DeFunis & Bakke . . . The Voice Not Heard

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On October 12, 1977, the Supreme Court of the United States heard arguments in the "reverse discrimination" case of Bakke v. The Regents of the University of California.1 Bakke, like its predecessor, DeFunis v. Odegaard,2 has attracted a great deal of attention from the legal community3 as well as from many other segments of American society.4 A far-reaching impact upon affirmative action5 programs is anticipated should the United States Supreme Court choose to affirm the holding of the California Supreme Court below.

Such a decision would be undesirable from an admissions standpoint. The process of gaining admission to highly competitive programs in general, and to professional schools in particular has been, thus far, only minimally outlined for the courts.7 A clear presenta-

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1. For purposes of this article, "reverse discrimination" is defined as classifications based on race designed to assist selected groups of persons.


4. When DeFunis was argued, 30 amici curiae briefs were filed by many diverse parties from all walks of life. Since that celebrated "non-decision," numerous articles have been written on the case and a number of symposia conducted, which enabled some of the finest legal minds in the country to address this very complex question. A mere sampling of the articles include: O'Neil, After DeFunis, 27 U. Fla. L. Rev. 315, (Winter 1975); Zimmer, Beyond DeFunis, 54 N.C.L. Rev. 317, (Fall 1976); Ely, Reverse Racial Discrimination, 41 U. Chicago L.R. 723, (Summer 1974); Symposium, DeFunis, The Road Not Taken, 60 Va. L. Rev. 917 (1974). Approximately 60 amici curiae briefs were filed with the Court when Bakke was argued—a record high. Literature published thus far includes Symposium, Bakke v. Board of Regents 17 Santa Clara L. Rev. 271 (1977).

5. Numerous news reports have focussed on this case in recent weeks as have several weekly news magazines. Further, a recently published poll indicated that the Bakke case is one of the topics most discussed in the public at large.


7. Perhaps this is because the situation of the groups allegedly unconstitutionally preferred in analogous to that of the minority employees referred to in Weber v. Kaiser Aluminim & Chemical Corp., no. 76-3266, U.S. Ct. Appeals, (5th Cir. November 17, 1977). Circuit Judge Wisdom dissented from a decision enjoining, as discriminatory against more senior white employees, the operation of a plan mandating admission of minority workers into an on-the-job training program on a one-to-one basis where admission was based upon seniority saying:
tion of the admission process is necessary to make the Court aware of the limitations inherent in quantifiable factors before it mandates the use of such factors in a manner severely or totally limiting the exercise of discretion in such usage by admissions committees. A more complete exploration of the ways in which such discretion has been exercised is necessary in order to place the use of race as a basis for preference in perspective.

This article will examine the state of the art which identifies, by use of primarily objective standards, those applicants most likely to succeed in professional school and contribute relevance to their profession subsequent to graduation. In addition this article will suggest how this data should best be used in light of historical considerations; it will suggest lines along which admissions practices in highly competitive programs may develop and suggest research avenues into admissions criteria during the next few years. The approach of this

"The defendants were never required to rebut a prima facie case [of discrimination against blacks], proved statistically because the statistics were never analyzed by the District Court . . . . In the district court no one represented the separate interests of the minority employees of Kaiser, the only people potentially interested in showing past discrimination. (at 687, emphasis added).

Both DeFunis and Bakke involved suits by white males possessing quantitatively better credentials than the average minority admittee. Neither plaintiff's case would be enhanced by a full explanation of the admissions process. See, e.g., DeFunis as discriminatory against more senior white employees, the operation of a plan man-argument, 3 BLACK L.J. 249, Gorton's response at 262 (1973). Questions Mr. Attorney General: "When I was teaching law many years ago, I discovered to my consternation, that these tests, these so called tests have built-in racial bias. Is there any finding in this record as to your test?" Mr. Gorton responds: "There is no finding in this record, Mr. Douglas, because neither party wished to bring that subject up. Obviously Mr. DeFunis would not make that claim, and the University of Washington did not attempt to prove that it engaged in previous racial discrimination" (emphasis added).

8. However, in view of its approach, it is quite likely that comments made herein will aid in assessing the constitutionality of such classifications regardless of the standard utilized. There appears generally, to be three standards of review which might be employed by the Supreme Court to constitutionally test suspect classifications. (But see Justice Marshall's opinion in San Antonio Independent Schools v. Rodriguez, 411 U.S. 1, 98-99 (1973) which indicates that there are ranges of standards which might be utilized dependent upon the circumstances in a given case.) Under the "rational basis" standard, a classification will be upheld if there is any conceivable state of facts reasonably supporting it. The "strict scrutiny" standard, which has generally been employed in cases involving classification based on race, will entail a strict construction of the classification and the classification will only be found valid if a compelling need for it is established. In using the third standard, "means scrutiny," the Court accepts the validity of the classifications and will uphold it if it substantially furthers the legislative purpose. See generally, Redish, Martin, Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments, Report # LSAC-75-4, at 7-25, citing to numerous additional sources.
article will not escape however, without some comment on the question of the appropriate standard of review for the apparent classifications along racial lines that is challenged by Bakke.9

DeFunis

The facts in DeFunis are familiar to anyone who has had any administrative responsibility for admissions in recent years. Indeed, the case has achieved notoriety far beyond this group because it has been extensively analyzed and discussed in many different settings.10 However, it is informative, for purposes of this discussion, to review DeFunis in order to highlight certain facts which seem to have been accorded little or no attention in the numerous discussions of this case, and to raise a number of questions which were dismissed as being of no moment, never raised, or answered only in the context of the limited exploration of the admissions process undertaken in conjunction with this case.

Marco DeFunis was a white male whose application for admission to the University of Washington School of Law with the class entering in September, 1971 had been denied by that school’s admissions’ committee.11 The size of the class entering in September, 1971 was to be 150 persons.12 The law school received approximately 1600 applications for admission to that class13—a ratio of slightly more than 10 applications for each seat. Each application was placed in one of two groups, one of which was for a “minority admissions” program.14 The latter group was composed of persons who had indicated in an optional question on the application form that they were of Black, Chicano, American Indian, or Filipino origin.15 A predicted first year average (hereinafter PFYA) was

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9. This is consistent with the dichotomy suggested by Professor Archibald Cox (Harvard) in the Harvard DeFunis amicus brief. He contended that two questions had to be answered by any institution which had more applicants than available seats: 1) which applicants have the ability to benefit from the course of study and the intellectual capacity which will not impede other students? 2) By what criteria should the number of qualified applicants which the institution can physically accommodate be selected?
10. See supra note 4. Many, if not most, of those writing are legal scholars primarily engaged in academic pursuits in various areas of speciality.
11. 416 U.S. 314 (1974). DeFunis had also been denied admission with the class entering in September, 1970.
12. Id. at 320.
13. Id.
14. Id.
15. Id.
formulated for each applicant which consisted of a combination of the LSAT score(s) and the last two years of undergraduate grades earned. These variables were weighted in the formula upon the basis of the law school’s experience with prior classes of students admitted there.\textsuperscript{16}

On the basis of the PFYAs over 77 for those in the first group, offers of admission were extended by the committee to a number of applicants.\textsuperscript{17} This ultimately encompassed one hundred percent (100\%) of those with PFYAs equal to or greater than 78.\textsuperscript{18} Those showing PFYAs of 74.5 or less\textsuperscript{19} were summarily denied\textsuperscript{20} by the chairman of the Admissions Committee.\textsuperscript{21} DeFunis’ PFYA of 76.30 was high enough to avoid summary denial but was not high

\begin{itemize}
\item[16.] It is, of course, axiomatic that factors considered for everyone in the applicant pool were the score attained on the LSAT and the undergraduate GPA (in this case the last two years of undergraduate work were the only years considered). But why are these factors given preponderant weight? How were relative weights for purposes of the formula in use to determine PFYA fixed? What is the effect of such weighing? How much of a correlation is there between the formula used and the first year of law school grades? How much of a correlation is there between the PFYA and overall law school performance?

Does reliance upon these objective factors have a disproportionate impact upon admission of any significant numbers of persons from any identifiable group? Is there a common characteristic linking persons so affected? Are these the only persons so affected?
\item[17.] 416 U.S. at 321.
\item[18.] Id. at 325.
\item[19.] The use of a PFYA cut-off assumes that it is appropriate, at least initially, to rely solely upon objective criteria to determine “qualification”. What was (is) the relationship between the cut-off point used and the level of objective criteria below which chances of successful law school performance become acceptably remote? If there were a point other than the cut-off selected at which such a judgment became possible, where would it be? What percentage of applications fell above each of the levels indicated?
\item[20.] 416 U.S. at 322.
\item[21.] The term “summary denial” is nowhere defined in the admissions policy quoted from this law school. It probably entails a cursory examination of the application for “saving factors” given the comparably low objective criteria. It is interesting to note that, apparently, some of these non-minority applicants escaped summary denial. A few were apparently referred to the committee on the basis of unspecified factors indicating greater promise than shown by the quantitative factors, were considered by the committee in due course, and may ultimately have been admitted. \textit{See} Justice Douglas’ discussion, 416 U.S. at 322. If this proved to be the case, it becomes even more clear that DeFunis was not the only “more qualified” applicant denied admission and that the minority students were not the only applicants “preferentially admitted”. This affects two points: determination of qualification and bases for preferential admission. Did denial of applicants including DeFunis (especially) above the cut-off establish that they were “unqualified” or “less qualified” than others admitted with lesser objective credentials? To what extent does this depend upon the manner in which “qualified” is defined?
enough to warrant an offer of admission initially with the regular
group. After initial consideration, his application was placed with
those to be considered for discretionary admission—presumably
a group composed of applicants initially passed over whose PFYAs
were less than 78 and equal to or greater than 74.5. After this fol-
low-up consideration, his application was denied. It is clear that
in the final class admitted, at least 20 or so of those admitted were
veterans who had been unable to accept offers of admission with prior
entering classes. Factors for discretionary admittees in each case
were not articulated, but it is likely that some of the discretionary ad-
mittees had PFYAs lower than that of DeFunis. It is also clear
that some applicants with PFYAs higher than that of DeFunis were
denied.

Applications submitted by self-designated minorities were chan-
neled to a special subcommittee, and were never directly compared
to those submitted by all other applicants. Neither did any appear
to be summarily denied, based on a PFYA of less than 74.5. It
is clearly established that less emphasis generally was placed on the
PFYA for this group of applicants. “Other factors” may have
been considered in selecting applicants for admission from this
group; race was certainly one of these. Beyond race, there is no
indication of the extent to which “other factors” such as grade ascen-
dancy, difficulty of undergraduate course of study and post-graduate
experience were actually considered on an application-by-application
basis. Likewise, there is no indication that admissions committee
members proceeded strictly on the “numbers”. Whatever the process,
37 minority applicants were admitted, 36 of whom had PFYAs be-
low that of DeFunis with 30 below 74.5. DeFunis claimed that
he had been denied admission solely because of race (because he was
not black or of any of the other designated minority groups) in vio-

22. 416 U.S. at 323.
23. Id.
24. Id. at 321.
25. Id. at 325. Factors deemed an appropriate basis for discretionary ad-
mission generally are discussed at footnote 99, infra.
26. 507 P.2d at 1176.
27. 416 U.S. at 323.
28. Id.
29. Id. at 324.
30. Id.
31. Id. at 324.
32. Id.
lation of the equal protection clause of the fourteenth amendment and he sought a mandatory injunction to compel his admission.

The Washington trial court agreed with plaintiff, relying heavily on Brown v. Board of Education (the trial court agreed with plaintiff that he had the constitutional right to be treated like all other applicants—i.e., that the procedure had to be color-blind) and granted the requested relief. Plaintiff was admitted to law school. On appeal, the Supreme Court of Washington reversed the trial court upholding the constitutionality of the school's policy. Plaintiff petitioned the United States Supreme Court for a writ of certiorari, and the judgment of the Washington Supreme Court was stayed pending final disposition of the case by the United States Supreme Court. Plaintiff remained in school and was in his final quarter when the case was argued before the Supreme Court of the United States on a writ of certiorari.

The Supreme Court never reached the question of the constitutionality of "reverse discrimination." In a 5-4 decision, the court decided that the case was moot, since the plaintiff would be entitled to complete the quarter and receive his degree if he fulfilled all requirements therefor, and since the plaintiff had not cast his suit as a class action. The only justice to reach the merits was Justice Douglas. In what has been characterized as a "troubled and troubling opinion", he set forth what is generally regarded as an indication of what the Court might look for in assessing the constitutionality of admissions programs which treated race as an item of preference.

Justice Douglas observed initially that there had not been clear evidence establishing that the LSAT and GPA, the factors heavily weighing in this school’s admissions decisions, provide particularly good evaluations of every applicant’s ability to succeed in law school. The test itself was "limited by the creativity and intelli-

33. Id.
34. Id. at 314.
36. 507 F.2d at 1178.
37. Id.
38. DeFunis opinion, 416 U.S. at 315.
39. Id.
40. Id.
42. DeFunis dissent, 416 U.S. at 330.
gence of the test maker . . . 48 and could not measure many relevant factors, such as motivation [and the] cultural backgrounds of specific minorities. . . . 44 Grades had problems also. 46 Finally, no convincingly clear correlation had been established between these predictors and "the intrinsic or enriched ability of an individual to perform as a competent or successful law student or lawyer in a functioning society undergoing change." 48 Notwithstanding the possibility that such issues could validly be raised, the failure of any party to challenge "the validity of the Average . . . as an admissions tool . . . " foreclosed the possibility of examining this issue. 47 Neither had the law school presented any evidence to establish the necessity of segregating applications along racial lines "in order to validly compare applicants of different races. . . ." 48

"The Equal Protection Clause did not enact a requirement that the law schools employ as the sole criterion for admission a formula based upon the LSAT and undergraduate grades" wrote the Justice, "nor does it prohibit law schools from evaluating an applicant's prior achievements in light of the barriers that he had to overcome." 49 The law school had clearly taken advantage of this flexibility by refraining from employing these as the sole criteria but, in doing so, a dual standard of consideration had apparently been formulated. One standard revolved primarily around the PFYA criterion and was applied to persons other than those designated for special treatment

43. Id. at 328.
45. DeFunis dissent, 416 U.S. at 330. Justice Douglas summed it up tersely by observing that "[o]ne school's A is another school's C." For a more detailed discussion of the problems of comparing applications which may require giving common treatment to transcripts both intrinsically and extrinsically different, see footnote 62, infra.
47. Id. As will be shown, the ultimate issue is probably not whether the average constitutes a valid tool for selection but, rather, whether it should or could be the only tool of selection. Consideration of the latter issue requires examination of the former issue.
48. Id. at 331. This reinforces the observation made at footnote 7, supra. The real parties in interest, the minority students, were not represented here. DeFunis could not be expected to challenge a tool which tended to reinforce his allegations of "better qualification," the Law School would undoubtedly be reluctant to attempt to establish that reliance on a discriminatory tool justified the admissions process then being challenged.
49. 416 U.S. at 331.
under the admissions policy implemented. The second standard was apparently geared toward "evaluating an applicant’s prior achievements in light of the barriers that he had to overcome . . ."—permissible as a general position but was seemingly applied solely to persons in the designated minority groups and, according to the law school Dean, resulted in "less qualified" students being admitted to the school.

Thus, two problems clearly emerge: 1) Though the Admissions Committee in question may well have acted properly in setting aside for separate processing the applications submitted by those belonging to the designated minority groups because of what the Justice perceived as being possible cultural bias contained in the criteria and, particularly, in the LSAT, the law school had not made a case setting this out. 2) Even assuming that a reasonable basis could be established justifying the placement of this group of applicants "into a separate class in order better to probe their capacities and potentials," what justification can there be for so limiting this brand of sensitive evaluation?

The question when dealing with applicants with disparate credentials is whether, notwithstanding the weight of prior handicaps, the applicant, (any applicant) in the long pull of a legal career, may realize his full potential, perhaps outstripping his classmates whose earlier records appeared superior by conventional criteria. "[A] poor Appalachian white, or a second generation Chinese in San Francisco, or some other American whose lineage is so diverse as to defy ethnic labels, may demonstrate similar potential and thus be accorded favorable consideration by the committee." Assuming again that such an approach to each application was warranted, each applicant’s accomplishments would be measured against the barriers which have been overcome. Admission would then be offered to applicants showing the potential to succeed, if not by excellence in law school then later during their legal careers, rather than on the basis of race and the negative impact of racial discriminations.

Evaluation and selection should take place in a "racially neutral" manner. This could result in separate treatment of minority racial groups as a class "to make more certain that racial factors do not miti-

50. Id. at 326, 333.
51. Id. at 332.
52. Id. at 331.
gate against an applicant or on his behalf.” Racial neutrality would then seem to require that the accomplishments of any applicant, once deemed at least minimally qualified regardless of race, be carefully evaluated in order to ascertain whether there is any factor present to justify admission in spite of low predictors. This leads logically to the third hard question: Can race be constitutionally used as a basis for selection from a pool of otherwise “qualified” applicants? Justice Douglas wrote that “[t]he state may not proceed by racial classification to force strict population equivalencies for every group in every occupation . . . produc[ing] black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans . . . .”

Justice Douglas stopped just short of deeming invalid per se the law school’s use of race as described in the record, for the record did not clearly establish whether or not the University of Washington’s admission procedure was “racially neutral.” Justice Douglas would have remanded the case to the trial level in order to explore further the question of “racial neutrality.”

The term is, however, nowhere defined in this opinion. Did Justice Douglas mean that while race may be considered in determining “qualification” it can never be used as a factor to distinguish among and “preferentially admit” from a group of otherwise qualified applicants such utilization would serve to “produce good lawyers for Americans”, or was his objection primarily to the use of race to admit applicants otherwise “less qualified” (from the standpoint of objective credentials) to serve the needs of the minority segment of the population only? An examination of the admissions process and its un-

53. Id. at 336 (emphasis added).
54. Id. at 342.
55. Id. at 344.
56. Id.
57. The distinction seems to be an important one in light of the Supreme Court’s opinion in Morton v. Mancari, 417 U.S. 535 (1974), decided two months after the decision was reached in DeFunis. That case upheld the constitutionality of an employment preference awarded qualified Indians under the Indian Reorganization Act of 1934. It has been much cited to support the proposition that a preference awarded along racial lines would withstand constitutional scrutiny.

However, it is important to note that the court very carefully limited its opinion to encompass an Indian preference only “in the narrow context of tribal or reservation-related employment . . . .” 417 U.S. at 548, (emphasis added).

Indeed the court attempted to temper somewhat the notion that the decision upheld a classification along racial lines by observing that “[t]he preference, as applied, is granted to Indians, not as a discrete racial group, but, rather, as members
avoidable and profound impact on education, society and the profession suggests an answer.

*The Question of "Qualification"*

An assertion of more or better qualification necessarily assumes that, generally, objective criteria can be meaningfully quantified with a reasonable degree of precision. This is hardly the case.

As a point of general information, for the American Bar Association (hereinafter ABA) approved schools, the parameters for determining "qualification" are set by the ABA Standards and Rules of Procedure for Approval of Law Schools. Those standards provide that:

The admissions policies of the law schools shall be consistent with the objectives of its educational program and of the resources available for implementing those objectives. The school may not admit applicants who do not appear capable of satisfactorily completing that program.

The first step in assessing qualification under that standard entails consideration of the applicant's LSAT score and UGPA.

1. *The Predictors*

The practice of utilizing first, undergraduate grades and,
later, the score(s) attained on the LSAT\(^{62}\) arose late in the game of ‘legal education’. The practice has been implemented on a piece-meal basis\(^{63}\) partly in a continuing effort to develop a “fitting image,”\(^{64}\) and partly out of necessity.\(^{65}\)

Criticisms of utilizing results obtained on a standardized test for selecting persons to be admitted to law school dates from the initial implementation of the practice.\(^{66}\) However, early validity studies\(^{67}\)

school are one of the two primary factors routinely considered by admissions committees. The difficulties inherent in use of grades explain, in part, the attractiveness of using a score on a standardized test. For example, pass-fail grading, different grading scales (1.0-4.0, A+-E, 50-95), ungraded transcripts, and eroding grade value must all be coped with.

The manner in which grades are utilized may vary from institution to institution. University of Washington, for example, used the last two years of undergraduate grades earned. More commonly, all undergraduate grades earned are considered, though this is by no means the universal rule. See generally, 1977-78, Pre-Law Handbook, published by LSAC.

In addition, grades may be adjusted by schools in accordance with data gathered over a period of years relating to performance of prior admittees who have attended and been evaluated by the institution in question. See e.g., Gellhorn and Hornby, Constitutional Limitations in Admissions Procedures and Standards—Beyond Affirmative Action, 60 Va. L. Rev. 975, 977-978 (1974).

62. The Law School Admission Test (LSAT) is a half-day test used as a rough measure of certain mental abilities—“the ability to read, recall, understand, and reason logically using a variety of verbal, quantitative, and symbolic materials.” These abilities are deemed important in the study of law and, thus, the test is deemed an aid to law schools in assessing (predicting) the academic promise of their students. There is also a writing ability (WA) portion which measures the command of written English. Scores are based on the number of correct responses made by the test-taker; LSAT scores range from 200 to 800 and WA scores range from 20 to 80. See Consalus, The Law School Admission Test and the Minority Student, Tul. L. Rev. 501, 511 (1970), and the Law School Admission Bulletin, 1976-77, published by the Law School Admission Council. The Educational Testing Service (ETS) pursuant to its contract with the LSAC, is responsible for preparing, administering, and scoring the test. It should be noted that the LSAT is not deemed to be a test of aptitude, i.e., general intelligence, but rather an assessment of the extent to which certain skills are developed.

63. Consalus, supra note 62 at 501-508.

64. Id.

65. Bar admission requirements have substantially foreclosed the question of whether an undergraduate degree can be required before an applicant can be admitted to the bar subsequent to attending law school. There is no comparable requirement for the LSAT, though all ABA approved law schools now require applicants to take that test. See 77-78 PRE-LAW HANDBOOK, supra, note 58 at 36-43. This is a recent development as a perusal of relevant material will show. See, e.g., Luneboz and Radford, Law School Admission Test: A Survey of Actual Practice, 18 Journal of Legal Education, 311, 313-324 (1966).

66. See, e.g., Wigmore, Juristc Psychopometry—Or, How to Find Out Whether a Boy Has the Makings of a Lawyer, 24 Ill. L. Rev., 454 (1929). Note that this article predates by almost twenty years the first administration of the LSAT.

67. A validity study entails testing the reliability of a tool of measurement by showing the frequency with which it accurately predicts the level of performance with regard to a specified criterion.
on the LSAT were conducted by the Educational Testing Service
(ETS),\textsuperscript{68} using performance in the first year of law school as the
criterion. ETS established that the LSAT score was useful alone as a
predictor of academic performance (as were grades), and that pre-
diction could be further enhanced if the LSAT score were combined,
in a given ratio, with UGPA.\textsuperscript{69} One commentator has noted that
the coefficients of correlation which generally range from .3 to .5 for
law schools "may be considered low by some",\textsuperscript{70} but this has been
deemed to be a high enough correlation to justify continued reliance
on these tools of measurement.\textsuperscript{71}

There has been no dramatic increase in the value of the coe-
ficient of correlation over the .52 value\textsuperscript{72} over the 30 years of law
school LSAT usage.\textsuperscript{73} This is due, in part, to difficulties inherent
in devising a test which reflects an accurate definition of all skills
or qualities relevant to successful performance in law school (content
validity)\textsuperscript{74}, which will, in turn, aid in eliminating measuring error,
thus enhancing predictive validity.\textsuperscript{75} To the extent that qualities

\textsuperscript{68} The Educational Testing Service has conducted extensive studies for the Law
School Admission Council and its predecessors since the beginning of the LSAT
program in 1948, in addition to its other obligations, into the validity of using the
LSAT and UGPA alone for predicting first year performances and in combination.

The results of comparison between predicted performance and actual perform-
ance is expressed as a value called a coefficient of correlation. These coefficients
of correlation indicate that either the LSAT or UGPA predict to some extent alone,
but prediction is enhanced when the factors are combined.

\textsuperscript{69} See, e.g., Schrader and Olsen, The Law School Admission Test as a Pre-
dictor of Law School Grades, Report #LSAC-50-1, In Law School Admission

\textsuperscript{70} See Consalus, supra note 62 at 513. The "some" referred to probably en-
compases persons other than social scientists.

The coefficient of correlation in the Schrader-Olsen study, op. cit., supra was
.52. This means that the LSAT/UGPA combination accurately predicted perfor-
ance for 25% of the students admitted to law school in the year in question.

\textsuperscript{71} Consalus suggests that these correlations appear acceptable to the user
schools in light of their understanding that "... it is extremely difficult to differ-
entiate between individuals in a group of highly qualified, homogeneous applicants
for admission". \textit{Id.}

\textsuperscript{72} \textit{Id.} For detailed information relating to results of validity studies over the
years, see SCHRADE, THE PREDICTIVE VALIDITY OF LSAT, 1949-1976, LSAC Re-
search.

\textsuperscript{73} As has been noted the LSAT was first administered in 1948.

\textsuperscript{74} (Definition in Law School Admissions Services Operations Reference Book),
"Content validity deals with the degree to which the knowledge and ability tested
are appropriate to the purpose and use of the test and to the field with which the
test is concerned."

\textsuperscript{75} (Definition in Law School Admissions Services Operations Reference Book),
"Predictive validity is based upon the ability of one variable, such as test scores,
deemed important to law school study are not assessed\textsuperscript{76} attainment of perfect content validity is impossible. The abilities that the test \textit{is} designed to measure have been set forth earlier.\textsuperscript{77} As Justice Douglas observed, accurate assessment of even \textit{these} qualities will be limited by the ability and imagination of the test-maker.\textsuperscript{78} This leads to difficulty in asserting that a score attained on a standardized test is a "true" measure of an applicant's ability. For example, admissions officers routinely encounter applications in which multiple test scores vary, and such variations occur for reasons totally unrelated to the fact that the applicant is taking a different version of the test. The average repeater's performance\textsuperscript{79} illustrates the "true score" theory\textsuperscript{80} which assumes that for each test taken, there may be a "true score" which differs from the score actually achieved. To account for this, the standard error of measurement is calculated which allows the amount of variation to be determined.\textsuperscript{81} Further, the range of applicants actually accepted will not be universal. The physical inability to accept all applicants dictates selectivity, and, to the extent that accepted applicants are clustered, the coefficient of correlation will be accordingly lower.\textsuperscript{82}

\textsuperscript{76} To accurately predict another—success in law study, for example. This relationship is expressed as a coefficient of correlation, \textit{see supra} note 68.

\textsuperscript{77} Supra note 44.

\textsuperscript{78} Supra note 62.

\textsuperscript{79} DeFunis dissent, 416 U.S. at 328.

\textsuperscript{79} A "repeater" is a person who has taken the LSAT two or more times. On the average, these repeated attempts produce LSAT scores within 30 points of each other.

\textsuperscript{80} The theory is based upon the assumption that accidental measurement error is caused by extraneous factors such as physical health, environmental considerations in testing site, etc. Screening out these factors in multiple administrations would result in performances being "clustered" around an average or true score. (Law School Admissions Services Operations Reference Book, p. 6, Sept., 1977).

\textsuperscript{81} Id. at 6, 7. The standard error of measure extends from one interval below to one interval above the attained score. This includes approximately \( \frac{1}{4} \) of the scores obtained by candidates performing at the level. This is approximately 30 points for the LSAT. This means that, if an applicant attains a score of 550 in that test, 2 times out of 3, the hypothetical true score will fall between 580 and 520. \textit{See} Clayton, \textit{Equal Protection and Standardized Testing}, 44 Miss. L.J. 9009 (1973).

\textsuperscript{82} Limitations in conducting an adequate validity study noted in LSAS Operations Reference Book, \textit{Id.}

Another way of explaining the relationship between high selectivity and what some deem the relatively lower ranges within which the law schools' coefficients of correlation generally fall is to say that the more homogeneous the population being tested in terms of factors being validated the lower the coefficient of correlation is likely to be. There are fewer differences to explain. Thus, for example, a coefficient of correlation of .6 which means that the factors being evaluated ex-
In determining how best to use these predictors, in any given case the user is reminded that while reliability does increase as the predictors become lower, even very low predictors do not establish conclusively that the applicant will fail. Rather, the predictors simply allow the user to estimate the probability of performance at or above a given level, given these objective credentials. The user must remain mindful of the possibility that performance may far exceed expectations.\textsuperscript{83} This point is made in Justice Douglas' opinion: “The proponents own data show that, for example, most of those scoring in the bottom 20\% on the test do better than that in law school—indeed six of every 100 of them will be in the \textit{top} 20\% of their law school class.”\textsuperscript{84} Notwithstanding these inherent weaknesses, use of these predictors allows the user to better “guess” what the level of performance will be most consistently, and, on a gross basis, improves upon what might be expected if a system of random selection were utilized.\textsuperscript{85} Initial reliance thereon has been justified on that basis.

2. \textit{Summary Denial}

In light of this discussion, determination of “minimal qualification” has not been presumptively established at any point on the LSAT/GPA continuum. This general lack of consensus in actual admissions practice is demonstrated convincingly by a study recently completed by Franklin R. Evans of ETS.\textsuperscript{86} This major research project, published under the title “Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall of 1976”\textsuperscript{87}, examined national data com-

\textsuperscript{83} Id. “LSAT results, while they serve a useful purpose in the admissions process, cannot measure all the elements important to success or the specific admissions requirements of the individual institutions. They need to be examined in relation to the total ranges of information about the prospective law student.”

\textsuperscript{84} 416 U.S. at 329 n.13.


\textsuperscript{86} Mr. Evans is a senior psychologist at ETS and the program research coordinator for the Law School Admissions Council.

piled by ETS as a result of administering the operation of the Law School Admission Services for the Law School Admission Council. The compilation of data shows that ABA accredited schools participating in this survey accepted students—an action which must be interpreted as an imprimatur of "qualification" if action in accordance with the ABA accreditation standards is assumed—on the basis of various combinations of LSAT scores ranging from less than 300 to 800 and UGPA's ranging from less than 2.0 to 4.0 (on a four point scale). This encompassed slightly more than 43,500 of the 66,000 candidates for admission possessing credentials in the ranges noted out of a total applicant pool of slightly more than 76,000.

Since accepted candidates constitute only two thirds of the applicants possessing credentials in this range, it is reasonable to assume that the ranks of the "lesser qualified", those whose combination LSAT and UGPA place them in the lowest cells, contained the least acceptances. However, as an examination of Tables 5 and 6 in the Evans study will show, no combination of factors enjoyed a 100% success rate based on this data, nor was there a 100% rejection rate in any of these cells. Some of the apparently unsuccessful cases in the highest cells may no doubt be explained by the fact that applications for admission were not completed or that, by failing to astutely select schools in order to take advantage of the "step down".

88. The Law School Data Assembly Service (LSDAS) has been developed by the Services Committee of LSAC and ETS to centralize the collection of college transcripts required for law school admissions decisions, to combine a summary of the transcripts with LSAT scores and basic data about law school applicants such as state of permanent residence, social security number, etc. This information when supplemented with additional data provided ETS by applicants utilizing the Law School Candidate Referral Service (LSCRS) and law schools supplying admissions status information in order to utilize the LSDAS Extended Services, allows the accumulation of an extensive body of data relating to the total law school applicant pool. See Evans Study at 9-13, supra note 87.

89. Supra note 59.

90. See Table 6, Evans Study, supra n.87 at 20.

As has been noted, LSAT scores may range from 200 points to 800 points. On a four-point scale, grades may range from 0.0 to 4.0. The extent to which LSAT scores fall below 300 or grades fall below 2.0 where applicants have been successful cannot be determined from the table cited.

91. Id.

92. For example, where the LSAT score was 750 and over and UGPA was above 3.74, 179 of 181 candidates were offered admission. In contrast, 2 candidates of 167 with an LSAT score below 300 and UGPA between 2.00 and 2.24 were offered admission.

93. The "step down" theory takes into consideration the fact that law schools admit a range of applicants but themselves range from most to less selective. At
phenomenon, chances of successfully applying for admission were diminished. However, even allowing for this comparable softness in the data, it remains clear that law school admission committees of ABA approved law schools have not collectively identified a precise point on the LSAT/UGPA continuum below which an applicant is conclusively deemed to be less than minimally qualified. 94

Identification of applicants who appear capable of satisfactorily completing the program in light of an institution’s educational policy and resources available thereto may, therefore, proceed on an institution-by-institution basis. There may be wide variations from law school to law school without running afoul of accreditation standards.

A perusal of the 1977-78 Pre-law Handbook shows that in individual law schools, while the range of successful applicants in most law schools is usually narrower than that reflected in the composite table in the Evans Study cited above, such ranges exist. Further, admissions committees distinguish among applicants bearing the same objective credentials in determining which applicants will finally be offered admission. 95 The existence of such ranges and the evidenced selectivity within LSAT/UGPA combinations reflect that the law schools are indeed proceeding within limits to select on the basis of factors in addition to the predictors just discussed.

Therefore, it is clear that two cut-off points may exist in law

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94. This point is reinforced at p. 21 of the Evans Report, supra n. 87, where the author makes the following observation:

As expected, those candidates with higher LSAT scores and UGPAs were more often offered admission than those with lower ones. It can also be assumed that most of the candidates with high LSAT scores and UGPAs applied to and were offered admission by the more selective law schools. However, the fact that there were many offers of admission to candidates with scores and grades in the lower regions of the matrix is evidence that law schools were considering qualifications other than test scores and undergraduate grades in choosing their classes.

95. See, e.g., Admissions grids of University of Alabama, p. 53, Boston College, p. 73, University of California at Davis, p. 83, Case Western Reserve University, p. 93, Emory University, p. 134, etc. It should be noted that this reflects a practice which the law schools have continuously asserted to be the case. See generally, Turnbull, et al., Law School Admissions, A Descriptive Study, supra note 58.
school admissions. The first is the point at which an applicant may be said to be only minimally qualified which, as the data referred to shows, has not yet been established across law schools. The second point is the level on the LSAT/GUGPA continuum below which a law school summarily denies applications for admission. It then logically follows that if a law school has not identified the point on the LSAT/UGPA continuum below which an applicant is deemed to be minimally qualified and sets a cut-off, or sets such a cut-off above what it knows to be the point of minimal qualification, applicants summarily denied may be denied, not because they were "unqualified" in the absolute sense, but because they fell too low on the continuum referred to above to be within what the law school considers to be a desirable range.

To the extent that the cut-off eliminates those demonstrably unable to perform successfully in a particular law school, there can be no criticism of this administrative practice. However, if "qualified" applicants are in the group summarily denied, and if this group so denied contains within it significant percentages of applicants from identifiable subgroups, questions of predictive bias or unwarranted reliance on objective credentials may be raised.

3. **Summary Admission**

Regardless of how the cut-off below which summary denial is permitted is set, the pool of applicants left will, in all likelihood, still far exceed the number of seats available. That was the situation in *DeFunis*, and that case probably presents a typical pattern for processing from that point.

The first seats will be filled, quite literally proceeding by the numbers—starting at the "top" of the applicant pool with the "best

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96. This is not to imply that such a point does not exist. It is clear that, at some point, objective credentials may be so low that questions of academic survival are legitimately raised. See, e.g., Winograd, *Law School Admissions: A Different View*, 59 A.B.A.J., 865 (August, 1973). However, the amount of weight seemingly given "cut-off" points in determining "qualification" necessitates making the distinction.

97. Rock explains predictive bias as follows: "when, for any identifiable subgroups from an applicant population, there is a consistent tendency to underpredict their performance on an external criterion." Rock, *Motivation, Moderators, and Test Bias*, 1970 TUL. L. REV. 527, 531.

98. See *DeFunis* dissent, 416 U.S. at 322 n.13; Also Gellhorn and Hornby, *supra* note 58, and Turnbull, et al., *supra* note 58.
qualified" (those applicants possessing the highest LSAT/UGPA combinations)—and continuing until some predesignated cut-off for "automatic of summary admit" is reached, some percentage of the class is filled, or the pool of "best qualified" applicants as defined by that law school is exhausted.99

There can be no objection to this practice in the admissions process; those who are truly the "best and brightest" have earned such consideration and should surely be impervious to challenges directed against their "qualifications" when a law school chooses to proceed in this manner. However, at most law schools the ranks of such "superstars" are likely to be relatively small in number, and, notwithstanding the number of "automatic or summary" admits, this process is still likely to leave a pool of applicants outstanding which is in excess of the number of seats remaining.100 Further, there will be the additional complication that many of the remaining applicants proffer "objective" credentials which are both less distinguished and indistinguishable. Selection of admittees from those applicants remaining will likely turn on "other factors."

4. "Other Factors"—the "Discretionary Admittee"

As noted, the objective predictors are inherently unsuitable for total reliance in selecting all applicants to be admitted into the program in question. There will inevitably be some degree of error in the measurement for reasons discussed earlier.

Further limitations flow from the presumptions underlying the design of a "standardized" test (environmental factors). Discussion thus far has implicitly assumed that the hypothesis underlying a standardized test is true—that all of the testtakers have homogeneous backgrounds and value systems, and that they differ only in the degree to which they possess requisite qualities or have been exposed to the

99. All of the points for cut-off are likely to be somewhat artificial. It is clear that a highly numerical system could be used to select all successful applicants. However, this would not necessarily guarantee selection of the best applicant in every case because the numbers become less meaningful as a basis for distinguishing between applicants at a point unique to each law school's applicant pool.

100. For example, the University of Washington received 1600 applications for 150 seats. Assume that the cut-off for summary denial eliminated 50% of these. 147 applicants with predicted first-year averages above 77 were admitted which probably filled half the class. This left more than 650 applicants for the 75 remaining seats.
necessary information. If this were true, even where the test itself is content-deficient, since the deficiency could be presumed to touch and affect all relatively equally, the "true score" theory would not prevent the admissions officer from relying on these factors to a very great extent in selecting applicants for admission. However, differences in applicant background such as socio-economic background, physical handicaps, educational background and language facility could possibly exist. This in turn, would create the possibility that the test measures different things in each applicant. When this is true and the response relates to the prediction of the ability to perform with a particular criterion in mind, calculation of the "true score" will not correct the error in measurement, and predictive bias is present in the test. Thus, there would be a further limitation since measurement could result in either over-prediction or under-prediction of performance on the identified criterion.

This imprecision in the quantifiable predictors has allowed admissions committees with the blessings of ETS to experiment with a wide variety of "non-quantifiable" factors which may be utilized by an admissions committee to distinguish among this group of applicants.

Such other factors justifying admission have included the following: personal interviews, letters of recommendation, character, matters relating to the needs of the profession and society such as an applicant's professional goals, work experience, rigor of the course of study pursued and competitiveness of the college attended, history as a "low tester," the trend of grades, extracurricular activities, significant achievements, graduate study, race, residency and relation to alumni. Since use of these factors will likely be limited to those

101. See generally, Rock, supra note 97.
103. See definition of predictive bias at note 97.
104. ETS suggests that, for the applicant pool as a whole, "[s]uch things as the candidates' overall undergraduate record, faculty recommendations, evidence of his/her motivation and enthusiasm for the study of law, the nature of his/her undergraduate institution, and many less identifiable elements all play a role in his/her admisibility and success as a student." Such factors would certainly take on increased importance as the pool of applicants became increasingly indistinguishable.
105. Factors noted are composite of those mentioned in the University of Washington's admissions policy as reproduced in the Appendix of the DuFonis dissent, the Evans Study.
87. Supra note 87, the 1977-78 Pre-Law Handbook, and Turnbull, et al., supra
in the "middle tier" of applicants, between summary admission and summary denial, their use will automatically create a class within the applicant pool—a group to which a "preference" may be extended.

As noted earlier, the applicant pool will have been substantially reduced by summarily admitting the strongest applicants and summarily denying the weakest applicants. The manner in which the cutoff for summary denial may have been determined has been discussed earlier. Courts have deemed it crucial in determining qualification, and there is no doubt that it directly affects the make-up of this pool. If the Evans Study reflects the make-up of most law school applicant pools, it is likely that applicants from racial minority groups will be clustered in the lower quartiles of that pool. Two possibilities for the pool's make-up thus exist: (1) if minimal qualification is the test, the middle tier includes all qualified applicants and cuts across racial (or other) lines, or (2) where the group considered is a subset of qualified applicants, that there is no middle tier and admission is based strictly on objective criteria, but for the racial preference, or that there is more than one group for preferential admission—one defined along racial lines and the other including everyone else. However, this should be of no moment; the question of relative qualification is inappropriate given either model. The real issue should be whether a preference is justifiable given a pool of applicants all of whom are qualified.

The assumption underlying further discussion will be that all applicants being considered are qualified. Evaluation of other factors which constitute the basis for preference will focus on several defenses which might be asserted: correction of suspected predictive bias by using discrepant predictors or moderator variables, recognition of meritorious achievement in narrowly defined areas, and presentation of attributes whose exploitation will serve educational, professional, or societal ends.106 In each instance, the need for the preference, harmony between the exercise of the preference and overall educational policy, and correlation between the exercise of discretion and attainment of the desired ends, will be examined.

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note 58. The latter source describes with some detail that phase of the process most likely to call into play such non-quantifiable factors. The reader is afforded a breadth of viewpoints toward appropriate weighting of such factors.

106. When reference is made to results of LSAC sponsored research, the reader is reminded of the limitations on generalization which might be implied based upon the difficulties of comparing data across a number of law schools.
a. *Discrepant Predictors*

Generally, in evaluating candidates for admission, candidates who are about average on the LSAT and in UGPA are considered equivalent to the candidate who is relatively high on one predictor and relatively low on the other.\textsuperscript{107} Nevertheless, both applicants and admissions persons have tended to believe that this latter group is "different" from the applicant with average credentials on both predictors. The argument is that where grades are high and the test score is low, the test score and the index figure, computed partially thereon, should be disregarded and more reliance should be placed on the grades. By the same token the reverse combination should warrant placing more reliance on the test score.

Several ETS studies have demonstrated that no statistically significant improvement in prediction results when applicants with such "discrepant predictors" are identified, and those applications are processed separately. In other words, the predictors are about as "valid" for this type of applicant as for the "average" applicant.\textsuperscript{108}

It would seem, then, that one could argue against such separate processing because it does not, in fact, result in the admission of a "better qualified" applicant. On the other hand, an argument could be made in defense of the practice if it were reasonably related to some educational goal.\textsuperscript{109}

b. *Moderator Variables and Subgroup Validity*

A moderator variable may be defined as a grouping variable, such as age, which enhances the reliability of the selective instrument though it may be unrelated to the predictors.\textsuperscript{110} Such factors could


\textsuperscript{109} This latter idea is further expanded at the discussion of attainment of educational, professional, and/or societal ends. See discussion at note 116, infra.

prove useful in correcting predictive bias to the extent that improvement proved significant for definable subgroups, or they could be used as a predictor throughout the applicant pool to enhance prediction generally.

Problems arise in attempting to identify those moderator variables which appear significantly useful, and then, in defining them so as to facilitate their use in a consistent manner within the applicant pool. These problems relate both to the factors which may affect the intrinsic value of the objective criteria, as well as extrinsic factors which may have had a direct bearing upon the strength of the objective criteria, or which may indicate promise for academic performance on a higher level than appears to exist initially solely from the objective criteria.

Factors which may aid in ascertaining intrinsic value may include the rigour of the undergraduate course of study pursued, the competitiveness of the undergraduate college attended, the trend of grades and performance in graduate programs of study. Issues raised would include determining whether hard science majors were consistently underpredicted, determining how pronounced a trend in grades had to be in order to be significant, and determining the weight to be accorded to graduate school grades given the fact that most graduate school grades awarded are As and Bs.

111. A word about internal grade adjustment seems in order here. The theory underlying grade adjustment is based upon the belief that making undergraduate grades from college to college more comparable will enhance predictive value. The adjustment may be based upon formulae developed by virtue of extended experience with students from those schools, which allow for transformations for groups of schools with similar LSAT averages for their undergraduates or some combination thereof. See generally, Turnbull, et al. supra note 58. An early study conducted by ETS to determine the feasibility of this approach on a broad scale was unpromising. [Shrader and Pitcher, Adjusted Average Grades as Predictors of Law School Performance, Report #LSAC-64-2. In Law School Admissions Council, Reports of LSAC Sponsored Research: Volume I (1949-1969). Princeton, N.J.: Law School Admissions Council, 1976.] The matter is currently being reconsidered by ETS and the progress report from this study indicates more promise. See progress report from Boldt, on Grade Adjustment Study II as reported in the Program Research Progress Report prepared by the Office of Program Research, ETS, Princeton, N.J. No completion date for the project has been projected.

Such an adjustment, of course, affects the entire applicant pool. However, since a difference of a few one-hundredths of a point may determine whether an applicant falls above or below a pre-established cut-off, the middle tier of applicants comprise a group of special concern.

112. Race is discussed at note 126, infra. Some of these possible moderator variables are incapable of quantification in any meaningful manner. Thus, no attempts at validation have yet been made on a larger scale by ETS. (ex. effect of part-time work).
Extrinsic factors which may have had a depressive effect upon the strength of the objective criteria could include part-time work during college and extracurricular activity. Other extrinsic factors which may be used to help explain the objective criteria include the evaluative personal interview and recommendations that suggest a high probability of success in the study and practice of law.

There have been several studies by ETS which conclude that, generally, those moderator variables studied thus far do not enhance prediction based on LSAT or UGPA alone or some combination thereof. Nor have there yet been subgroups defined having unique qualities statistically proven which require the development of separate equations in order to better predict their performance on the present criterion. The personal interview, a moderator variable mentioned by Justice Douglas, is one of the factors whose use has been extensively explored and which has consistently been found to be unreliable as a predictor for law school admission purposes. Such studies have been conducted both on a broad basis in graduate and professional education and in at least one law school. Furthermore, attempts to determine whether recommendations are helpful, and, if so, whether information can be better elicited by use of some standard form across law schools have reached a negative conclusion.


114. See Pitcher, Id. Bear in mind that this does not mean that there are no observed differences in validity. Rather, the differences were not great enough on this broad level to be deemed statistically significant. Law schools having statistically significant numbers of such persons in their student bodies may, in the view of ETS, find it reasonable to explore subgroup validity further with an eye toward developing separate prediction equations.


116. In 1971, the LSAC investigated at least some of these questions in attempting to ascertain the utility of a standard law school recommendation form. The study concluded that the only skill relevant for prediction being evaluated was oral communication and that considerable user error severely undermined the reliability
At this point though, the ETS position is to encourage continued experimentation by law schools.\(^{117}\) The increasing heterogeneity of the applicant pool and the law school population makes it likely that, at some future point, use of some of these variables for predictive purposes may become more significant. Validation techniques are becoming increasingly sophisticated. Finally, the utilization of other factors can be defended as a permissible exercise of discretion for some immediate purpose other than enhancement of prediction or correction of predictive bias against a defined subgroup. As moderator variables for predictive purposes seem at best to be a coincidental benefit where an applicant is a member of some subgroup for which prediction is relatively less reliable, the admissions officer may take steps enabling him to seek additional information, thus influencing the selection process.\(^{118}\)

c.  "Meritorious Achievement" Broadly Defined

The second justification eschews any enhancement of prediction (assuming that clearly demonstrated promise has already been "rewarded"), relying instead on the award of merit defined—either in individual or societal terms—when the applicant is otherwise "qualified." If it is initially assumed that this will implicitly encompass all of the factors previously considered in sections 'a' and 'b', the definitional problems clearly remain. Consideration of various kinds of achievement demonstrates that the number of possibilities proliferate in a bewildering manner.

What is a "significant achievement"? Pitching the only no-hitter in the undergraduate school's history? Winning a Congressional Medal of Honor? Being named Ms. Tobacco Queen? Being

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117. Again, be aware that, on the law school level, the ability to conduct such subgroup validity studies may be severely circumscribed. This flows from the likelihood that such subgroups may be small in size on that—too small to have studies yield results that could be deemed statistically reliable. Nevertheless, as long as the possibility exists that subgroups may be predicted within different degrees of validity, an objection to admission based upon failure to show enhancement of prediction could be premature.

118. See Evans and Rock *supra* note 113 at 384.
awarded a Bronze medal for service in the Quartermasters Corps in Vietnam? Service as the only student member of the school's Board of Trustees? Organizing seating for football games? Editing the school yearbook?


The degree to which a particular decision in any of the above examples may be defended bears a direct correlation to the manner in which the goals of the education program are articulated. Once again, there should probably be room for a reasonable exercise of discretion in light of those articulated goals. The questions are: 1) what should or could constitute reasonable goals, and 2) should such goals be expressed in societal as well as individual terms? These are not questions which should be foreclosed by an inflexible rule of law.

d. Admission to Serve Educational, Professional or Societal Ends

A final defense for discretionary admission turns on the positive effect that such admissions would have on the accomplishment of educational, professional, or societal ends.

The educational, professional or societal ends which have been raised as justifications for preference run the gamut from those whose defensibility is, at best, questionable to those for which a strong case can be made.

An example of a preference which clearly seems difficult to defend is that accorded to applicants who are related to faculty, staff or colleagues. The preference is not based upon an "achievement" of the applicant, though it may arguably bear a relation to educational ends. However, because "the classification [they] represent is based upon politics and privilege and is unrelated to any legitimate, legisla-

119. This approach is discussed at some length in Karst and Horowitz, Affirmative Action and Equal Protection, 60 Va. L. Rev. 955 (1974). The theory of Professor Karst and Professor Horowitz is that "merit" may be defined so as to include service to societal needs as well as to reward demonstrated promise (based upon the traditional academic criteria). This statement should not be taken to imply approval by these writers of all preferences hypothesized herein. See also Dworkin, Taking Rights Seriously, Chapter 7.
tively sanctioned objective of public higher education," the preference is of doubtful constitutionality” even under the ‘rational basis’ test. . . ."\textsuperscript{120} The same observation applies with equal force to a preference for an applicant related to an alumni.\textsuperscript{121}

On the other hand, it seems clear that there are preferences which validly serve such goals and which can be defended on the merits. For example, the Peace Corps veteran may well compensate for relatively weaker objective credentials with enthusiasm and commitment, and may add a dimension to the class which would otherwise be absent by virtue of the experience of having so served. Admission of such an applicant, otherwise “qualified,” would probably serve educational ends by enhancing the quality of the academic experience.\textsuperscript{122} Similarly, a strong defense could be mounted for a preference accorded by publicly-supported law schools to applicants who are residents of that state,\textsuperscript{123} or a preference on the basis of declared intent to render professional service in a given geographic area upon graduation and certification.\textsuperscript{124}

The preceding observations support a clear inference that there is an area within which discretion in admissions could and should be

\textsuperscript{120} Gellhorn and Hornby, supra note 58 at 1006.

\textsuperscript{121} But see Rosenstock v. Bd. of Gov. of Univ. N. Car., 433 F. Supp. 1221, 1327 (M.D.N.C. 1976) where justification for the preference was based upon the continued monetary support accorded the institution by alumni. See also Bakke, 553 F.2d at 1185. It is interesting to note that the institutions in these two cases are both publicly supported.

\textsuperscript{122} See, e.g., The Pre-Law Handbook's discussion of reasons for considering “non-quantifiable” factors at 28-29.

\textsuperscript{123} It is interesting to note that one element of DeFunis' original attack was based upon the assertion that the state law school was required to accord a preference to resident applicants. This was disposed of quickly with the state court observing that there was no constitutional requirement to so prefer residents.

However, while the preference is not constitutionally required and is by no means absolute, many state law schools do accord a preference to resident applicants otherwise qualified. Cf. The U.S. Supreme Court has approved tuition differentials in Starns v. Malkerson, 326 F. Supp. 234, aff'd. 401 U.S. 985 (1971). See generally, 77-78 Pre-Law Handbook. One court has justified such preferences based upon the support through tax dollars accorded such institutions by state residents. See Rosenstock supra note at 1326.

\textsuperscript{124} At least one law school has abandoned the practice of admitting on the basis of such assertions—not because of questions relating to the veracity of the assertion—but because the STUDENT may well be more interested in pursuing alternative avenues as a result of interests developed during the law school years. In Boalt Hall Report After Bakke, 28 JOURNAL OF LEGAL EDUCATION 363, 366 (1977). Nevertheless, a law school which wishes to and which can establish such a preference as related to the ends desired should have enough flexibility to admit preferentially on the basis of such assertions.
exercised. Admissions committees have taken "other factors" into consideration in cases where to do so was deemed appropriate, even though considering applications in this manner could clearly result in the admission of students sometimes "lesser qualified" than others with higher objective credentials.

Race as a basis for preference fits in well here. The judicial response to attacks mounted against preferences apparently based on race makes it useful to further consider the basis for consideration of race for selection.

Race as a Basis for Preferential Admission

1. Background

Unlike, for example, a transient unevenness in the availability of professional services across geographic areas, the dearth of minority and women law students and lawyers can be easily per-

125. The DeFunis original complaint alleged several grounds for wrongful utilization of preferences of which race was only one. The court made short shift of these arguments in focusing on the "reverse discrimination" issue notwithstanding the fact that at least some of the preferences attacked were of doubtful constitutionality. For similar treatment of a broad-based attack on preferences see generally Rosenstock v. Board of Governors of University of N.C., 423 F. Supp. 1321 (M.D. N.C. 1976).

126. Definitional problems (such as those discussed in utilizing unquantifiable criteria) spill over into this area also. Identification of "minority" status has been based upon the applicant's representation or the institution's perception. Problems with this approach were discussed in some detail by Professor Posner in The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities (1974 Supreme Court Review 1, 11-14). However, for purposes of this discussion, the assumption will be that those holding themselves out as members of racial minority groups have done so properly for purposes of completion of the law school admissions process.

Additionally, it seems clear that to guard against this kind of misrepresentation by applicants, institutions may provide for withdrawal of offers of admission or cancellation of credits and/or registration should it be learned that applicants have engaged in material misrepresentation.

As a practical matter, it seems doubtful that many non-blacks will claim that status for anything.

127. The performance of women not members of racial minority groups on both the predictors and the criterion has been such that problems relating to unconstitutional preference are not likely to be raised. Evans Report at xv.

Women applicants achieve approximately the same scores as men on the LSAT, and have somewhat higher grades. Their rates of acceptance to law school are in close parallel with the rates for men in the same ranges of LSAT scores and GPA records.

In the mid-1960s there were less than 800 black law students enrolled in ABA approved law schools in which there were then approximately 60,000 students. Approximately one-half of these black law students were enrolled in five predominantly black law schools. Black students thus constituted less than 2% of all law students. Statistics comparing black attorneys admitted to practice to all attorneys admitted to practice show a similar relationship. Were period statistics available for other minority groups, they would undoubtedly show the same kind of pattern. In the late 1960's, the lack of minority law students and lawyers became the subject of concern in a number of circles.

The history of the American Association of Law Schools (AALS) involvement and events leading to the intensified effort to recruit minority students is recounted at length in a number of articles. That there were endorsements by the AALS is clear. That there were explicitly articulated policy reasons (professional and social engineering) is also clear. Indeed, the effort to "increase the number of persons from groups underrepresented in the legal profession" was probably unique in regard to the following; this was the first voluntarily undertaken nationwide attempt on the part of professional schools to engage in social engineering by governing the way in which this benefit was dispersed.

History establishes clearly that the number of persons from minority groups underrepresented in the legal profession enrolled in law school increased as a result of this intensified effort. The following table illustrates this. It is also clear that the effort to increase the

128. The history of the efforts of black aspirants to gain access to the legal profession is highlighted in Leonard, DeFunis v. Odegard: An Invitation to Look Backward, 3 BLACK L.J. 224 (1974).
130. Discussion in the qualification section is couched in terms of Black applicants. However, to the extent that any identifiable subgroup is disproportionately represented in the lower matrix cells of the Evans Report in the law school applicant pools and is underrepresented in the profession into which entry is being sought the same types of consideration would apply.
132. Id.
133. Table cited is from American Bar Association, "Memorandum," March 22, 1977, Table I.
number of persons from minority groups enrolled in law schools was taking place at a time when there was unprecedented pressure on law school admissions in general. The following table will illustrate the dimensions of this increase.134

Using a gauge for early years, the number of LSAT administrations, and for later years the number of Law School Data Assembly Service completions, reveals that, nationally, from approximately 1 and ½ applications for each seat in the class entering in the fall of 1964 for the academic year 1973-74, there were slightly more than two applications for each seat.135 Competition per seat could, of course, vary dramatically from law school to law school with some schools receiving as many as 10-12 applications for each seat.136

In addition, the increased competition was taking place among applicants whose paper credentials were spiraling ever upward.137 Therefore, even though law school enrollments overall had approximately doubled in the ten years between 1964 and 1974,138 in an attempt to accommodate those desiring to study law during this period, it became more and more apparent that “qualified” persons were being denied an opportunity to attend law school.

2. Race and the Determination of “Qualification”

The period referred to was characterized not only by burgeoning law school enrollments, but also by increasing acrimony over the moral and legal propriety of considering race as a factor in discretionary—i.e., preferential admission,139 in order to admit applicants not as strong on the objective criteria. In light of this fact, it is useful to reconsider the question of qualification in light of the racial background of the applicant.

134. Table cited is from 77-78, PRE-LAW HANDBOOK, supra note 56, p. 23.
135. See Table supra note 128.
136. See generally, 77-78 PRE-LAW HANDBOOK.
137. Evans report, supra note 87 at 3.
138. See Table supra note 127.
The relative weakness of minority students in terms of objective
criteria had long been suspected by some and conceded by others.\(^{140}\) The law school dean’s admission in *DeFunis* that the minority stu-
dents preferentially admitted were “less qualified”\(^{141}\) was clearly a
factor that troubled Justice Douglas. The Dean’s admission is
assumed to have been based upon the comparatively lower objective
credentials presented by these applicants. To the extent that any
questions regarding comparative qualifications and preferential treatment
remain, they have been settled to a great degree by the Evans study
which shows clearly that minority students are clustered in the lower
matrix cell UGPA/LSAT combinations,\(^{142}\) and that acceptance
rates for such students so clustered are higher than those for non-
minority students with comparable credentials.\(^{143}\)

Mr. Evans has pointed out that lower predictions cannot be
taken to mean that such applicants are unqualified since “a[ssum-
ing that the LSAT and UGPA are important in determining who is ‘quali-
fied’, it is clear that many of those with quantitative credentials that
are considered ‘low’ in the context of today’s admission criteria would
have been clearly admissible, ten or fifteen years ago.\(^{144}\) This

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\(^{140}\) ETS has not analyzed composite data for years prior to this survey
year, but Evans does observe (cautiously) that the applicant pool examined is likely rep-
resentative of the applicant pool for the past few admissions years. Evans Report
at p. xii-xiii.

\(^{141}\) *DeFunis* dissent, 416 U.S. at 326.

\(^{142}\) See generally Table supra note 90; Table 16 Evans Report, *supra* note 87,
at 36.

\(^{143}\) Several points from Table 16, “Number and Percent of Candidates at or
Above Selected LSAT and UGPA Levels and Number and Percent Who Received
at Least One Offer of Admission to an LSDAS-ABA Law School by Ethnic Identity,”
of the Evans Report, *supra* note 87, should be highlighted here:

(a) The higher acceptance rates referred to are within GPA/LSAT cate-
gories. The data examined by Mr. Evans show, for example, that 86%
(122 of 142) of the Black applicants scoring 600 or above on the LSAT
were offered admission (Chicano [C] 89%; 71 of 80; White [W] 85%:
20,814 of 24,468). However, this was only 3% of the applicant pool iden-
tified as black (C-7%; W-37%) and 7% of blacks admitted in 1976 (C-
14%; W-53%). Using an LSAT score of 450 or above shows that 73%
(1,051 of 1,437) of blacks at or above this level are accepted (C-71%:
400 of 562; W-65%: 38,541 of 59,359) but this still accounts for only 62% of
all black applicants accepted (C-78%; W-98%). Minority applicants are
being accepted at higher rates in the lower quantitative categories—a phe-
nomenon which leads Evans to conclude that race is being considered (p.
38).

(b) It is important to note that the overall acceptance rates are *not* as
high for minority applicants (B-39%; C-47%; W-59%). This would sug-
gest that Admissions Committees are not totally abandoning reliance on the
predictors.

\(^{144}\) Evans Report, *supra* note 87 at 39.
means that the law schools have had positive experience with persons possessing such credentials. However, since there has been a correlation demonstrated between lower objective credentials which concededly do not denote a lack of qualification, and relatively greater academic risk, and since the courts repeatedly focus on the "lower numbers," it becomes imperative to ask once again whether the lower numbers might really mean legally objectionable "lesser qualification."

The difficulties inherent in exclusive reliance on objective criteria, particularly the LSAT, to determine "qualification", especially for the middle tier of applicants, have already been discussed.\(^{145}\) The factor common to racial minority groups and particularly blacks, which would make it even more objectionable to rely heavily on predictors where such reliance, according to the Evans Study, would result in virtual exclusion of such groups from even this "middle tier" of applicants\(^{146}\) is the likely distorting affect of the discrimination historically suffered by such groups. Surely the fact that such minority groups are only now emerging from a virtually total exclusion from the mainstream of American life would find expression in a standardized test that presupposes relatively comparable backgrounds and common experiences in the testtakers.\(^{147}\) This does not necessarily

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145. See supra note 97.
146. See Evans Report, supra note 87 at 40-59.
147. See Breland, supra note 85 where the author observes that "[i]t is the cumulative impact of such [life-style] experiences that tests like the LSAT measure. If these kinds of life experiences inhibit the development of traditional scholastic abilities, then one should expect that those who have been so impeded would score lower on the test than others."

In this context the following quotation is directly in point:

The legal milestones on the educational path of these students point to the obvious cause which excluded two-thirds of the blacks, in comparison with whites, by the time of college graduation. The typical graduate of 1976 was 22 years old, born in the year when this Court first held racial segregation in public schools to be unconstitutional. Brown v. Board of Education, 347 U.S. 483 (1954). This typical student had reached the fourth grade in elementary school before enforcement authority was conferred upon the Department of Health, Education, and Welfare with the Civil Rights Act of 1964, and he was entering the formative high school years when enforcement began in earnest with this Court's declaration that "delays are no longer tolerable" and that the obligation of every school district was to terminate dual school systems at one. Green v. County School Board, 391 U.S. 430, 438-39 (1968). According to the 1970 census, roughly half the black population of the United States (11,640,000 of 21,970,000) was living in the South, where racial segregation in education was required by explicit state statutes. The other half of the black population was concentrated heavily in the metropolitan and industrial centers of the North and Far West, in the central cities, where racial segregation had
mean that all such persons were "disadvantaged" from an absolute economic or even an educational standpoint, but it certainly supports an inference that the formative years were "different" in terms of the types of experiences both enjoyed and suffered, and that such "differences" appear to a greater or lesser extent when one seeks to assess "standard" backgrounds.

The probable existence of cultural bias in the LSAT has not been a point of great debate in recent years; rather, since there has been a correlation established between the predictor and performance on the criterion, it has been conceded that to the extent that bias is present, it probably carries through to the criteria—the law schools. It is not especially remarkable to find that, given the probable existence of such bias, applicants from racial minority groups who do not perform as well on the predictor as non-minority group applicants may not perform as well during the first year of law school. However, it is very important to note the converse of that observation—that the probability of successfully performing can be determined with as much reliability for the minority applicant as for the non-minority applicant. The risk is that successful performance will be at a lower academic level, not that there is a reasonable probability

148. There may well be "true" differences in the performance of minority group applicants as compared to non-minority group applicants. However, as noted above, these differences may flow not from differences in abilities tested, but from responses based upon "different value systems which in turn are functions of . . . past experiences and environments." Rock, supra, note 97 at 534. This is, of course, a view quite opposite to that taken by Sedler, Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California, 17 Santa Clara Law Review 329 (1977). That view would unfairly perpetuate the stigma of inferiority based upon a rather arrogant presumption that the only relevant kinds of experiences (for purposes of measurement) were those likely to be enjoyed by members of middle-class, white society, the presumption upon which such tests are now based.

149. See, e.g., Consalus supra note 63 at 509. This view has been expressed in numerous other sources also.

150. This is the result of the latest subgroup validity study completed by ETS which concentrated on racial minority groups. That study found that the predictions were as "valid" for minority as for non-racial minority groups. This means that the percentage of cases "explained" were roughly equal for the groups studied. See Powers, Predicting First-Year Law Grades for Minority Students, reprinted in Program Research Progress Report, ETS (August, 1977).

151. Id.
that the applicant will fail. In light of this fact and given the breadth of objective data which could support a determination of "qualification," an institution could articulate its admissions standards in a manner enabling a liberal approach to the question of quantitative qualification without automatically implying a diminution of academic standards.

This point is further bolstered by the following observations:

1. The criterion for measuring predictive validity remains academic performance during the first year of law school. There is evidence that many minority students who successfully complete the first year of law school go on to graduate and may close the performance gap to some extent.

2. Questions of content validity remain unresolved. Justice Douglas spoke of the necessity of developing more and better tests—perhaps primarily for use in this area.

3. Questions of prescriptive use remain unexplored. Historically, the emphasis in use of standardized tests has been on predictive use. Exploration from the standpoint of prescriptive use may enable the identification of weaknesses which

152. There has been a very limited attempt to validate the predictions for all 3 years of law school. See Johnson & Olsen, Comparative Three-year and One-year Validities of the Law School Admissions Test at Two Law Schools, Report #LSAC-52-2, REPORTS OF LSAC SPONSORED RESEARCH: Volume I (1949-1969). Princeton, N.J.: Law School Admissions Council (1976). However, in light of the time which has elapsed since those results were reported and the changes which have taken place in legal education since that time, the present value of the report should be seriously questioned. There has been a vast proliferation, for example, in the number and types of courses in law school which may call into play skills quite different from those measured by the test.

153. See, ABA Survey data, table 1, supra note 133, 133 which supports and inference that the majority of minority students admitted go on to graduate. This, of course, raises a myriad of questions regarding, for example, attrition—whether for financial, academic or other personal reasons, readmission policies, grading policies, etc., all of which are beyond the scope of this article. However, there is no doubt that significant numbers of minority students are succeeding in successfully negotiating the law school course.

154. See also Consalus, supra note 61 at 516. Indeed, it may be that the only relevant inquiry may be not how well but whether an applicant can successfully complete law school. The "Competent Lawyer" study is still years away from completion. However, results of major studies in other areas suggest that there may be little or no correlation between the traditional predictors and success in the pursuit of a career. See Personal Factors Related to Careers of MBAS reprinted in FINDINGS, ETS, Volume IV, No. 1 (1977) at page 4. This, of course, raises serious questions regarding admission procedures generally.

155. See Rock, supra note 97 at 333-35 for additional proposals; Breland, supra note 85 at 27-29 for discussion of performance criteria.

156. See Breland, supra note 85 at page 34 where this point is inferentially raised.
could be remedied both on a short-range basis—to benefit persons within the applicant pool—and on a long-range basis—to aid in the development of appropriate skills in future generations of graduate and professional school applicants.

In summary, a final determination of constitutional magnitude which may adversely affect the vast majority of an entire identifiable racial minority group should not be based on an instrument of measurement which remains psychometrically unrefined.

In light of the breadth and gravity of unanswered questions about the predictors, particularly as they pertain to racial minority groups, and the possibility of drawing positive inferences from the objective data, it becomes clear that separate processing and assessment based on race may be warranted and should be permissible where an institution has a “cut-off” which eliminates qualified applicants—a practice which demonstrably would be likely to have a disproportionate impact upon applicants from racial minority groups—and where the institution in question has not yet articulated acceptable additional factors based upon which discretionary admission may be based. To do otherwise would clearly prejudice applicants from racial minority groups, for it would result in an unwarranted and unsupported prediction of lack of ability. Racial neutrality may reasonably be read to require that race be identified in order to minimize what might otherwise be a presumptive lack of ability based upon an uninformed or insensitive utilization of objective data of measurement.

3. Race as an Item of Preference

As has been shown, psychometrically speaking, a strong case can be made for even separately processing applications submitted by persons from racial minority groups in determining qualification. Once such a determination has been made, how should the minority applicant fare as against other applicants whose applications may also warrant possible treatment as discretionary admits?

Earlier, justification for use of “other factors” was discussed in detail. In light of that discussion, a strong case can be made (1) for a reasonable exercise of discretion in selecting on the basis of articulated preferences from what will normally be a substantial number of applicants reasonably qualified, and that (2) educational, professional, and social considerations can enter in determining how best to articulate and exercise this discretion.
Reasons for treating race as one item of preference for selection have been discussed at length in many other sources.\textsuperscript{157} They touch on all areas—educational, social, and professional.

**Educational:** There is an educational interest in producing a racially diverse student body because of the multi-racial nature of American society, and because of the critical role played by lawyers in this society.

**Social:** The conspicuous absence of persons from racial minority groups has reinforced an unwarranted presumption of intellectual inferiority or inability which can be dispelled, in part, by the existence of professionals from such groups. Further, development of the societal structure should be a process in which as many Americans as possible from all walks of life participate. Lawyers have traditionally played a role in the formulation of such policy and the ranks of that professions should be correspondingly diverse.

**Professional:** Racial minority groups have historically lacked the same level of professional services as the non-minority groups in this country. Admission

\textsuperscript{157} One of the first articles to favorably address the question at length was O'Neill, *Preferential Admissions: Equalizing Access to Legal Education*, TOLEDO L. REV. 281 (1970). Others which reach the same conclusion, though occasionally for different reasons, include Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974), Griswold, *Some Observations in the DeFunis Case*, 75 COLUM. L. REV. 512 (1975), and Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1974). This is a very small sampling of an area in which much has been written.

This is not to imply that there have not been significant opposing points made. Such objections—objections based upon the absolute numbers aside—include the following: Granting preferential treatment to some racial groups:

(a) encourages polarization of the races;
(b) perpetuates thinking in racial terms;
(c) causes those advanced by such preferences to be held in lower esteem than those advanced by reliance on traditional notions of merit;
(d) raises difficult definitional questions.

See Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 571-72 (1975). However, it seems that much of the objection may be tempered if the imprecision of and possible distortion in the tools of measurement is understood and appreciated. (See, e.g., Lavinsky, *DeFunis: The Non-Decision with a Message*, 75 COLUM. L. REV., 520, 523 (1975), wherein he observes that characterizing the minority applicants admitted as fully qualified "would define the problem out of existence.") Indeed, to the extent that admissions personnel, the students affected, and the institution involved are aware of this and "qualification" is taken as a given, resentment and tension attendant to, for example, problems of matriculation may be dispelled.
of more qualified applicants from such groups may help correct this imbalance in this area as well as in other areas of endeavor within the profession.

These reasons are compelling enough to justify the selection of reasonable numbers\(^\text{158}\) of qualified minority students \textit{regardless of socio-economic status} ahead of others qualified in order to reach the ends described.

\textit{Bakke}

Before answering the question raised by \textit{DeFunis} in light of this discussion, \textit{Bakke} should be briefly considered.

In that case, the California Supreme Court confronted much the same problem as had been presented by \textit{DeFunis}.\(^\text{159}\)

1. \textit{The Facts}

Alan Bakke, a white 37-year-old male, applied for admission to the medical school of the University of California at Davis with classes entering in September, 1973 and September, 1974.\(^\text{160}\) The number of applications for admission in each of these years far exceeded the 100 seats available in the entering class; in 1973 there were 2,644\(^\text{161}\) applications for this class and 3,737\(^\text{162}\) for the class entering in September 1974. Of the 100 seats available in each entering class, 16 were filled under a special admissions program\(^\text{163}\) the remaining 84 were filled pursuant to the "normal admissions process."\(^\text{164}\)

\(^{158}\) There is, of course, vast disagreement over how best to determine what constitutes a "reasonable number." To the extent that the courts allow the exercise of discretion by the institution to achieve permissible social policy, this would be—similarly—included within the realm of that discretion. Prof. O'Neill has suggested that a "critical mass" of students be admitted which would, I think, make such less conspicuously present. \textit{See} O'Neill, \textit{supra} note 131 at 313.

\(^{159}\) \textit{DeFunis}, 416 U.S. 312 (1974). Substantially similar facts were present in \textit{Alevy v. Downstate Medical Center of New York}, 39 N.Y.2d 326, 348 N.E.2d 537 (1976). The court in that case dismissed the plaintiff's petition which sought to compel the medical school to provide him a place in the entering class. The court never actually reached the question of the program's constitutionality, since plaintiff could not show that he would have been admitted if the program had not been implemented by the university.

\(^{160}\) Bakke, 553 P.2d at 1155.

\(^{161}\) \textit{Id.}

\(^{162}\) \textit{Id.}

\(^{163}\) \textit{Id.}

\(^{164}\) \textit{Id.}
Allan Bakke, denied admission into either of these classes, sued the university alleging that he was qualified for admission, and the sole reason his application was rejected was that he was of the caucasian race.\textsuperscript{165} The complaint also alleged that all students admitted under the special program, which was by nomenclature geared toward expanding medical education opportunities to persons from economically or educationally disadvantaged backgrounds, were from racial minority groups, "that the program applied separate—i.e., preferential standards of admission as to them, and that the use of separate standards resulted in the acceptance of minority applicants who were less qualified for the study of medicine than Bakke and other nonminority applicants not selected."\textsuperscript{166}

The trial court found that the special admission program discriminated against Bakke because of his race,\textsuperscript{167} and that he was entitled to have his application evaluated without regard to his race or the race of any other applicant, but declined to issue an injunction ordering his admission.\textsuperscript{168} It also made the determination that the special admissions program was invalid.\textsuperscript{169}

On appeal, the Supreme Court of California addressed this "sensitive and complex issue: whether a special admission program which benefits disadvantaged students who apply for admission to the medical school . . . offends the constitutional rights of better qualified applicants denied admission because they are not identified with a minority."\textsuperscript{170} This court reached the conclusion that "the program, as administered by the University, violates the constitutional rights of nonminority applicants because it affords preference on the basis of race to persons who, by the University's own standards, are not as qualified for the study of medicine as nonminority applicants denied admission."\textsuperscript{171} This decision is diametrically opposed to that of the Supreme Court of the State of Washington.

It is clear that, unless one were to engage in strict numerical ranking, the number of applicants deemed "qualified", capable of successfully pursuing the study of medicine, would exceed the number

\textsuperscript{165}. \textit{Id.}
\textsuperscript{166}. \textit{Id.}
\textsuperscript{167}. \textit{Id.}
\textsuperscript{168}. \textit{Id.}
\textsuperscript{169}. \textit{Id.}
\textsuperscript{170}. \textit{Id.} at 1155.
\textsuperscript{171}. \textit{Id.}
of seats available to entering students, simply because of volume. The court concedes as much, noting that "all the minority students under the special program may have been qualified to study medicine. . . . [but] Bakke was also qualified for admission, as were hundreds, if not thousands of others who were also rejected."\textsuperscript{172} In the same paragraph the court goes on to say that "[i]n this context, the only relevant inquiry is whether one applicant was more qualified than another."\textsuperscript{173}

The court concedes that it is "aware of no rule of law which required the University to afford determinative weight in admissions to [grade point averages and test scores]",\textsuperscript{174} and implies that "better qualification" may be determined in accordance with non-quantifiable factors.\textsuperscript{175} However, the court is apparently unaware that unless placed in the appropriate context, the factors suggested may neither enhance prediction nor relieve suspected predictive or cultural bias. Furthermore, suggested factors may bear little or no relationship to the articulated educational goals of the medical school at the University of California at Davis, or any other professional institution.\textsuperscript{176} These would seem to be minimal standards necessary in order to foreclose the possibility of an unbridled exercise of otherwise permissible discretion.

\textit{DeFunis and Bakke in Light of This Discussion}

Both the \textit{DeFunis} dissent and the \textit{Bakke} majority express concern with assuring "that each man and woman shall be judged on the basis of individual merit alone . . . ."\textsuperscript{177} In order to accomplish this, the only correct decision would be one which allows an admissions committee to consider race when deemed appropriate to do so initially in determining qualification. As has been shown, where reliance to a significant extent upon standardized test results

\begin{footnotes}
\footnote{172. \textit{Id.} at 1162 (emphasis added).}
\footnote{173. \textit{Id.} (emphasis added).}
\footnote{174. \textit{Id.} at 1166.}
\footnote{175. \textit{Id.} The court notes that the institution may take "disadvantage" into consideration in assessing qualification [see further discussion of "disadvantage at n.188 \textit{infra}\] and further notes that factors such as "the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals" may be considered as long as they are not utilized in a "racially discriminatory manner."}
\footnote{176. \textit{See supra} note 97.}
\footnote{177. Bakke, 553 P.2d at 1171.}
\end{footnotes}
are the norm, it may be necessary to consider race in order to place objective criteria in proper perspective.\textsuperscript{178} In neither case has there been convincing data presented establishing the case for separate processing.\textsuperscript{179} It would seem that, had the courts in question been presented with the full historical and psychometrical picture, there would have been no finding that the minority students in question were \textit{a fortiori} "less qualified" because some had UGPAs and MCAT or LSAT scores below those of non-minority students either rejected summarily or later in the admissions process. In the words of the \textit{Bakke} dissenter, Judge Tobriner, it would be then clearly established that such a finding would be tantamount to "endow[ing] standardized test scores and grade point average with a greater significance than the medical [law] school attributes to them or than independent studies have shown they will bear."\textsuperscript{180} 

If an objection to either program could be heard, it would have to be based upon the fact that a program ostensibly geared toward increasing opportunities in medical education for disadvantaged citizens had, in fact since inception, admitted only members of racial minority groups, or that a program focused solely and expressly on preferentially admitting such applicants was too narrow. Two points seem applicable here. First, it is certainly unlikely that members of racial minority groups would be the only such persons potentially disadvantaged by an uninformed or insensitive utilization of objective data. However, it is equally unlikely that there has been as dramatic an impact on any other minority group which is not also a racial minority group.\textsuperscript{181} Therefore, while an admissions committee

\textsuperscript{178} See supra note 126. There is no doubt that the discussion of minority group performance on the LSAT as contained in the Evans report, is equally descriptive of minority performance on the MCAT. See AALS \textit{Bakke} brief amicus at 18. "Recent Studies have analyzed the pool of 1976 applicants for professional study in the nation's medical schools (Gordon, Travis, "Descriptive Study of Medical School Applicants, 1975-76, Association of American Medical Colleges, Washington, D.C. (1977)), and in the law schools (the Evans Report), comparing minority applicants with the majority. Their findings are consistent and expected: applicants from minority groups subjected to unlawful educational segregation, rank significantly lower than white applicants on the conventional measures of academic achievement."  

\textsuperscript{179} See supra note 7. Neither court was ever presented with a \textit{detailed} description of the applicant pool or of the kinds of substantive questions which must be addressed in selecting applicants for admission as that attempt has been made in this paper. 

\textsuperscript{180} 553 P.2d at 1174. 


Nativist American to the contrary, the nation today is a blend of many peo-
could and should couch its admissions policy in terms which would allow the committee to place less emphasis on objective criteria during evaluation and the potentially unique contributions which could be made by this individual considered in light of the articulated educational policy, it would seem that such an individual would not be unconstitutionally harmed by the extension of such initial consideration to all or a substantial percentage of applicants from racial minority groups. Second, where there are programs geared solely toward preferentially admitting qualified minority students, the proper approach would be to direct the institution in question to clearly articulate its educational goals and policy, and show how such policy fits into its admissions program in order to determine whether and when that program may realistically be broadened in scope.\textsuperscript{182} The admissions programs in question may have been criticized for being too narrow in scope but recognition of this shortcoming should not lead the court to a conclusion which invalidates attempts to attain a goal implicitly recognized as legitimate by the Bakke court.\textsuperscript{183}

\begin{footnotesize}
\begin{enumerate}
\item Many members of racial minority groups—particularly blacks—can trace their families back five and six generations in this country, for the slave trade, even on an illegal basis, ended with the Civil War. Yet the problems persist.
\item It is precisely this inability to cease “being different” which has contributed to the perpetuation of what one commentator has called a “racial underclass.” See Morris, 17 Santa Clara L. Rev. 279, 280 (1977).
\item See DiLeo v. The Board of Regents of the University of Colorado. Civil No. 75-2280 (Colo. Dist. Ct.). Plaintiff, an Italian-American male, alleged that the Special Program for Admissions at the University of Colorado School of Law arbitrarily excluded all persons of minority ethnic and culturally deprived backgrounds, except persons of Black, Indian, or Mexican American heritage. The court expressed reservations about the constitutionality of the program but refrained from addressing that issue since to do so would deprive plaintiff of a remedy. The court held that DiLeo could challenge the exclusion of Italian-Americans as arbitrary and capricious, but held that the challenge failed because the school was entitled to attack the problem piecemeal rather than spreading its resources so thin as to be ineffectual. There is clearly a basis for finding such programs constitutional. If constitutional this suggests that the California court's decision in the Claey case, as reported in Newsweek (circa 9/77), ordering a white female Russian immigrant of low socio economic status admitted on the basis of a preference for applicants from a disadvantaged background to the same program into which Bakke sought admission as a regular student was correct. There may clearly be an expansion of preferences so that “disadvantage”, properly defined, may be a basis for admission.
\end{enumerate}
\end{footnotesize}
Nonracial Alternatives to Special Admission Programs

Since it would seem that the primary justification for any kind of preference must flow from the attainment of some clearly articulated educational, social or professional goal, if Bakke were affirmed and consideration of race deemed unconstitutional, the entire pattern of discretionary admission could be called into question given the strength of the defenses available to several preferences and the no-less compelling case for consideration of race. This would be true, it seems, even if the limited preferences suggested by the court were utilized. It is probable that applicants from minority racial groups could present competitive credentials and prove eligible for consideration for discretionary admission based upon a selected predictor or combination of predictors. However, assuming that other non-minority applicants are similarly situated, admission of the minority applicants could still assertedly be based upon race from the former applicant's point of view resulting in the same type of challenge which is being raised in the two cases being discussed. A court could conclude that the preference was really a racial preference in another guise.184

This would, in turn, require a strict adherence to objective criteria which would endow the numbers with more significance than ETS ascribes to them, severely proscribe the ability of the admissions committees to admit classes in conformity with articulated educational goals, and dramatically reduce the number of persons from racial minority groups enrolled in professional schools.

To what extent would this result be alleviated by ameliorative measures mentioned by the Court?

If reliance is to be placed on "disadvantage,"185 the Evans study shows that for law schools this would not allow the continuing

\[\text{equation}\]

(a) educational benefits flowing from diversification of student body;
(b) provision of role models for younger members of minority groups
[and, I might add, for the community at large]; and
(c) increase in the number of minority physicians with possible spillover into minority community.

See court's opinion at 1164.

184. See, e.g., Morris, supra note 181; and 553 P.2d.
185. Utilization of "disadvantage" (or underprivilege or deprivation) is an ap-
enrollment of minority students at present levels. The number of non-minority students with comparable credentials would necessarily dictate an overall increase in the number of all such admissions further taxing already limited financial resources. Furthermore, reliance on such factors may have the effect of screening out the minority applicant more likely to possess the drive and study habits necessary for successful pursuit of a professional or graduate education—the applicant whole background is one other than “disadvantaged.” This, of course, assumes that the definitional problem in initially identifying the “disadvantaged” could be satisfactorily resolved.

Aggressive programs to identify, recruit, and provide remedial schooling for disadvantaged students of all races seems initially more of a possibility. However, the number of students who can pass the threshold consideration—i.e., the number of college graduates—is a finite number, and it is unlikely that intensive recruiting will yield sat-

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186. Evans Report, supra note 87 at 59-62 [This assumes that Evans’ use of economic deprivation is synonymous with disadvantage.] Indeed, there could well be a decrease in the number of minority students if “disadvantage” were the sole permissible factor for preference.

187. Id. at 55-59.

188. In attempting to determine whether “bias” for psychometric purposes—i.e., bias resulting in differential validity—was present in the test, researchers found that those most likely to be underpredicted were non-minority applicants. At least one writer has suggested that this underprediction may be explained by looking to socioeconomic background for it appears that the bias may mitigate against those individuals for whom motivation is high—those “who come from an environment characterized by a high level of educational achievement orientation.” (Rock, supra note 97 at 536.

Professor Sandolow poses the dilemma and suggests the only reasonable answer as follows:

Reshaping special admission programs to focus upon disadvantaged applicants, rather than upon minorities, would also force the exclusion of some of the ablest minority applicants. It is reasonable to suppose that a substantial percentage of the (not otherwise admissible) minority applicants who have the best chance of success in law school and the profession come from backgrounds that cannot plausibly be considered disadvantaged . . . . [However], [i]f preferences are justifiable because they deal with the problems resulting from the continuing social significance of race and ethnicity, there is nothing unjust in awarding a preference to minority applicants who come from advantaged backgrounds. The preference is granted for the same reason that preference is shown for exceptionally bright applicants—a judgment that qualities of the individuals admitted are likely to make them more useful to society than those who are excluded.

Sandalow, supra note 157 at 691-692.

189. See Boalt Hall Report After Bakke, supra note 124 at 371-375.
isfactory results in the near future.\textsuperscript{190} Providing remedial schooling is an attractive idea if one can, in fact, identify those skills which need additional development. As indicated previously, standardized tests have never been used as diagnostic tools.\textsuperscript{191} It could well be that so using them would reveal deficiencies which could best be handled by sensitive and talented teachers already engaged in the training of the professionals in question. A wholesale adoption of "remedial training" without identifying deficiencies could be untimely and might well result in unnecessary additional stigmatization. Indeed, if the problems of underperformance are motivational in origin, such programs may well do more harm than good.

Increasing the number of places available in entering classes is unlikely to be very popular with the various professional organizations overseeing these institutions without making a carefully documented case strongly supporting the need for expanded training of professionals. Furthermore, if these seats are to be made available exclusively to minority students, the distinction between this approach and an outright quota is one which escapes the writer. The pressure on admissions into professional schools is on, and a disappointed non-minority applicant is unlikely to be dissuaded from mounting a challenge upon a showing that he/she could not survive the competition even in the face of expanded opportunity. If this is based upon an assumption that more available seats would allow the professional schools to reach far enough into the applicant pools to enroll representative numbers of minority students based upon the quantitative "merits," that has been effectively refuted by the Evans study—at least insofar as law schools are concerned.\textsuperscript{192}

In sum, it seems fairly clear that affirmation of Bakke would leave professional schools without a reasonable alternative method of maintaining minority enrollments at present levels for educational purposes.

\textsuperscript{190} There are two additional factors mitigating against possible success for this approach:

(a) there will be competition from other professional schools and graduate programs for many of these same students;

(b) the NAACP Report on Minority Testing by May 1976 (mimeographed) indicates that minority test-takers experience difficulty generally with standardized tests so the weaknesses referred to do not manifest themselves solely on the LSAT or MCAT.

\textsuperscript{191} See supra note 156.

\textsuperscript{192} Supra note 87 at 45.
Further, limited data is available which would tend to show that reducing the number of minority students enrolled in professional schools would result in a reduction of services to the minority community.\textsuperscript{193} Again, using law schools as an example, the number of schools systematically and effectively following-up graduates is likely to be small. However, the Council on Legal Education Opportunity (hereinafter CLEO) had conducted partial follow-up studies of some of its graduates.\textsuperscript{194} These studies have demonstrated that a significant number return to their communities upon attaining professional status.\textsuperscript{195} Thus, there is clear evidence that there is increasing service being afforded to areas previously lacking such services.

Equally as important, the CLEO graduates show considerable diversity in career paths chosen.\textsuperscript{196} The absence of minority groups in all phases of professional life has been recognized, and this proliferation would seem to once again dramatically reaffirm the desirability of such programs. The minority attorney or doctor who practices on Wall Street or teaches at the State University Medical School is fulfilling an additional function as role model in a manner which is just as important as the coincidental function as role model being fulfilled by the professional who returns to the heart of an area exclusively populated by minorities to open an office.

To take this to its logical extreme, it is interesting to hypothesize the scenario should the court fail to be persuaded of the disingenuity or impracticality of its suggested alternatives.

Mr. Weber, the student author of “Racial Bias and the LSAT: A New Approach to the Defense of Preferential Admissions,”\textsuperscript{197} made the following statement: “If it can be shown that the objective criteria traditionally used for admissions decisions are individually dis-

\footnotesize{\textsuperscript{193} The point is narrowly framed in an attempt to respond to the Bakke court’s concern on this point. As a practical matter, there is no reason to admit minority students solely on the theory that doing so will provide more representation for the minority population by minority lawyers. See Leonard, Placement and the Minority Student: New Pressures and Old Hang-Ups, TOLEDO L. REV., 583 (1970).

\textsuperscript{194} The mission of CLEO is described as follows: CLEO is designed to serve those economically and educationally disadvantaged persons who, but for a program like CLEO, would have little chance to attend an accredited law school due to financial and admissions credential limitations.

\textsuperscript{195} See Brief of the Council of Legal Education Opportunity as Amicus Curiae in Bakke at 39-43.

\textsuperscript{196} Id.

\textsuperscript{197} 24 BUFFALO L. REV. 439, 448 (1974).}
criminatory against minority students, it may be easier to justify the use of the preferential admissions policy for potentially qualified applicants who are penalized by the use of the standardized indices." The Bakke dissent points out that the "other factors" on which reliance could be placed in the eyes of the majority are "on their face . . . either disingenuous or impractical or both." Surely such weaknesses would become even more glaring if usage were made of the factors and a clear pattern of preference either way emerged.\textsuperscript{198} Defense would be correspondingly more difficult since there would not necessarily be any correlation between goals and admissions practices.

Indeed, the indefensibility of this position becomes even more clear if one assumes that an attack on potentially groundless preferences succeeded—either because there were no minority students being admitted or because a pattern of favoring minority students emerged. A decision which required that race not be considered could thus ultimately leave an institution with no alternative but to rely solely on quantitative predictors.

This would demonstrably exclude the majority of minority students presently enrolled in law school and, as Professor Zimmer has so ably argued,\textsuperscript{199} could logically lead to a finding that reliance on the predictors would be invidiously discriminatory against qualified minority students. The net result might find the courts imposing a requirement upon the state-supported schools to consider race as an item of preference in order to compensate for the racial bias inherent in the predictors.

This would probably be dependent upon a successful statistical showing that such reliance on objective criteria would have a disproportionate impact upon potentially qualified members of minority groups to establish intent—a proposition that has been placed somewhat in doubt by Washington v. Davis.\textsuperscript{200} This, of course, is based upon the assumption, for purposes of this hypothetical, that voluntary affirmative action plans adversely affecting non-minority persons would be unconstitutional without such a showing. [But note that the Supreme Court expressly disapproves the inference that "a

\begin{itemize}
\item \textsuperscript{198} See supra note 156.
\item \textsuperscript{199} Supra note 39 at 371-385. See also Zimmer, Reverse Discrimination: Will the Court Act to End the Second Reconstruction?, 31 ARKANSAS L. REV. 370 (1977).
\item \textsuperscript{200} 96 S. Ct. 2040 (1976).
\end{itemize}
law's disproportionate impact is irrelevant in cases involving constitution-based claims of racial discrimination."") Plaintiffs in Davis were black applicants for the District of Columbia Police Department who were required, among other things, to score at least 40 on "Test 21"—a standardized test designed to test verbal ability, vocabulary, reading and comprehension. The District Court said that the plaintiff's evidence warranted three conclusions: "(a) the number of black officers, while substantial, is not proportionate to the population mix of the city; (b) a higher percentage of blacks fail the test than whites; and (c) the test has not been validated to establish its reliability for measuring subsequent job performance." However, the court in an opinion reversed by the Court of Appeals and reinstated by the Supreme Court granted defendant's request for summary judgment based upon the facts that (a) 44% of new police recruits had been black; (b) that figure represented the proportion of blacks on the force and was proportionately equivalent to the number of blacks 20-29 years of age in the recruiting area and (c) that the Department had actively sought to hire blacks many of whom passed the test but failed to appear. The court also noted that validity with training school performances as the criterion was successful.

The process of seeking admission to law school can be distinguished on several basis:

(a) the number of minority law students and lawyers is not "substantial";
(b) the performance of minority applicants in the test is lower but, because of the inherent imprecision in the predictors and the fact that law schools, in terms of credentials, range along the LSAT/UGPA continuum, this cannot psychometrically be taken to conclusively mean failure;
(c) the manner in which the test has been validated lends support to the argument that such students are "qualified" in the only sense which may ultimately prove meaningful—that they are capable of successfully completing law school.

Conclusion

A complete record would likely show that DeFunis and Bakke were denied, not because they were either "unqualified" or "lesser qualified." Rather, the decision to deny was made because, in view of what the professional schools were trying to achieve through their respective admissions policy in light of articulated educational goals,
they were not the qualified persons who fit within the policy. Given the nature of the objective tools of measurement, the decision need not turn solely on demonstrably higher objective credentials.\footnote{1} There is room for the exercise of discretion in the admissions process.

Society today accepts the philosophy of racial equality. Unfortunately, it is still only one step away from yesterday's segregated society. In order to counteract the otherwise potentially misleading results of the past, race must be considered in the present on two levels in order; (1) to assure racial neutrality in evaluation—allowing each applicant to be evaluated on the basis of individual merit, and (2) to assure enough flexibility in admissions programs to achieve compelling educational goals—the training of competent lawyers or doctors from diverse backgrounds for all Americans.\footnote{2} Refusal to allow such consideration, even given the availability of “non-racial” alternatives, will result in the unwarranted and indefensible wholesale exclusion from the nation's professional schools of significant numbers of qualified members of racial minority groups.

In sum, consideration of race in the manner indicated is legally and educationally defensible, morally correct, and consistent with “racial neutrality” in the only way in which contemporary reality permits that phrase to be reasonably interpreted.

\footnote{1} “[M]r. DeFunis was ... entitled to a policy, not a narrow policy which says the highest grades get all the positions, but a policy which took into account valid educational and professional grounds, which include the effects of discrimination in the world as a whole, outside of the halls of this law school.” Gorton, supra note 7 at 265.

\footnote{2} For a description of an admissions process that seems to have struck an acceptable balance between awarding past merit traditionally (i.e., academically) defined and “merit” broadly defined, see the report of Peter J. Liacouras, Dean of the Temple University School of Law as contained in A Balanced and Successful Approach to Professional School Admissions, 123 Congressional Record, No. 68, H3539 (April 25, 1977).

\footnote{3} Indeed, it has been suggested that an argument in support of racial preferences such as that made herein could pass the strict scrutiny test for “proof that the objective criteria used for admissions decisions discriminates against members of certain racial groups would severely weaken the claim that a procedure which takes into consideration such bias is invidiously discriminatory against a member of a majority racial group against which no comparable bias has been shown.” Note, 25 Buffalo L. Rev. 439 at 448. It seems clear that, were law schools not permitted to take race into consideration as they have such discrimination would surely exist. See, e.g., Gonzales v. Southern Methodist University, 536 F. 2d 1071 (5th Cir., 1976). The denial of a preliminary injunction against use of the LSAT in computing PFYA for plaintiff, a Chicano female, was predicated in part upon the fact that the University’s individual review of minority applicants, “if anything, gave her some advantage over the non-minority applicant.”