

The LSAT Sweepstakes

*Dorothy A. Brown**

SCENE 1: THE STAGE IS SET

This morning started out as any other morning. I got up, made some coffee, and went downstairs to get my *New York Herald*. Boy did I love that newspaper. Yeah it had its ups and downs—its pseudo-liberalism caused it to get race issues wrong, but who can ever get race issues right? The *New York Herald* was still, in my opinion, the best there was.

I settled down with my coffee, turned on the television to Good Morning Today!, and picked up my *New York Herald*. Nothing could have prepared me for what was to follow. I couldn't believe my eyes. The headline read, "Blacks Outscore Whites on LSAT: Lawsuit Threatened."

I put the newspaper down and took another sip of my coffee. Did I read that correctly? I rubbed my eyes. I've been accused of an overactive imagination but this is ridiculous. All of my work over the years on the Admissions Committee must have finally driven me insane.

I picked up the newspaper again. The headline had not changed: "Blacks Outscore Whites on LSAT: Lawsuit Threatened." I continued reading.

The LSAC published its scores for the LSAT. The LSAC is the governing body that implements the LSAT, an exam that virtually all law school applicants take. Those scores showed that for the first time ever, the median LSAT scores of black applicants were higher than that of white applicants. Blacks' median scores were 150 and whites' were 140. The Chair of the LSAC, Robert Jefferson, reiterated his concern that the LSAT not be used as the sole admissions or financial aid criteria because it would exclude highly qualified but lower scoring white applicants.

When asked to explain what accounted for the scores, Robert Jefferson noted that since he became Chair, the LSAC had adopted several new policies and procedures and had made changes to the test, including adding new questions. In addition, the LSAC was a majority minority body for the first time in its history.

Mr. Warren Fetchitt, Executive Director of the Institute for Equal Rights, an institute that had represented several white plaintiffs in recent law school admissions cases, was quoted as saying, "We're going to fight this all the way to the Supreme Court if necessary."

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Robert Jefferson acknowledged that the LSAC sponsored tutorial programs around the country for blacks to study for the LSAT. Jefferson also stated that no prior study had ever conclusively proved a racial or cultural bias, and he didn't expect this year's test scores to be different. "How can it be culturally or racially biased when blacks outscore whites but not culturally or racially biased when whites outscore blacks?" he asked.

Mr. Fetchitt responded that such allegations were ridiculous. To make his point he referred to some of the questions asked on the most recent LSAT:

Fred is short, white and bald, but not smart. People who are short and white are not popular. Popular people are either black men or white men with money. White women like to meet anyone popular.

If the statements above are true which of the following statements must also be true?

1. White women like to meet black men.
2. Fred is popular.
3. Fred has money.
4. Fred is someone white women would like to meet.

"That's playing on stereotypes!" Mr. Fetchitt continued, "I can't believe the LSAC passes this garbage off as science."

The article continued on to discuss the potential for litigation as well as what various law school admissions officers and deans from around the country would do in response to these statistics. Interestingly, there were many officials interviewed but no one made any predictions. I was curious about what my law school would do, but no matter what course of action they decided upon, it was going to be fun watching!

Because it was Sunday, I couldn't talk to any of my colleagues. I had never so eagerly anticipated going to school. I had just been talking about this issue at a faculty brown-bag lunch a couple of weeks ago. How timely!

SCENE 2: THE DIALOGUE

When I arrived at school on Monday, however, more doors were closed than when they announced the O.J. Simpson criminal verdict. As usual, the only ones willing to discuss the issue were the students. As I turned the corner three first-year students were waiting for me outside my office. They were all research assistants for my colleagues and they were all white. Somehow my colleagues never did seem to hire black research assistants. These three students, however, were interested in intellectual debate, and in hearing my views—a distinct contrast to many of my colleagues.

First there was Lenore Whitman. Both of her parents were lawyers. I believe she could trace her family back to the pilgrims. Her family was very prominent in the area and it was assumed from her birth that she too would be a lawyer. She was admitted to law schools across the country but chose to stay

close to home. This law school was very fortunate to have her. She was confident in her abilities, and I believe, close to the top of her class.

Second there was Randy Goodshoe. Lawyers in his family date back to a Supreme Court Justice in the late nineteenth century. Not only did he come from a long line of lawyers, but his family was quite wealthy. He was one of the few students at our law school who, based on his inability to show need, did not qualify for any financial aid. He was very outgoing, did very well during his first year, and from what I hear, throws a fabulous bash at his parents' country estate at the end of each semester for his fellow students. As a result, he got along with everyone.

Third there was Sally Gobuloski, a first-generation law student. No one in her immediate family had even graduated from high school. I remember she brought her parents to school once, and when I ran into them they seemed very proud of her but intimidated to be in a law school environment. They had both emigrated from Poland and owned and operated a dry cleaning business. They didn't have very much money, and Sally seemed to be slightly embarrassed about it when she was around some of her classmates. She was quite bright, but she lacked confidence in her abilities.

"What do you think, Professor Brown?" they asked, almost in unison.

"It's pretty amazing isn't it?" I responded. "Who wants to make a bet on how long before the LSAC gets sued?"

"Who would sue?" asked Lenore.

"The same people who represent white plaintiffs claiming reverse discrimination," I replied.

"What possible basis would they have to sue?" asked Randy.

"I'm not familiar with all of the case law, but some cases have held that certain tests that discriminate on the basis of race are illegal."

"But Professor Brown, isn't it a stretch to assume that just because blacks outscore whites it is illegal race discrimination?"

"Not at all," I replied. "The argument would go as follows: Blacks outscore whites on the LSAT, yet the LSAT does not accurately predict law school performance. Therefore to rely on the LSAT, which would discriminate against lower scoring but equally qualified whites, would be to violate the guarantee of equal protection under the law."

"Professor Brown, I scored high on the LSAT, and I'm also first in my class," stated Randy, a white, male first-year law student. "Doesn't that prove that the LSAT is a good predictor?"

Lenore answered him by saying, "I didn't do very well on my LSAT. I was even wait-listed at the law school and didn't get admitted until very late in the summer. I'm number two in the class. Doesn't that prove the LSAT isn't a very good predictor? What do you think, Professor Brown?"

"I think that we should consider that the LSAC warns us not to place too great an emphasis on the LSAT. As you can see, the LSAT doesn't really account for much."

“Professor Brown, if that’s true, then why do law schools emphasize it as much as they do?” asked Sally softly. We almost forgot that she was there. She didn’t often speak, but what she added was frequently very valuable. “I know that I placed a great emphasis on it. I did so well, yet my law school grades don’t really reflect that. I’m in the top thirty percent of my law school class, but my LSAT was in the top one percent. I think I relied on my LSAT score too much. Nobody ever told me how little it predicted.”

“Sally, you ask a very interesting question. I think law schools use the LSAT even though at best it predicts one-third of your law school performance and it doesn’t tell you whether you’ll pass the bar. First and foremost, most law professors are lazy. If the LSAT wasn’t around, how would all the applicants be distinguished from each other? We might have to read files or spend time interviewing candidates. We might have to add more resources to the administrative budget rather than the faculty budget. Faculty almost never support hiring administrative staff because it potentially takes money out of their pockets. Second, the LSAT appears scientific and neutral so we can distinguish among equally able-bodied applicants without feeling like we’re behaving in an arbitrary and capricious manner. Third, white males, who predominate admissions committees, win in the LSAT lottery. The results appear fair, neutral, and objective, making them seem correct.”

“Professor Brown,” Randy continued, “as the only white male here, I think I object. The LSAT, although it doesn’t predict everything, predicts a lot. No study has ever shown the LSAT to have a white, male bias. Just because white males perform well on the LSAT shouldn’t automatically make it appear unfair.”

“Fair point,” I added. “Randy, do you remember any of the questions on your LSAT?”

Randy replied, “No.”

“What about you two? Do either of you remember any particular question?”

“No,” said Sally quietly.

Lenore also said no.

Randy asked, “Why do you ask, Professor Brown? You never ask anything without a good reason.”

“I was wondering how you could be so sure that the LSAT wasn’t racially or culturally biased.”

“Or maybe a gender bias” interrupted Lenore. “Perhaps that’s why I didn’t do so well on the LSAT.”

“Yes, but it can’t be due to a gender bias,” Sally replied. “I did well on the LSAT. What do you think, Professor Brown?”

“I’m not getting in the middle of that argument. All I will say is that we have two LSAT scores from two women. One did well on the LSAT and the other didn’t do so well. The one who is ranked number two in the class was the one that didn’t do so well. This is just anecdotal evidence. You would need

to consider a sample size far larger than two to determine if the LSAT has a gender bias.

“Now where was I? Oh yes, Randy why are you so sure that the LSAT isn’t biased?” I asked.

“Because I read somewhere that no study had ever shown that it was.”

“Well Randy, what the studies have shown is that the LSAT over-predicts for minority students. Relative to whites with the same score, standardized tests actually over-predict the achievement that blacks will realize in law schools. Blacks achieve lower law school grades than whites even when they have the same undergraduate grades and LSAT score. To the best of my knowledge, I know of no study that examines what role, if any, law schools play in the lower law school grades of black law students.”

Randy responded, “Couldn’t it be that law schools play no role, and that if one racial group didn’t score as high as another racial group, it isn’t because of the test? I don’t mean to offend, Professor Brown, but historically blacks have not received high quality education. They may not do well on the LSAT through no fault of the LSAT, they just didn’t learn things in school.”

“Randy, you’re addressing the argument that minorities suffer from an educational disadvantage,” I replied. “The argument goes: If blacks received an education equal to whites, they would score just as high as whites on the LSAT and do as well as whites in law school. The only quarrel that I have with that argument is that law schools do very little to address the educational disadvantage. Look at what we do here. Our academic support program is majority white although there is a disproportionate number of black law students in academic difficulty. All of the academic support instructors are white, and there is no evidence that our program improves anyone’s grades. There is no assessment mechanism. Either this institution doesn’t believe there is an educational disadvantage or it simply won’t do anything to address it.”

“But Professor Brown, just because your colleagues don’t do anything about it doesn’t mean it doesn’t exist.”

“That’s a good point Randy. It just means they don’t care enough to do anything about it, or they assume black intellectual inferiority such that if black law students do perform poorly, they do so because they aren’t as smart as whites.” Another grenade lobbed, I thought.

“Well we’re not going to solve this problem today, Professor Brown, and if I don’t leave now I’m going to be late to a meeting with Professor Maris,” Randy stated.

“We don’t want you to be late. Are you sure he’s here? I just walked past his door and knocked, but no one answered.”

“Well, I have an appointment scheduled with him, and he never misses our appointments.” Randy observed.

“See you later,” I replied.

“Well, all this talk has made me hungry. I’m going to get a sandwich,” said Lenore. “Is anyone else hungry?”

“Not really,” said Sally.

I stated that I had already eaten. "Talk to you later," I said. The only one left was Sally. She looked very sad.

"What's the matter?" I asked her.

For a moment she said nothing. Then she blurted out, "Professor Brown, I wish someone had told me. I wish someone had told me. I placed all this confidence in my LSAT and it didn't mean much at all. I wish someone had told me."

"I know," I replied. "I wish we told a lot more students. But I don't want you to think that any test defines you, or for that matter any group of tests. You can improve your grades, Sally. Don't allow your first year of law school to control the rest of your life."

"But Professor Brown, first-year grades do mean everything. My first-year grades determine Law Review. Law Review determines clerkship and prestigious summer associate positions. Clerkships determine where you can work next. I thought I might like to be a law school professor someday. Being on Law Review, having a federal clerkship, and working in a prestigious law firm are all important to that decision. Yet if the LSAT is used to predict first-year grades, I was set up from the first day I entered here. I would have been even more set up if I was a minority."

"What do you mean?" I asked.

"Well, if the LSAT over-predicts for minorities, they are expected to do poorly in law school. Since the LSAT is such a large part of the admissions process, we know the statistics. Blacks don't score as high as whites on the LSAT. There is an assumption that every black student got admitted because of affirmative action. Everybody knows that and it becomes a self-fulfilling prophecy. When a minority gets admitted to law school, nobody has to tell them we expect them to do poorly. They know it, and everyone who is white in the class anticipates doing better than they will."

"That's a very astute observation, Sally," I responded. "You've obviously spent some time thinking about this issue."

"I think it may be even worse, Professor Brown. I think that it's not only the students who assume blacks are not smart, but so do some of the other professors."

"What do you mean, Sally?" I asked.

"Well, some professors don't even call on the black students."

"Sally, how many students are we talking about anyway?" I asked.

"Professor Brown, there are seven black students this year," Sally replied testily. She knew I already knew the answer to the question.

"But with only seven black students, don't you think it's possible that those professors didn't also call on at least seven other white students?" I asked.

"No I don't Professor Brown, and even if there are seven white students who didn't get called on last year, it's not the same," Sally cried. "Those Professors also called on white students. By calling on white students and not calling on any black students, it sent a subconscious message to the class that

the professor either assumed blacks were not smart enough to answer the questions, or perhaps the professor just didn't like blacks. Either way, it sent a message to all the students—black and white—that you don't have to take the black law students seriously."

"You make a good point," I replied.

"That's not all, Professor Brown. Some professors call on black students when they want a 'black view.'"

"A black view? What's that?" I asked.

"Don't ask me," responded Lenore, "but let me give you an example. We were in Constitutional Law and the professor assigned a black student to argue in favor of *Brown v. Board of Education*, and a white student to argue in favor of segregation."

"It seems to me there was a lot of unfair stereotyping going on in Constitutional Law—of both black and white students," I replied.

"I never thought of it that way, Professor Brown. I've got to run. It was nice talking with you. I'll see you later."

"Okay," I replied.

SCENE 3: ANTICIPATION

I always enjoyed talking with the summer research assistants, and in fact, with students in general. They always seemed far more interested in discussing race-related issues. They didn't seem to have the fear that my colleagues did. I bet Maris was in his office hiding. He is awfully quiet and so paranoid about offending. The guy constantly talks in footnotes. He can't even finish a sentence without all kinds of qualifying phrases. He's very pleasant, but whenever you talk with him, you need to pack a lunch because you're going to be a while.

I remembered that in my excitement to talk about the LSAT newspaper article, I hadn't even checked my mailbox. I went down to look and found the usual junk mail which seems to grow every day. More and more junk mail. Boy I wish I could figure out a way to never receive any more junk mail. But then I saw the memo:

To: Admissions Committee Members
From: Dean Jabberwocky
Re: Review of Admissions Procedures

There is an EMERGENCY MEETING of the Admissions Committee TODAY at 2:00 p.m. in the Dean's Conference Room.

Boy was this going to be fun! I love it when a plan comes together. The entire Admissions and Financial Aid Committee plus the Dean. The Dean never went to committee meetings, preferring to have his Chairs do his bidding. He was the consummate bureaucrat—his fingerprints were rarely on

anything. Yet, he even signed this memo. Was he finally going to take a stand? I could hardly wait.

It never ceased to amaze me that he was the Dean. And they say affirmative action is only for people of color. I believe that if you look affirmative action up in the dictionary you'll see a picture of the Dean. He was the first person to come to mind when I read that newspaper article that described the LSAT question: "Fred is short, white and bald, but not smart. People who are short and white are not popular." If you substitute Dean Jabberwocky for Fred, you have the perfect description of the Dean. He is short, white, bald, not smart, and not popular. Rumor has it that he would never have gotten a majority vote for Dean if he hadn't voted for himself! There's a mandate for you. I'm already taking names for the Next Dean Search Committee—there is no shortage of volunteers.

The entire Admissions Committee consisted of Alan Hawkins, the Chair, Mark Dresser, an Admissions Officer, myself, and two other colleagues, Mary Vernon and Barry Craven. I always thought of the Admissions Committee as the politically correct committee—a so-called white male liberal as Chair, one token white female, one token person of color, and a few white men.

Alan Hawkins, the Chair, was also not very bright—another affirmative action baby. Again, I never cease to be amazed at how affirmative action is solely portrayed as resulting in allowing unqualified minorities to be hired. Alan has been Chair for many years and under his "leadership," minority admissions have significantly declined. He always seems so hurt that I don't "appreciate" how committed he is to diversity. For example, I remember one conversation that I had with him last year when our first-year class had no black males. His response was that the Admissions officer "tried very hard." When I asked him to name one thing the Admissions officer did in "trying very hard" to attract black males, he conceded that he couldn't. It was obvious that he trusted the Admissions officer and wasn't going to let the facts get in the way of that trust. One of us was confused about Alan's level of commitment to diversity—and it wasn't me.

Alan fancied himself a liberal and thought he knew what was best for people of color. I always found it humorous that he never got along with any of the faculty members of color. He believed that he knew how people of color should think, and if they didn't think that way he needed to tell them how to think—for their own good. This was the man, handpicked by the Dean, to lead our admissions decisions into the twenty-first century.

Mark Dresser, the Admissions Officer, was fairly nondescript. He basically did what the Dean and Chair wanted. When I first became a member of the committee, I noticed some hostility on his part towards me and the other female member of the committee. But once he realized that we weren't going anywhere, that we had tenure and he did not, and we both wrote memos documenting his insubordination, he became much easier to work with.

Barry Craven was the other white male faculty member on the committee. I often refer to him as the numbers man. There isn't a law school statistic in

existence he has not memorized. Barry has been on the committee for several years. He is an invaluable committee member and one of its hardest working. He is also a rare breed of academic. He rarely, if ever, has an axe to grind. He dispassionately considers the facts, and unlike most academics, he has an open mind. He is often quite influential in committee decisions.

Mary Vernon, the token white female, also happens to be one of my favorite colleagues. She is supportive of diversity, is very bright, and has a great sense of humor. She, like Barry, has a great institutional memory. She has been a member of the Admissions Committee for over ten years. I have learned a great deal from her, and although we don't always agree, I always come away from our conversations richer for having had them.

Well, well, I thought. Could it be a coincidence that the only emergency Admissions Committee meeting ever called at our law school occurred on the same day as the LSAT news? When I first came to Admissions, I too bought into the LSAT as a useful admissions criterion. Yet as a result of my experience on Admissions, I realized that the LSAT was a pretextual device, at least for certain members of the committee.

Here's how I observed the pretext. If the member of the committee liked the applicant and the LSAT was good, then the LSAT would become the determining admissions factor. If the committee member wanted the applicant admitted and the LSAT was bad, then the LSAT could be ignored and "other factors" could be considered. Many might think those other factors are race and gender where race is minority and gender is female. Before I served on Admissions, I thought so too. But hear me out. I'll change your mind, I promise.

If the committee member does not want the applicant admitted and the LSAT is good, the LSAT score gets ignored or is somehow used against the applicant. If the committee member does not want the applicant admitted and the LSAT is bad, then the low score is a bar to admission. Now, I didn't figure out the "LSAT Sweepstakes Rules" until well into my second year on the Admissions Committee. I remember the exact meeting as if it were only yesterday. The meeting began innocently enough. The committee members had similar recommendations on most of the applicant files. There were less than six files that we needed to discuss because there was a split of opinion amongst the committee members. Generally we discussed only those files where there was disagreement and worked our way to a consensus. I know, a consensus among law school professors? Impossible, right? Before I sat on the committee, I didn't believe it either, but we did work our way to a consensus in virtually every case.

The first applicant, Applicant A, had a 159 LSAT score and an undergraduate grade point average of 3.5. I argued for admission because he looked a lot like other students who had already been admitted. I was concerned that as a state institution, we needed to treat similarly situated applicants the same, and at the very least not treat them in an arbitrary manner. As it was, I was a bit suspicious as to how the Admissions officer selected

which files to send up to the committee members each week. He did not automatically send up files once they were completed; some he sent up; some he held back. Depending upon which week your file was sent up, the likelihood of acceptance could in large part be negatively or positively affected. For example, if you had a 159 LSAT but were sent in a pile with a lot of other lower LSATs, the odds increased that you were admitted. On the other hand, that same 159 LSAT would be less likely to be admitted if it was selected from a group with a lot of higher LSATs. That was why I insisted that the Admissions officer make a list of all admitted applicants with their GPA, LSAT, and undergraduate school, so that the committee could have a frame of reference for its decisions from one week to the next.

The Chair of the committee, Alan Hawkins, argued against admission of Applicant A because of his 159 LSAT. Alan argued that the school had a good shot at a 160 median LSAT and Applicant A's 159 would hurt our chances.

"That's ridiculous," I stated. "One more 159 is not going to hurt our chances at a 160 median. Besides, we've admitted other 159 LSATs and I don't see much of a distinction between this applicant and the others."

We went back and forth for awhile and the Chair decided to admit Applicant A. So far so good. But the meeting went downhill from there. Next up was Applicant B. He had a 162 LSAT and a low GPA somewhere around 2.2. I thought this would be easy. The committee always admitted high LSAT, low GPA applicants—they were usually white males. I was the only member who would vote against those who had below a 2.5 GPA, but I never fought strenuously.

"I don't think this applicant should be admitted," said Alan. I couldn't believe my ears.

"But he'll help keep our 160 median LSAT," I cried, using his prior argument.

"I don't think he should be admitted," Alan repeated.

"But he looks a lot like other high LSAT/low GPAs we've admitted this year," I said, using the argument I made in support of Applicant A. At this point I became very confused.

"He spent the last year traveling in Europe, I believe," said Mark Dresser, the Admissions Officer.

I was still confused. I didn't understand how Mark's statement would add to the committee's decision-making deliberations. But I often didn't understand Mark. Today apparently was no exception.

"He went to a private high school," said the Chair.

What on earth did that have to do with anything? We didn't have his high school grades. I then exploded, "You just sat here less than twenty minutes ago arguing against a 159 LSAT applicant because he would hurt our chances of a median 160 LSAT. Now you're arguing against a 162 LSAT, not because he would hurt our chances—we both know he would help our chances—but because he went to a private high school. If you don't vote to admit this applicant you can't say you're committed to a 160 median LSAT!"

"I can too say it," Alan responded tersely.

"You can say it, but I won't listen. You will have no credibility on that issue with me ever again," I replied.

"Well, I don't want to turn this law school into a school for a lot of rich kids," the Chair stated.

"If you want to deny rich kids admission to law school, we may as well go out of business." Then it hit me. This was a class issue. Alan didn't like rich kids. His "vision" of the law school would exclude rich kids. Such categorical exclusion is arbitrary at best. What's wrong with rich kids? Some of my best friends are rich kids! After a few more rounds, the Chair admitted applicant B.

The last straw came with Applicant C. Applicant C had average grades and a 143 LSAT. I voted to reject the applicant. Again, I foolishly thought this decision would be easy. Alan voted to accept Applicant C.

"How can you argue that an applicant with a 143 LSAT should be accepted in the same meeting that you argue that an applicant with a 159 LSAT should be rejected because of their LSAT scores?" I asked incredulously. The miracle came in my being able to speak at all given the steam coming out of my ears and the fact that the room went dark, except for the red blob in front of my eyes. I now know what the sensation of seeing red really means.

The Chair responded in his best condescending tone: "I've served as Chair of Admissions for over a decade. This applicant is a doctor. I know what a tremendous addition he'll be to the legal profession. I know this law school will be proud that we admitted him." The red subsided. I slumped back in my chair with my eyes rolled up into my forehead. The blood once again was circulating to my brain and I was starting to find this amusing.

Mary Vernon, who had said very little up until now, broke the silence. "I'm surprised by his low LSAT given his background. Being a doctor, he should have had the skills to have done better on the LSAT. Also, I'm troubled by the fact that he only took the LSAT once; he should have taken it again."

Finally, I thought, a voice of reason in this wilderness. Mary, however, was willing to give some deference to the Chair. I was not. I passed her a note at this point saying: Now Alan is arguing that the LSAT is not a good predictor for white males.

Barry Craven added, "Perhaps we should get some more information on this applicant and defer our decision until then." The applicant was working on another degree, but we didn't have those grades. The other committee members agreed we should defer our decision at least until we received those grades. I made it clear that without significantly more than just good grades I was not going to vote to admit a 143 LSAT. We had previously rejected minority applicants with higher LSAT scores and I was worried about a

Bakke-type¹ challenge. Given our low minority enrollments and several recent incidents, I did not believe a potential plaintiff would have any trouble proving race-based discrimination at our law school. It would be a real disaster if they got hold of my memos to the file, particularly the one in which I documented Alan stating, in his capacity as a member of the Appointments Committee, that we didn't need to hire any more minority faculty members because "two is enough," and because "they're not going anywhere anytime soon." The "two," of course, referred to the total number of minority faculty members at our law school at that time. I chuckled to myself over the different possible scenarios that could have that memo "accidentally" fall into the hands of potential plaintiffs. Each scenario was more fun than the last. I still think about the possibilities

The committee voted to defer the decision on Applicant C. But I learned the rules of the game. People can be very inconsistent when playing the LSAT Sweepstakes. The LSAT can help or hurt depending upon whether the proponent wants the student admitted or denied. The most interesting point to make about Applicants A, B, and C is that they were all white males. Applicant C, who the Chair was arguing to admit because of "other factors," was a white male for whom the Chair had no problems arguing affirmative action. I have no such recollection of the Chair arguing in favor of any minority candidate in like manner. And yet he wonders why I'm not impressed with his so-called "commitment to diversity."

In preparation for the Emergency Admissions Committee meeting, I dug out some literature concerning the LSAT that the committee had previously ignored. First, the LSAC, who administers the test, says we must be cautious in how we use the test score. In addition, the LSAC only says the LSAT is a predictor of first-year grades. That fact never ceases to amaze me. The LSAT at most predicts one-third of law school performance. It bears no correlation to bar passage rates, the entry ticket to practicing law in most states. But how critical are first-year grades? Very important, just as Sally had observed. They determine Law Review membership. They determine judicial clerkship opportunities. They determine prestigious law firm positions.

Well it was time for the Admissions Committee meeting. I still wasn't sure that our plan would work, but I was ready for battle!

SCENE 4: THE MEETING

Alan began, "It is an honor to have Dean Jabberwocky with us this afternoon. We have never before had the privilege of his presence at our Admissions Committee meetings. We know how busy you are Dean. I think you have something you'd like to say to the committee."

1. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

I had a hard time keeping a straight face. Boy when Alan sucked up, he really sucked up. I had been told that Alan had gotten tenure by sucking up to the previous Dean.

“Thank you, Alan. As you must have heard by now, for the first time ever, blacks have outscored whites on the LSAT. I want to begin by reaffirming my commitment to affirmative action.” I always get nervous when whites start to talk about their commitment to affirmative action, particularly whites, such as the Dean, who have a record that supports the opposite conclusion.

The Dean continued, “As we get ready for next year’s admissions process, I want to discuss the LSAT issue. On numerous occasions, this committee has bemoaned the fact that we rely too heavily on the LSAT. The LSAC even suggests caution in how we use the LSAT scores. I believe now is the time to re-examine how we use the LSAT. We have been inattentive to the harm caused by relying too heavily on one statistic, and now is as good a time as any to make a change. I have read some of the published reports of the questions asked, and I am deeply concerned about the test. I was certainly upset by some of the questions, and I would expect the test takers to be upset as well. I believe that those questions showed a significant bias, and as a state institution, we must be careful.”

I could hold it in no longer. “But Dean, with all due respect, . . .”—my friends tell me when they hear me use the phrase “with all due respect” they run for cover, because they know there’s going to be incoming wounded—“how can you assume a bias in the test that has never previously been shown to have a bias. What’s so different now?”

Alan then interjected, “Well, I have every expectation that there will be new studies showing bias.”

Secretly, I believed he was right. Now that blacks were outscoring whites, the same scholars, who previously found no bias in the LSAT when whites outscored blacks, would no doubt find it convenient to find bias.

“Based upon the future studies that we expect to receive shortly, we must be pro-active.” The Dean continued, “We must get ahead of the curve. We should set an example for our peers. For too long, we in the legal academy have relied upon numbers in our admissions decisions. We have allowed it to shape our admissions decisions, the entering class, and the profession at large. Who has access to legal representation is a direct result of the admissions decisions that we make. The public has lost confidence in our profession. In order to show our commitment, we must revolutionize admissions.” He paused for emphasis. We were hanging on his every word. Then he said the magic words: “We must throw out the LSAT. We must forbid our students from telling us what their LSAT score is. I know it will be more time-consuming, but I also know that it will be worth it. I am prepared to increase the staff of the Admissions office. I know that Mark has needed more help for a while, and I have procured some additional funds. We once again will have true merit-based admissions decisions and we won’t rely on pseudo-science.” The

Dean rested back in his chair. I don't believe I have ever seen him more pleased with his performance.

"I will leave the balance of the meeting in your able hands Alan," stated Dean Jabberwocky. He left the room before any of us could react. In any event, I don't think I could have mustered a question if my life had depended on it. I had been arguing against the use of the LSAT in admissions decisions for quite some time, with no success. If I recall correctly, Alan once responded to my request with the phrase, "over my cold, smoldering, dead body." I used the same arguments the Dean was now espousing, namely that we should put more time into our decisions because they were impacting who would represent the public in the future, that the LSAT was nothing more than pseudo-science, and that the LSAT was biased, if for no other reason than blacks were inherently as smart as whites and any test that has whites always outscoring blacks must be biased. Now, by virtue of blacks outscoring whites, it was done. I could hardly believe my ears. Robert was right, I couldn't wait to talk to him.

I was still in shock when Alan began to speak. "We must support the Dean in this decision. It is a terribly brave thing. We will be the first law school to say how opposed we are to the use of standardized tests because of their bias. Just because blacks outscore whites on the LSAT doesn't mean that they will do better in law school than whites. Therefore, to rely on the LSAT, which would discriminate against lower scoring but better qualified whites, would be to violate the guarantee of equal protection under the law." Depending upon the day, Alan fancied himself a Constitutional Law "scholar." I use the word "scholar" loosely because in his entire academic career, he has never published a single law review article.

"What do you mean better qualified whites? How are they better qualified when they score less than blacks on the LSAT?" I shot back.

"Merit is more than just numbers," Alan replied. "I thought you of all people would know this. Haven't you been arguing all year against the use of the LSAT?"

"Yes I have, and haven't you consistently rejected all of my arguments? What's so different now, Alan?" I replied. I started to see the vein pop in Alan's forehead. Alan's vein always became active when he got agitated, causing me to worry about his health every time. What little ability he had to make sense also left him when the vein showed up.

"I'm not going to argue with you. I think we need to look at our use of the LSAT in light of Dean Jabberwocky's opening remarks." Alan then stated, "Hearing no objection, Mark and I will work on drafting a new application form which we will circulate to the committee within one week. Take a look at it and give me your comments. Unless there are any other comments, this meeting is adjourned."

I left the meeting and began to slowly walk back to my office. I could hardly contain myself. We did it! I can't believe it! I drifted back to our last strategy session. Robert Jefferson and I had gone back and forth for the past

few years. We both knew that the LSAT was being used to discriminate against highly qualified minorities in law school admissions. We had argued at our respective law schools until we were both blue in the face that relying too heavily on the LSAT in admissions decisions meant a less diverse class and one that excluded equally qualified applicants. I said we should sue to get the LSAT barred in law school admissions decisions. Robert said we'd never win, and even if we did, it would take forever. "Those kids need our help now," I remember Robert saying. I decided to give Robert's idea a try. Robert and I both believed that the LSAT was a pretextual device. Our only disagreement had been over strategy. I remember the conversation as though it were yesterday

SCENE 5: PLOTTING STRATEGY

"We both agree that the LSAT must go." Robert stated. He was a member of the LSAC and in line to become its next Chair.

"So what else is new?" I asked. "The question is how are we going to do it?"

"The cynic in me says that we should figure out a way for white males to lose in the LSAT sweepstakes so that the LSAT will be abolished," Robert replied.

"I think that we should sue. The LSAT has a discriminatory impact and it explains very little. I think we could make the case," I started.

"Litigation takes years, and recalcitrant school officials can drag their heels. Remember the 'all deliberate speed' guideline of *Brown v. Board of Education*?"² Robert asked.

"I know, but it sure would be nice to have a law school found violating the law. We both know law professors break the law all the time because they either don't know the law or assume that they won't get caught. Most academics have not litigated a case in years, if at all, and as a result will provide us with great discovery. All we need is one really publicly humiliating lawsuit that's covered on the Court Channel," I replied.

"Haven't you always talked about fighting smarter. I don't think litigation is fighting smarter," Robert observed.

"Okay," I stated, "tell me your suggestion."

"Here goes," Robert replied. "The goal is to get the LSAT thrown out. The primary decision-makers are white law professors who probably scored high on their LSATs and don't have a problem with white law students outscoring minority law students. You need to make the law professors want to throw out the LSAT."

"Can't I just provide them with statistics that show how little the LSAT explains?" I interrupted.

2. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

"But you've already tried that at your school for the past few years. Has it worked yet? I read somewhere that one definition of insanity is doing the same thing over and over and expecting a different result," Robert said with just a touch of exasperation in his voice.

"Alright Robert, point taken," I replied.

"Where was I?" Robert asked.

"You were about to tell me your brilliant plan to get white law professors to throw out the LSAT scores of higher scoring white applicants," I said sarcastically. Robert chose to ignore the sarcasm.

"That's right," he replied. "As long as whites outscore blacks, the LSAT will continue to be used by predominantly white admissions committees. Whites will still win and the few blacks they do admit will make the liberals feel as though they're benefitting the unfortunate blacks who need their help. As a result, the liberals can feel better about themselves."

"So, what is your solution?" I asked.

"Tutor black applicants so that they can outscore white applicants," Robert replied.

"But Robert," I interrupted, "Why will we want the LSAT thrown out if blacks start outscoring whites?"

"Because the reality is that when blacks outscore whites that data is routinely ignored. We know the LSAT is nonsense, no matter who wins. The victory in throwing out the LSAT results not just in helping blacks, but whites who come from socio-economically disadvantaged backgrounds. You've seen some of the questions about cruise ships, haven't you? It's not just black students who lose in the LSAT Sweepstakes."

"Do you think it will be that easy?" I asked

"Yes," Robert responded, "it's going to be that easy."

EPILOGUE

As I opened the door to my office, I heard the phone ringing.

"Well, how did it go?" Robert asked.

I knew it was Robert. I assumed he would be calling to find out about the meeting. "You were right. I was wrong," I answered.

"It's never been about right and wrong. It's about winning," he replied.

"Well, then we won," I said slowly.

"I knew that we would," Robert said.

"They abolished the use of the LSAT," I stated.

"Your school is not the only one to declare the LSAT abolished. All but twenty have done the same thing and those twenty simply haven't had the chance to meet yet. My telephone has been ringing off the hook," Robert quickly added.

"You mean no school has reaffirmed its commitment to diversity by continuing to look at the LSAT when blacks outscore whites?" I asked incredulously. This was slowly beginning to sink in. When Derrick Bell said

“racial patterns adapt in ways that maintain white dominance,”³ he wasn’t kidding. This victory was beginning to mean less and less.

“I knew that some schools would abolish the LSAT—but every school that considered it? I really am surprised. I never would have predicted that,” I slowly observed.

“You don’t seem that excited,” Robert said.

“I know. I’ve surprised myself,” I replied. “Sometimes winning isn’t everything.”

3. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 12 (1992).