the problematic questions that have emerged over the years followed precisely these passages. For example, the LSAT proudly included a laudatory passage about jazz musician Miles Davis, just as the GRE had earlier contained a passage about feminist author Doris Lessing. When students were asked to describe the "author’s attitude toward Lessing," over half of all test-takers rejected the credited response of "qualified admiration." Most selected "grudging respect" instead. The vast majority of these incorrect responses were from women. Years later, the LSAT asked students to best describe "the author's attitude toward Miles Davis’s music." I showed the Society of American Law Teachers the potential for bias in the Miles Davis item by referring to the Doris Lessing item. The attitude toward Miles Davis’s music was supposed to be "appreciative advocacy," but students were given the opportunity to pick "grudging respect." A few weeks later one of my students, a middle-aged African American woman, picked this incorrect answer.

Of course, the test developers can hardly be faulted for including material that showed "qualified admiration" for Doris Lessing or "enthusiastic advocacy" for Miles Davis's music, but students who do not so characterize these passages are downgraded on their Reading Comprehension scores. When it is women or minority students who reject such a characterization and accept the invitation to pick "grudging respect," the benefit of having such a laudatory passage on the GRE or LSAT accrues to the test developers, but not necessarily to the women or minorities that were the object of their concern.

3. Another significant test specification is the search for differential item functioning, which reinforces the overall pattern of discriminatory impact of the LSAT as a complete test.

The Law School Admissions Council describes its "special statistical analysis," as one that "identifies test questions that, because of differences in performance between members of subgroups of the testing population in spite of similar levels of skills as determined by their performance on the test as a whole, merit special review to determine whether or not they are fair. Items determined to


36. Exhibit C at 21-22 (The exhibit is not included in this publication).

37. Exhibit C at 19-20 (The exhibit is not included in this publication).
be unfair are eliminated or are not scored.\textsuperscript{38} I am not aware of any record indicating how many items are identified for such a review, nor of the final disposition of such items by reviewers. The problem lies with the search itself.

The procedure looks for differences in performance between subgroups in spite of "similar levels of ability as determined by their performance on the test as a whole."\textsuperscript{39} As the foregoing discussion makes clear, a different comparison would occur if subgroups were compared on the basis of other measures of accomplishment—for example, by their performance in college, as measured by GPA.

The reader may consider the application of this rule to the objective test Name That Tune. Once the pattern of responses is determined by the quest for high-scorers described above, the after-the-fact search for differences necessarily accepts the pattern as the baseline for fairness, when the baseline may itself be affected by unfairness.

At a more technical level, the search for Differential Item Functioning (DIF), is typically pursued using a "balancing statistic," meaning that items favoring one group must be balanced out by other items with a commensurate preference for the other group, but only when those groups have already been matched on overall test score.\textsuperscript{40}

At best, DIF may be a prudent tool for a test developer seeking to identify extraordinarily unfair items, but it does not reduce the overall test gap. In fact, the coupling of such a "special statistical analysis," with sensitivity reviews may both

\textsuperscript{38} Law School Admission Council, Data Retention and Confidentiality, and LSAT Fairness Procedures, in LSAT & LSDAS Registration Information Book 2000-2001, 122.

\textsuperscript{39} Id.

\textsuperscript{40} Gregory Camilli, The Case Against Item Bias Detection Techniques Based on Internal Criteria: Do Item Bias Procedures Obscure Test Fairness Issues?, in Differential Item Functioning 397, 412 (Paul W. Holland & Howard Wainer eds., 1993) ("As a means of demonstrating test fairness, the use of DIF analyses is by no means straightforward. It must be understood at the outset that a test showing little DIF is not necessarily unbiased. A systematic bias in test scores cannot be detected. . . . Finally, the removal or modification of items judged as biased may or may not result in a fairer test: Fairness must take into account the external circumstances of test use."); Nancy S. Cole, Judging Test Use for Fairness, in U.S. Commission on Civil Rights, The Validity of Testing in Education and Employment 92, 100 (1993) (Cole, who is currently President of the Educational Testing Service, stated that there "is no statistic that can prove whether or not a test question is biased."); Lorrie A. Shepard, The Case for Bias in Tests of Achievement and Scholastic Aptitude, in Arthur Jensen: Consensus and Controversy 177, 187 (Sohan Modgil & Celia Modgil eds., 1987) ("There is no statistical analysis that can be applied by rote to determine the unbiasedness of a test."); Gregory Camilli & Lorrie A. Shepard, The Inadequacy of ANOVA for Detecting Bias, 12 J. Educ. Statistics 87 (1987) (demonstrating that item-by-group interaction procedures can miss the presence of real bias); Lorrie A. Shepard et al., Comparison of Procedures for Detecting Test-Item Bias with Both Internal and External Ability Criteria, 6 J. Educ. Statistics 317, 321 (1981) (contending that a "major limitation of all of the bias detection approaches employed in the research to date is that they are all based on a criterion internal to the test in question. They cannot escape the circularity inherent in using total score on the test or the average item to identify individuals of equal ability and hence specify the standard of unbiasedness."); see also Nancy S. Cole Pamela A. Moss, Bias in Test Use, in Educational Measurement, Third Edition 201, 210 (Robert L. Linn ed., 1989) (noting that the problems identified by Camilli and Shepard are "especially disturbing because many existing empirical item-bias studies have relied on these procedures"). See also William C. Kidder, Portia Denied: Unmasking Gender Bias on the LSAT and its Relationship to Racial Diversity in Legal Education, 12 Yale J.L. & Feminism 1 (2000) (reviewing the debate among psychometricians about the ineffectiveness of DIF techniques).
deflect criticism of items that is quite justified, and reinforce the overall group differences displayed by the test.

The inadequacy of a statistical search for differential item functioning solely on the basis of racial identity can be explored by recalling that the LSAT has both a racial and a socioeconomic impact among candidates. The LSAT advantages higher socioeconomic status, but it also disadvantages members of minority groups. The combined effect can be examined with reference to an item that rewarded the answer: "all good parents buy encyclopedias," and tempts candidates to respond that: "some good parents do not buy encyclopedias." For students who think they had good parents, but know they did not have an encyclopedia, the temptation to pick the latter is often irresistible. Thus, the potential for bias is socioeconomic in nature, but since minority groups that have endured prior discrimination have a lower socioeconomic status as a consequence, the item may contribute to the overall LSAT gap among racial and ethnic groups. Standardized tests are typically constructed so that relatively easy items begin each section and items get progressively more difficult later in the section. As the item is Number 1, it is likely to have a high accuracy, with only a few applicants answering incorrectly. Thus, this item would fit the overall pattern of bias against both low income students and minority students even as it contributes to that pattern in an obviously biased manner. A post-hoc search for individual items that were unfair to minority groups may well pass over item Number 1 because it fits the overall pattern of bias.

F. Item bias interacts with the setting of a standardized test to further depress the scores of students who belong to groups thought to be less intelligent.

Despite the best efforts of the Law School Admissions Council in making the LSAT, additional disadvantages against minority students can occur while they are taking the LSAT.

As soon as minority students enter the room to take the LSAT, their exceptional situation is obvious to all. As one student recently recalled, "out of 30 people in my testing room, only two of them weren’t white." Of course, minority students may also stick out in the cafeteria or student union, but when these students enter a room to take the LSAT, they carry more baggage than when selecting a lunch table. The pervasive societal presumption that minority students are less intelligent—a presumption underlying the present attack on race conscious admission policies and reinforced by the attack—can add pressure to dispel the stereotype even as students engage in test-taking behaviors that confirm the stereotype.

41. Exhibit B at 10 #1 (The exhibit is not included in this publication).


43. David R. Williams et al., Traditional and Contemporary Prejudice and Urban Whites’ Support for Affirmative Action and Government Help, 46 Soc. Prob. 503, 527 (1999) (opposition to affirmative action among whites found to correlate not with individual values, or belief in meritocracy, but with racist ideas about black people).
Dr. Claude Steele and his colleagues have explored the impact that stereotype threat can have on highly motivated, highly qualified minority students. Their carefully crafted studies produced results that are consistent with the LSAT gap. Yet the studies may even understate the impact that such a threat may have during the LSAT.

Dr. Steele and his colleagues produced disparate results in a campus laboratory setting, in which students volunteering to participate in the study would not have their scores recorded on their college transcript. Their scores would certainly not be part of their permanent self-evaluation in the way the LSAT can be. Moreover, as Dr. Steele sought to isolate the effects of stereotype threat, he carefully limited the tests to limited domains such as verbal ability, math ability, or language ability and tested those domains with test questions that are obviously related to those domains.

In contrast, the Law School Admission Test is not based on any previous course of study and is not intended to reward students from any particular academic discipline. In fact, although the LSAT is supposed to measure "an applicant's proficiency in the well-defined set of skills included in the test," the definition of such skills is broad enough to include many different types of test items. Over the years, various item types have been introduced and removed without any claim that the overall LSAT had been changed. In fact, item types that seemed to be most obviously related to the practice of law have been introduced only to be removed a few years later. According to the Law School Admission Council, "It provides a

44. Claude M. Steele & Joshua Aronson, Stereotype Threat and the Intellectual Test Performance of African Americans, 69 J. Personality & Soc. Psychol. 797 (1995); Joshua Aronson et al., The Effect of Stereotype Threat on the Standardized Test Performance of College Students, paper presented at the Annual Convention of the American Psychological Society, Washington D.C., May, 1998 (reporting experimental studies of the negative influence of stereotype threat on the performance of Latinos at the University of Texas-Austin when using standard sections of the GRE verbal test); Steven J. Spencer, Claude M. Steele & Diane M. Quinn, Stereotype Threat and Women's Math Performance, 35 J. Experimental Soc. Psychol. 4, 12 (1999) (using GRE questions on University of Michigan students and repeatedly finding that when the test was purported to yield a gender gap, women underperformed in relation to men, but when the same test was purported not to yield gender differences, women and men performed equally); Jean-Claude Croizet & Theresa Claire, Extending the Concept of Stereotype Threat to Social Class: The Intellectual Under-Performance of Students from Low Socioeconomic Backgrounds, 24 Psychologist 613, 625-26 (1997) (describing a summer intervention program for incoming freshman to the University of Michigan, using insights from stereotype threat research, which resulted in statistically significant improvement in college grades and graduation rates for African American students compared to control groups); Joshua Aronson et al., When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat, 35 J. Experimental Soc. Psychol. 29 (1999) (establishing the social construction of stereotype threat by demonstrating how white male test takers can be made to underperform in face of the stereotype that Asian Americans are better at mathematics).


46. The first LSAT released in 1980 contained a 40 minute section with 30 questions divided into three subsections. The significant directions for each section were:

"Part A. In each of the questions below a principle of law is applied to a statement of facts. These principles may be either real or imaginary, but for the purposes of this test you are to assume them to be valid. In each question you will be asked to decide which of four factors is the major factor in the application of the principle to the statement of facts. Part B. Each principle of law in this part is followed by several sets of facts. Part C. This part consists of two groups of fictional law cases. Each case includes a set of facts and a legal holding handed down by the court. Four legal principles follow each case. You are to choose the narrowest principle
measure of acquired reading and verbal reasoning skills. ... The LSAT is designed to measure skills that are considered essential for success in law school: the reading and comprehension of complex texts with accuracy and insight; the organization and management of information and the ability to draw reasonable inferences from it; the ability to think critically; and the analysis of the reasoning and argument of others.  

In contrast to the narrowly defined skills studied by Steele and his colleagues, the LSAT does not seem to measure a particularly "well-defined set of skills."

When minority students enter a room under the threat of the stereotype that they are less intellectually capable, they may interact with the open-ended challenge of the LSAT in ways that reflect the stereotype threat rather than their intellectual capacities. In the campus laboratory settings of Dr. Steele's studies, he has identified behaviors that black students may be more likely to exhibit, including self-doubt, self-handicapping, avoiding stereotypes about blacks, and refusing even to identify their race, when they are told that their "verbal ability" is being tested with verbal items.

As I teach students in small classroom settings, minority students are not directly threatened by the LSAT, as they are only preparing to take it. Nevertheless, that reasonably explains the decision and is not inconsistent with the ruling given in any of the earlier cases in the group. A principle that reasonably explains a decision gives a good reason for the decision and must fit both the set of facts and the resulting court decision. For the first case, compare those principles that reasonably explain the decision and choose the narrowest. The narrowest principle is not the principle with the fewest restrictions, such as, 'Law books must be bound in red,' but the principle covering the smallest relevant group of cases, such as, 'A casebook that is assigned by a professor in a torts course must be bound in red.' In the remaining cases in the group, however, the answer chosen must also be consistent with the rulings given in the earlier cases in the group. The rulings include both the decisions and the principles chosen to explain the decisions. Therefore, for these cases, find the principles that reasonably explain the decisions, eliminate those that contradict preceding rulings, and choose the narrowest."

Each set of directions is followed by this underlined sentence: "These questions do not presuppose any specific legal knowledge on your part, you are to arrive at your answer entirely by the ordinary processes of logical reasoning."

In 1982, the section was replaced with a 35 minute section with 37 questions. The significant directions were:

"Each of the sets in this section contains a statement of facts, a dispute, and two rules. The rules may be conflicting. Each rule should be applied independently and not as an exception to the other. The rules are followed by questions. Select from the choices below the one that most accurately classifies each question as it relates to the possible application of one or both of the rules to the dispute."

(A) A relevant question whose answer requires a choice between the rules
(B) A relevant question whose answer does not require a choice between the rules but requires additional facts or rules
(C) A relevant question that is readily answerable from the facts or the rules or both
(D) An irrelevant question or one whose answer bears only remotely on the outcome of the dispute."

In 1990, the section was removed from the LSAT.


I read Dr. Steele's research with recollections of similar behavior that I had seen during these preparation sessions.

In addition to specific attitudes and behaviors, students often exhibit test-taking strategies that reflect their backgrounds. For example, some students will reject a correct answer as "too obvious," only to learn that it was the answer to a relatively easy item. When that student is a minority student, the incorrect answer to the easy item will serve to reinforce the pattern of bias even though the student actually found the right answer only to reject it as too obvious. This behavior can be a combination of self-doubt and a test-taking strategy employed on a test that is touted as very hard. In contrast, a student who belongs to a group that is not stigmatized as less intelligent, and who performs with confidence on the LSAT, will quickly pick the credited answer without doubt or guile.

Similarly, a student may exercise inordinate care in selecting and confirming answers, leading to a high accuracy on items that are actually attempted, but to a lower overall score. A student who moves more quickly through the items, making more mistakes but answering more items, could earn a higher score.

No amount of care by the Law School Admission Council can insulate the LSAT from these biasing influences. Nevertheless, the different ways students take tests can affect their scores without reflecting their underlying abilities to read or reason. Simply giving the same test to all applicants cannot ensure that all applicants will take the same test.

G. The increased discriminatory impact of the LSAT compared to GPA is widely known among law school admissions officials.

The results of the study of applicants to Boalt Hall in 1996-98 were first presented during my testimony on standardized testing before the Higher Education Committee of the Texas House of Representatives in September, 1998. A press release announcing the conclusions accompanied the presentation.49

I personally handed the press release and the details of the study to dozens of admissions officials in the next days and weeks. I met with only agreement with the study's findings and acceptance as a fact of life that minority applicants with high GPAs often have lower LSATs. Although there was some surprise that such a large gap persisted in such an elite group of students, the general notion that the LSAT discriminates against highly qualified minority students with excellent GPAs was well understood among admission officials who spend many hours poring over files. While the precise dimensions of the gap presented in the study were not common knowledge, the pervasiveness of the LSAT gap affecting minority students with high GPAs was not news to admissions officials.50

49. See Exhibit D (The exhibit is not included in this publication).

50. See Linda F. Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.Y. L. Rev. 1, 8 (1997) [hereinafter The Threat to Diversity] (reporting that for the entire 1990-91 national applicant pool to ABA law schools that "the discrepancy between applicants of color and white applicants is larger for LSAT scores than for UGPA"); Wightman also finds that the black-white gap on the LSAT for all 1990-91 applicants is one-half a standard deviation larger than the gap in UGPA; Danny Holley & Thomas Kleven, Minorities and the Legal Profession: Current Platitudes, Current Barriers, 12 T. Marshall L. Rev. 299, 309-312 (1987) (reviewing national admissions data and concluding: "We found the LSAT to have a far greater negative impact than UGPA"); Eulius Simien, The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action, 12 T. Marshall L. Rev. 359, 379 (1987)
H. The widespread knowledge among law school admission officials that the LSAT has a greater discriminatory impact on minority students than does UGPA, coupled with plausible explanations for that difference, permits admissions officials to take into account the racial or ethnic background of an applicant in evaluating that file.

When admissions officials evaluate candidates from different backgrounds, they do so against a backdrop of GPA and LSAT distributions that are well known. Although different schools make different individual decisions, the pattern of decisions does not vary noticeably from school to school. All rely on a combination of GPA and LSAT in sorting applicants, but all make a genuine effort to evaluate other factors in an individual applicant’s file. Thus, every school shocks some applicants by rejecting them despite their high grades and scores, and shocks others by accepting them despite their low grades or test scores.

At the University of Michigan, the result of this evaluation process means that even students with the very highest GPAs above 3.75 and LSATs above 170 sometimes receive polite rejection letters. This no doubt occurs at virtually every other elite law school. Indeed, as a law school with a very high reputation and a large number of applicants chooses its class, the luxury of rejecting some applicants with the highest numerical indicators is a natural corollary of searching for the best class from diverse backgrounds to enrich the educational environment. A prestigious private law school exercises such discretion in much the same way that a similarly regarded public law school, such as Boalt Hall or the University of Michigan, would routinely practice. Except for law schools that have been prohibited from considering race in admissions, law schools across the country engage in very similar decision making as they select incoming classes.

It is evident that the University of Michigan has not adopted standards of evaluation that are measurably different from those used at other law schools. One measure of this similarity of standards involves what law schools term the “yield rate” of their admission program. In 1995, for example, only 30% of all those admitted to the University of Michigan Law School actually enrolled. Over two-thirds of those who won admission to the University of Michigan Law School eventually went somewhere else. When the yield rate is compared across racial groups, it is clear that the minority students admitted to the University of Michigan Law School were also prized by other highly regarded law schools. Whereas 32% of the whites who were admitted actually attended the University of Michigan Law School, only 25% of the admitted African Americans and 20% of the admitted Mexican Americans actually attended. Whatever standards were applied to minority

(reviewing national LSAC data for 1985-86 and finding that “the average GPA of Blacks is 87% of whites average GPA. . . . In that same year, the average score of Blacks on the LSAT was only 66% of what whites scored.”); David M. White, An Investigation into the Validity and Cultural Bias of the LSAT, in Towards a Diversified Legal Profession, supra note 2, at 113-17; Law School Admission Council, Analysis of Minority Law School Applicants 1980-81 to 1985-86, 23-27 (1987); David M. White, Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record, 14 Harv. C.R.-C.L. L. Rev. 89, 115-16 (1979) ("The LSAT differentiates white and black law students more than comparison of their undergraduate grade point averages or their first year law school grades.").
applicants by Michigan were clearly also applied to these same applicants by other law schools that these minority students found more attractive.

When various law schools evaluate minority candidates, they typically evaluate the LSAT scores with reference to the background and prior academic achievement of the applicant. Admissions officials know that a particular LSAT score earned by an African American applicant from a low socioeconomic background means something quite different from what the same LSAT score indicates when earned by a Caucasian applicant from an upper class background. Evaluating candidates fairly means interpreting information in the context of their backgrounds.

When admissions officials admit African American applicants with high GPAs but relatively low LSATs, they are not simply responding to the applicant pool, nor applying lower standards. Instead, the GPA represents something quite different from what the LSAT does. The GPA represents the cumulative result of years of performance in an academic setting. On the other hand, the LSAT is an attempt to predict future academic performance on the basis of a four hour test. The serious limitations of the LSAT may justifiably prompt an admissions official to place more emphasis on the past performance of minority applicants than on their predicted performance. This is particularly so when their past academic achievements surpassed predictions based on earlier tests.

The search for students who exceeded past expectations does not mean that current standards are favored when the predictions made by the LSAT are discounted in favor of high GPAs that were not predicted by earlier tests.

IV.

DR. LARNTZ’S OPINION HAS BEEN USED TO CREATE A FALSE IMPRESSION THAT THE UNIVERSITY OF MICHIGAN SCHOOL OF LAW IS PREFERING LESS QUALIFIED MINORITY APPLICANTS OVER BETTER QUALIFIED WHITE APPLICANTS.

A. The opinion of Dr. Larntz has been improperly interpreted by counsel to demonstrate that different standards are being applied to minority students.

Dr. Larntz offers three basic conclusions.51 First, “for Native American, African American, Mexican American, and Puerto Rican applicants, undergraduate GPA and LSAT scores are lower compared to other ethnic groups, in particular, compared to Caucasian American applicants.”52 Second, “undergraduate GPA and LSAT scores are lower for Native American, African American, Mexican American, and Puerto Rican accepted applicants compared to other ethnic groups, in particular, Caucasian American accepted applicants.”53 Third, “membership in certain ethnic


53. Id. at 4.
groups is an extremely strong factor in the decisions for acceptance. Native American, African American, Mexican American, and Puerto Rican applicants in the same LSAT x GPA grid cell as a Caucasian American applicant have odds of acceptance that is many, many (tens to hundreds) times that of a similarly situated Caucasian American applicant.54

Counsel for plaintiff summarizes Dr. Larntz’s opinions and concludes: “Consequently, in order to enroll a ‘critical mass’ or ‘meaningful numbers’ of underrepresented minorities, it is the policy and practice of the Law School to admit such minorities with generally lower test scores and grades than those of other groups.”55 In their argument, however, counsel transforms these facts into an apparent proof of “a dual system that attaches far greater importance generally to the LSAT scores and undergraduate grade point averages when comparing applicants within the majority group than when comparing an underrepresented minority applicant to members of the majority group.” No such proof was offered by Dr. Larntz.

Such a bait and switch with the evidence is very fortunate, as “concern about affirmative action in the admission process is primarily an issue in those instances where a perception exists that a student for whom race became a factor took the place of an academically ‘more qualified’ white applicant.”56 Dr. Larntz was quite careful only to compare applicants who had equal qualifications, as measured by GPA and LSAT. Yet his conclusions are reinterpreted to appeal to the notion that less qualified minority applicants are being preferred over better qualified white applicants.

1. Average rankings are not relevant when comparing individual candidates.

Individual applicants do not gain greater claim to acceptance simply because they belong to a group that has applicants with higher average GPAs or LSATs. In particular, an African American applicant with top grades and test scores, a GPA above 3.75 and an LSAT above 170, does not have a lesser claim on admission because the average GPAs and LSATs of African Americans are lower than those of Caucasian applicants.

Likewise, when the law school fills out its class with applicants with relatively low GPAs and LSATs, a Caucasian applicant does not have a greater claim on the last admission offer because the average GPAs and LSATs of all Caucasian applicants are higher. In short, evaluating individual applicants does not involve favoring or disfavoring applicants because of the relative ranking of the groups to which they belong.

The point is different from a preference for members of various groups because individual members of that group are unusual and therefore more likely to contribute to the overall educational experience of the entire law school student

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54. Id. at 9.


body. So too, individual members of a group may have their qualifications evaluated in light of current and past discrimination that the group has experienced.

2. The odds of acceptance are calculated among equally qualified candidates.

However important the distinction above may be to many discussions of affirmative action, the proof provided by Dr. Larntz explicitly makes such a distinction irrelevant. This is because the only comparison he made was among applicants who were matched on both GPA and LSAT. As Dr. Larntz made clear, "The main tool for comparison is the relative odds of acceptance of one ethnic group to the odds of acceptance for another ethnic group for applicants in the same GPA-LSAT grid cell."\(^{57}\) He based his conclusion by comparing members of "certain ethnic groups...in the same LSAT x GPA grid cell as a Caucasian American applicant."\(^{58}\)

The evidence offered by Dr. Larntz is quite different from the typical complaint about a preference for less qualified minority applicants. Rather, Dr. Larntz seeks to demonstrate that, among equally qualified applicants, a preference exists for applicants from these groups because they are small minorities. As characterized by counsel, however, the proof of Dr. Larntz is transformed into the notion that less qualified minority students are being preferred over more qualified Caucasian applicants.

V.

**Dr. Larntz's Standard of Fairness Would Result in the Separation of Equally Qualified Candidates by Race.**

The statistical findings of Dr. Larntz have been reviewed by Dr. Stephen Raudenbush. Dr. Larntz has presented the information from the perspective of the University of Michigan. This section views the information from the perspective of a minority applicant. The prior reports have implicitly accepted Dr. Larntz's standard of fairness as the only alternative to the race conscious admissions program of the University of Michigan. By viewing the information from the perspective of a minority student, the standard will be shown to be quite different from the one typically assumed by all sides of the affirmative action debate. In fact, Dr. Larntz's standard of fairness will quickly lead to a complete separation of racial groups, with Caucasian applicants soon becoming the sole group admitted to future classes of the University of Michigan Law School.

Affirmative action is typically attacked as a preference for less qualified minority students. Proponents of affirmative action respond in various ways. Some

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57. Expert Report of Dr. Kinley Larntz at 6, Dec. 14, 1998, Grutter v. Bollinger (E.D. Mich.) (No. 97-75928); See also Second Supplemental Expert Report of Dr. Kinley Larntz at 5, Mar. 20, 2000, Grutter v. Bollinger (E.D. Mich.) (No. 97-75928) ("The main tool for comparison is the relative odds of acceptance for ethnic groups within the grid cells. That is, we statistically compare the odds of acceptance of one ethnic group to the odds of acceptance for another ethnic group for applicants in the same GPA-LSAT grid cell.").

58. *Id.* at 9.
defend such preferences as reasonable responses to past discrimination, or even to ongoing discrimination. Others question the objectivity of the criteria used to measure qualifications. Indeed, it was the very possibility that minority group representatives could make such claims that justified their intervention in this case.\textsuperscript{59} In contrast, Dr. Larntz seeks to prove that there is a preference for minority group applicants "in the same LSAT x GPA grid cell as a Caucasian American applicant."\textsuperscript{60}

While there are reasons to doubt that minority applicants are correctly classified in the appropriate GPA x LSAT cells, Dr. Larntz would still find discrimination against Caucasians regardless of which cell the minority applicants found themselves in.

The point was made very clear by Dr. Larntz during his deposition in this case.\textsuperscript{61} At one point he considered the situation in the very highest group of candidates.

Dr. Larntz. "Look in the very upper right corner, the 170 and above and 3.75, not the total one, but — so it’s — selected minorities there was one, one applicant and one selected. Now that odds is infinity because it’s one to zero. One versus zero. That’s a big number. Now if it were infinity for majority students we wouldn’t use it in the analysis. We look for majority students, it’s 143 to eight so in fact — so in fact, just the observed odds ratio is infinity there, the observed." ... "the odds there are high, but they’re not 100 percent, they’re not — they’re not infinity."\textsuperscript{62}

Dr. Larntz performs the same analysis cell by cell. His final opinion is based on the cumulative result of each of these individual cell comparisons.

Dr. Larntz. "So what we do is this number here is a composite estimate based on all of those odds ratios, all those compare somebody’s throughout the entire grid and you can see anywhere where African American are admitted 100 percent and Caucasian Americans are not admitted those are actually infinity by the point estimate, but all those are combined into an overall estimate."\textsuperscript{63}

\textsuperscript{59} "The proposed intervenors in these two cases have presented legitimate and reasonable concerns about whether the University will present particular defenses of the contested race-conscious admissions policies. We find persuasive their argument that the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and that these may be important and relevant factors in determining the legality of a race-conscious admissions policy." \textit{Grutter v. Bollinger}, 188 F.3d 394, 401 (6th Cir. 1999).


\textsuperscript{62} \textit{Id.} at 137-38.

\textsuperscript{63} \textit{Id.} at 150.
Dr. Larntz noted that among the African Americans with the highest qualifications: "in the upper right corner are all 100 percent admitted." He later explained the numerical basis for his odds ratio of infinity. "One out of one is not very much information. Absolutely, [a]nd it does that throughout all of the other calculations and it's the preponderance of the numbers where it's a series of one out of one, three out of three, two out of two that allows the ratio to be very high, not the fact that a single one is that way, no. Absolutely."

Not all cells admit all African Americans, as only 26 percent were admitted in 1995. Dr. Larntz selected a cell with highly qualified applicants to demonstrate the odds ratio when it was not "infinity." He compared applicants with GPAs between 3.50-3.74 and LSATs between 161-163, where five out of six African Americans were admitted. "The odds that a Caucasian American is admitted is, what, 14 were admitted and 147 were denied so that's an odds of about one-tenth, right, one to 10. So the odds that we saw for African Americans was five and the odds for Caucasian Americans was about one-tenth so the odds ratio is about 50."

When Dr. Larntz compiled all the cells, including his selected examples of "infinity" and 50, he arrived at an overall odds ration of 257.93. The misleading impression of statistical precision conveyed by this overall odds ratio has been criticized by Dr. Stephen Raudenbush. The simple point that affects individual minority students subjected to this methodology is that the overall odds ration is dominated by "infinity."

This report concerns the minority students who contribute to the infinity odds ratio. As a review of the admissions grids makes clear, these students are the rare applicants, from groups that are themselves in a minority, who have the very highest GPAs and LSATs. Naturally, the University of Michigan School of Law admitted these students, as would virtually any law school that was able to recruit these candidates into their applicant pool. Thus, the African American with the best GPAs and LSATs were admitted, although this particular student actually enrolled elsewhere.

64. Id. at 149.
65. Id. at 153.
68. Supplemental Expert Report of Dr. Kinley Larntz at 5, Feb. 21, 2000, Grutter v. Bollinger (E.D. Mich.) (No. 97-75928); Compare Addendum to the Supplemental Expert Report of Stephen W. Raudenbush at 2: "In general, such separate analysis of many small subsets of data produces highly unstable results. This explains why the odds rations computed in that analysis range from near zero to infinity." It is of interest that in Dr. Larntz's analysis of odds ratios among Michigan residents and non-residents in 1995, only two odds ratios were reported above 257.93 that were not infinity: 392.00 and 287.00. Second Supplemental Expert Report of Dr. Kinley Larntz at 5, Mar. 20, 2000, Grutter v. Bollinger (E.D. Mich.) (No. 97-75928).
Under Dr. Larntz's standard of fairness, these highly qualified applicants should have been rejected, as they contributed "infinity" to his overall odds ratio estimate. Yet, as his own testimony makes clear, the "infinity" estimates resulted from exceedingly small samples.\textsuperscript{70} Indeed, in 1995 the most common infinity odds ratio occurred when one African American applied and one was admitted. In only two cells were more than four African American applicants part of an "infinity" estimate.\textsuperscript{71}

Dr. Larntz's standard of fairness would startle virtually all parties to the affirmative action debate. When opponents of affirmative action suggest improved education for minority students in elementary, secondary, and undergraduate educational institutions as the solution to low minority enrollment in law school, they offer the hope to all that they will earn admission when their qualifications improve. However, as the current data make clear, Dr. Larntz's standard of fairness would require the rejection of these highly qualified minority applicants simply because they were so rare.

A. Dr. Larntz's requirement that students from different groups have equal chances of admission when they are equally qualified permanently disfavors minority groups, with greater disfavor for small minorities.

In the final analysis, requiring an equal odds ratio among groups permanently favors majority groups and penalizes minority groups just because they are minorities. Whereas law schools currently admit such exceptional students, Dr. Larntz's standard of fairness would require that they be rejected.

The point can be made even more clearly by comparing Native Americans with Caucasians who applied to the University of Michigan School of Law in 1995. Whereas 2,316 applicants identified themselves as Caucasian, only 45 identified themselves as Native American. A total of 668 Caucasians were offered admission and 216 accepted the offer and actually enrolled. By comparison, 14 Native Americans were admitted and three enrolled. Yet, the 14 admitted Native Americans included 10 who enjoyed an "infinite" odds of getting accepted and therefore had an impermissible advantage over Caucasians. All 14 had GPAs that were at least equal to admitted Caucasians, nine out of the ten Native Americans with "infinite" odds had GPAs at least 0.25 above the lowest GPA among Caucasians. One of the three Native Americans who actually enrolled had a GPA of 3.00-3.24 and an LSAT of 161-163. Three similarly qualified Caucasian applicants were also admitted and all three enrolled. Yet there were 37 Caucasian applicants in that GPA x LSAT cell, so Caucasians only had an odds ratio of 9 percent, much less than "infinity." By comparison, the lowest odds ratio among enrolled Native

\textsuperscript{70} This point was reinforced in Dr. Larntz's analysis of data from the admissions year 1999. See Second Supplemental Expert Report of Dr. Kinley Larntz at 11, Mar. 20, 2000, Grutter v. Bollinger (E.D. Mich.) (No. 97-75928) ("...many cells contained small numbers of individuals and thus provided only weak comparative information").

Americans was 50 percent, as one out of three Native Americans with GPAs of 3.25-3.49 and LSATs of 154-156 were admitted.\(^7\)

Clearly, the odds ratio penalizes small minority groups. In 1995, Native Americans had relative odds of acceptance of 61.37, which Dr. Larntz characterized as "extremely large compared to those observed in usual statistical practice."\(^7^3\)

The odds ratio methodology offers no hope to the highest scoring minority applicants. Once an applicant has earned a GPA above 3.75 and an LSAT above a 170, there is no improvement possible. Yet because that applicant is so rare, the "infinity" odds ratio would label their admission as an impermissible racial preference. For many more applicants who also find themselves to be the only member of their group in an admission cell, no amount of improvement in the undergraduate performance, as measured by GPA, or test taking ability, as measured by LSAT, would improve their plight under Dr. Larntz's standard of fairness. Whatever cell the applicants moved to, whether higher GPAs or higher LSATs, minority applicants are too rare to justify their admission under the odds ratio standard of fairness.

B. Dr. Larntz's analysis interprets a demonstrable search for diversity on a variety of dimensions as a single-minded preoccupation with race.

When the focus of Dr. Larntz's odds ratio method shifts from the highest grades and test scores to those admitted to the University of Michigan Law School despite relatively low index numbers, his method does a disservice to the law school even as his method requires the rejection of minority applicants who had been admitted. This is because the law school is actually fulfilling its commitment to a student body that is diverse on a variety of dimensions, one of which is racial or ethnic background. Yet the odds ratio methodology transforms that search for exceptional students of all racial and ethnic backgrounds into a seemingly single-minded preoccupation with race during the admissions process.

The point can be made with reference to the example selected by Dr. Larntz in his supplemental opinion. He selected the 1995 applicants with GPAs 3.50-3.74 and LSATs of 154-156.\(^7^4\) Among non-resident applicants, four selected minority applicants were admitted, and three majority applicants were admitted. Nonetheless, this was interpreted as a very large advantage for the minority applicants, as there were 37 majority applicants but only eight minority applicants, yielding an odds ratio for the minority applicants of 12.33.

Of course, the minority applicants are again penalized for being in a minority, but who are likely to be the majority of applicants who won admission? When only a few applicants are selected from a certain GPA and LSAT range, these are by definition exceptional. The minority students may have been exceptional


partly because they belong to a minority group, but these students did not have infinite chance of gaining admission. In fact, four of the eight were rejected. Thus, the four minority students stood out when compared with other minority applicants with the same grades and test scores. When the law school identified majority applicants who also had exceptional qualities that justified looking beyond the numbers, their offers of admission fulfilled the promise of the admission policy it had articulated.

Yet the method employed by Dr. Larntz transforms that general search for diversity into an unfair advantage for minority applicants. According to his standard of fairness, the minority applicant had less claim on admission than did the majority applicants simply because there were more majority applicants with those grades and scores. When the law school sought exceptional candidates from both groups, Dr. Larntz's standard of fairness interprets these decisions as a racial preference because more Caucasian applicants were not also selected.

C. *The application of Dr. Larntz's standard of fairness to the admissions process at the University of Michigan School of Law would have an increasingly discriminatory impact until minority students were completely eliminated from the group of admitted applicants.*

The ultimate impact of Dr. Larntz's standard of fairness could not be fully appreciated during a single admissions cycle. As word of the decisions from one year filtered back to prelaw advisors, prelaw groups, and the general public through formal and informal channels, any law school adhering to the odds ratio standard of fairness would soon gain reputation as a waste of money for minority applicants.

When admissions officials recruit minority students, they would actually be trying to recruit more such students to justify the admission of a fraction of those students. For example, in 1996, the admissions official would have been trying to convince the two African Americans with GPAs over 3.75 and LSATs over 170 to apply to the University of Michigan Law School, so that one of them could have been admitted and one of them rejected, thereby complying with Dr. Larntz's aversion to "infinity" odds ratios. Since the one such applicant admitted in 1995 actually enrolled elsewhere, and as Dr. Larntz's standard of fairness would have required the rejection of that applicant in the first place, the admissions official would face an uphill battle in recruiting the next highly qualified minority applicant.

When the admissions official sought minority students to fill the cell that yielded the most applicants in the four years of concern, the battle would have become no easier. The largest single cell of African American applicants who actually earned admission was the GPA 3.25-3.49 x LSAT 156-158. Yet to justify the admission of the 10 African Americans actually admitted in 1995, the admissions officer would have had to find 510 such African Americans and convince them all to apply to the University of Michigan School of Law. If the officer could have accurately identified the three such applicants who actually decided to enrolled in the fall, only 153 African Americans with those qualifications would have had to have been convinced to apply, so that 150 of them could be rejected so that the chosen

three could then be admitted under Dr. Larntz's standard of fairness. Unfortunately, in the 1996-1997 national applicant pool, there were only 101 African Americans in the much larger cell of GPA 3.25-3.49 x LSAT of 155-164. As the futility became apparent to advisors, applicants, and admissions officers, the actually applicant pool to the University of Michigan Law School would become increasingly homogeneous over time, until a minority applicant would no longer be a rarity, but only a memory.

D. Adoption of Dr. Larntz's standard of fairness would unfairly stigmatize all minority students.

Perhaps the cruelest twist of fate associated with applying Dr. Larntz's standard of fairness would involve the self-perception and social reputation of minority applicants subjected to the standard. The admission to colleges and law schools has been criticized by some as a preference for the less qualified. Affirmative action programs are often characterized as stigmatizing to minority students who actually deserve to be enrolled because they are mistaken for minority students who only gained enrollment because of their identity, not their qualifications.

Yet, as the foregoing discussion makes clear, Dr. Larntz's standard of fairness would penalize even the best qualified applicants when they are from a minority group. These students would suffer the ultimate stigma, since they would be rejected under Dr. Larntz's standard of fairness because they were rare, but the general public would be left with the impression that they were rejected because they were less qualified.

The all-white public law school would stand silently for the proposition that minority groups are less qualified, even though the public law school would have become all-white after rejecting individual minority applicants who had presented qualifications that were equal to those of the individual white students who replaced them.