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Journal

Chicana/o Latina/o Law Review, 18(1)

ISSN

1061-8899

Author

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Publication Date

1996

DOI

10.5070/C7181021080

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COMMENTS

UCLA SCHOOL OF LAW ADMISSIONS IN THE AFTERMATH OF THE U.C. REGENTS' RESOLUTION TO ELIMINATE AFFIRMATIVE ACTION: AN ADMISSIONS POLICY SURVEY AND PROPOSAL

THOMAS GLENN MARTIN, JR.*

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* B.A. Philosophy 1993, Yale University; J.D. 1997, UCLA School of Law. I would like to thank my parents, Thomas and Josephine Martin, for their love and support. I am very grateful to Professors Julian Eule, Kenneth Graham, Richard Sander, and Eugene Volokh for sharing their time, experience and insight. I would also like to thank Dean Susan Prager for her words of wisdom and encouragement. I appreciate Dean of Admissions Michael Rappaport's cooperation and generous provision of information on UCLA School of Law's present system of affirmative action. I would also like to thank his secretary, Arian Yaqubi, for her expeditious replies to my requests. I am indebted to Professor Cruz Reynoso for his comments and guidance. I am also grateful to my roommate and classmate, Parag Patel, for his constructive criticism. Finally, I would like to thank Miriam Panzetta for her patience.

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INTRODUCTION

They chanted. They marched. They cried and were arrested. But in the end, the sudden flare of community activism was not enough to reverse the decision of the governor appointed U.C. Regents, who chose to end the university's thirty year-old affirmative action policies.¹

Affirmative action at the University of California ("U.C.") has created one of the most racially diverse university systems in

1. Patrick Kerkstra, *Protests Explode in Wake of Decision*, SUMMER BRUIN, July 24, 1994, at 1. For an excellent discussion of the historical development of affirmative action policies at UCLA School of Law, see Albert Y. Muratsuchi, Comment, *Race, Class And UCLA School Of Law Admissions, 1967-1994*, 16 CHICANO-LATINO L. Rev. 90 (1995); For a discussion of admissions developments affecting Hispanic applicants, see e.g., Vincent F. Sarmiento, *Raza Admissions at the UCLA School of Law: An Update on Current Policies and Recent Developments*, 14 CHICANO-LATINO L. REV. 161 (1994).

the country, and a hallmark for diversity in higher education.² The nation's largest³ and most prestigious university system, the U.C. has a student body which reflects the racial, economic, and cultural diversity of the Golden State and the nation.

On July 20, 1995, the history of affirmative action at the U.C. took a dramatic and controversial turn. After a turbulent twelve-hour meeting marked by a bomb threat, political grandstanding, and student demonstrations, the U.C. Regents resolved,⁴ in a greatly divided vote,⁵ to terminate affirmative action in university admissions and employment.⁶ The resolution, named after its author, U.C. Regent Ward Connerly, makes the U.C. the first university system in the nation to formally scale back its own affirmative action policies.⁷

The Connerly Resolution threatens to undermine the U.C.'s past efforts to open the doors of educational opportunity to minorities. Consequently, U.C. officials are scrambling to reassess and reformulate admissions procedures and practices to comply with the Connerly Resolution in a way which will maintain the racial diversity that affirmative action policies have achieved.⁸ Likewise, students are waging a valiant, if unlikely, struggle to change the U.C. Regents' collective mind.⁹

2. Amy Wallace, *UC Regents in Historic Vote, Wipe Out Affirmative Action*, L.A. TIMES, July 21, 1995, at A1.

3. The University of California consists of nine university campuses and more than 162,000 students. *Id.*

4. The two resolutions were proposed by Regent Ward Connerly. In those resolutions, the U.C. Regents abolished affirmative action practices in two areas: student admissions and in employment and contracting. See Office of the Secretary, SP-1, Policy Concerning Equal Treatment—Admissions, July 12, 1995 [hereinafter "Connerly Resolution"]; Office of the Secretary, SP-2, Policy Ensuring Equal Treatment—Employment and Contracting, July 12, 1995 (on file with author). This project concerns itself solely with the former resolution.

5. The U.C. Regents voted 14-10 in favor of the Connerly resolution to end affirmative action in student admissions. Amy Wallace, *UC Regents in Historic Vote, Wipe Out Affirmative Action*, L.A. TIMES, July 21, 1995, at A1.

6. *Id.* The Connerly Resolution, which applies equally to undergraduate, graduate and professional schools admission policies, will take effect January 1, 1997 and affect the entering Class of 2000. Connerly Resolution, §2. For a discussion of the political dynamics of the U.C. Regents' vote, see Dave Leshner, *Affirmative Action Raises Wilson Profile*, L.A. TIMES, July 31, 1995, at A3. See also *infra* note 11 and accompanying text.

7. Ronald J. Ostrow, *UC Vote Places Money to State at Risk, Panetta Says*, L.A. TIMES, July 24, 1995, at A1.

8. See, e.g., Memorandum from Susan Prager, Dean of the UCLA School of Law, to UCLA law students (Oct. 5, 1995) (on file with the author); Richard C. Paddock, *U.C. Berkeley Unveils Plan to Maintain Racial Diversity*, L.A. TIMES, Sept. 8, 1995, at A1.

9. Since the Connerly resolution passed, there have been several major student demonstrations at the university campuses. See, e.g., Amy Wallace, *Protesters Disrupt UC Regents Meeting*, L.A. TIMES, Sept. 15, 1995, at A3; Monica Valencia, *300 Protest Regents on Affirmative Action*, S.F. EXAMINER, July 24, 1995, at A9; Gale Holland, *Protests Erupt as Regents Eliminate Affirmative Action*, USA TODAY, July 21,

The purpose of this Comment is to articulate and to survey one set of admissions policies which, while adhering to the restrictions of the Connerly Resolution, will attempt to preserve the current levels of racial diversity at UCLA School of Law ("UCLAW"). This Comment advocates a particular policy, the diversity/disadvantage ("D/D") model. This Comment argues that the D/D model would provide a more effective, efficient, and equitable distribution of valuable resources than would the adoption of a merely socioeconomic policy. By addressing the underlying concerns of affirmative action, namely, diversity and socioeconomic disadvantage, the D/D model would avoid the over and under inclusiveness of race as a proxy for those two concerns. Moreover, such an admissions policy would not drive the divisive wedge of race between beneficiaries and non-beneficiaries.

Part I of this Comment paints with broad strokes a picture which roughly captures the nature of the affirmative action debate. Part II places the Connerly Resolution in the national context of the current conservative tide of the Republican majority Congress, Supreme Court rulings, and California legislation on the subject of affirmative action, arguing that the adoption of a race-neutral admissions policy was inevitable, given the political climate. Part III anchors the discussion of the policy and practice of U.C. affirmative action to the concrete example of UCLAW. UCLAW's former affirmative action policy is then introduced and critically analyzed. Part IV explores two goals, taken from UCLAW's stated mission, which will guide our selection of an alternative admissions policy: racial diversity and academic excellence.

Part V presents several alternatives to replace the current UCLAW admissions policy. Such alternatives include admissions proposals based upon the consideration of factors, in addition to an applicant's predictive index, such as economic disadvantage, diverse social experience, family educational background, work experience, history of community activism and volunteer experi-

1995, at 1A. Also, students organized a "National Day of Action" wherein students nationwide protested the Regents' decision, including students at Yale and Harvard Colleges. See e.g., Amy Wallace, *Thousands Rally at UC Campuses for Affirmative Action*, L.A. TIMES, Oct. 13, 1995, at A1; Noel Hartman, *Students Hold Rally in Support of Affirmative Action Programs*, YALE DAILY NEWS, Oct. 13, 1995; Robert Jystad, *Law Students Join Affirmative Action Protest*, THE DOCKET, Oct. 1995, at 1. Moreover, in the last week of October, several students at U.C. Irvine went on a hunger strike to have their appeals to reverse the U.C. Regents decision heard at the state capitol. See Martin Miller, *7 Arrested at UC Irvine Hunger Strike*, L.A. TIMES, Oct. 30, 1995, at A3; Eric Bailey, *Hunger Strikers Rally in Capitol*, L.A. TIMES, Nov. 1, 1995, at A3.

ence. Part V will also explore the limits and weaknesses of these proposals.

Although this Comment focuses on the problem of reforming UCLAW's admissions policy and practices to comply with the Connerly Resolution, the discussion herein may find broader application. This Comment represents the beginning of a more detailed and fruitful discussion concerning UCLAW admissions policies and practices. Hopefully, UCLAW's Special Committee on Admissions Policy will select an admissions policy which will uphold UCLAW's high academic standards, yet preserve the racial diversity that has made UCLAW a beacon of hope to aspiring minority lawyers. In a country and profession which undervalues the beneficial effect that attorneys with diverse social and cultural perspectives may have on the efficacy of legal practice, UCLAW has stood as an exception to the rule.

I. THE NATURE OF THE AFFIRMATIVE ACTION DEBATE

There are two fundamental, opposing views of race-based affirmative action. I will illustrate these two views with the following example. Imagine a relay race on a four hundred and forty yard track. Each sprinter must run one hundred and ten yards and pass his baton to the next sprinter, except for the last sprinter who must race to the finish line. Let us assume that each sprinter is of a different racial group and that all racial groups recognized by UCLAW Admissions are represented (i.e., white, black, Latino, Asian, and American Indian). The athletes have stretched and are in position at their starting blocks. Beads of perspiration freckle the runners' nervous brows. The starter holds her starting gun high in the air. A crisp shot echoes through the air. The race begins.

In the race for degrees of higher education, opponents and proponents of affirmative action have contrary opinions as to where the sprinters should place their starting blocks. Opponents of affirmative action believe that all the starting blocks should be placed along a straight line, giving each sprinter an equal chance at victory. The opponents of affirmative action thus presuppose that everyone begins with an equal opportunity—that we are all *de facto* equal. Opponents of affirmative action believe that no one should be favored regardless of race, regardless of historical context, and regardless of socioeconomic conditions.

Proponents of affirmative action disagree, noting that whites have had the inside track for many years. Proponents of affirmative action claim that to ignore the reality of societal disparities between whites and racial minorities would only serve to exacer-

bate such disparities. If the white sprinter's starting block is parallel to the minority runners' starting blocks, and the white sprinter has the inside track, then such "equal treatment" can only insure the repeated victory of the white sprinter. As years pass, and the competitions wear on, the gulf between whites and minorities grows ever larger. If, however, each runner's starting block is staggered so that a runner on the outside track has just as much of an advantage as a runner on the inside track, then each runner has a truly equal opportunity to win the race.

The two opposing views of affirmative action may be simplified further. On the one hand, opponents of affirmative action assume that we all begin with an equal opportunity, and hence an equal start. On the other hand, proponents of affirmative action believe that we must correct societal disparities among racial groups to insure such equal opportunity. Of course, both views oversimplify reality. The problems with which we are faced are extremely complicated. Nonetheless, these views may serve as a conceptual guide to help us navigate the gulf that separates proponents and opponents of affirmative action.

II. THE CONSERVATIVE BACKLASH AGAINST AFFIRMATIVE ACTION

The U.C. Regents' decision to overturn thirty years of affirmative action did not take place in a political vacuum.¹⁰ In several ways, the decision to abolish affirmative action was inevitable. Had the U.C. Regents not resolved to abolish affirmative action, then affirmative action would most likely have been displaced by the so called California Civil Rights Initiative.¹¹ And, even if the initiative were not to succeed, affirmative action at the U.C. would not likely have survived a constitutional chal-

10. Some commentators asserted that "the board [of Regents] delivered a *quid pro quo* to the governor, who appointed six of its members, [in time for his presidential bid]." Elaine Woo, *Regents: Too Much Clout?*, L.A. TIMES, July 22, 1995, at A1, A26. Marguerite Archie-Hudson, chair of the state assembly's higher education committee, has remarked that the regents are acting as political appointees as opposed to trustees of an institution of higher learning. *Id.* Moreover, it is interesting to note Governor Wilson's selective attendance of regent board meetings. As Governor, Pete Wilson serves as president of the U.C. Regents. See Amy Wallace, *Wilson to Vote as Regent Against Affirmative Action*, L.A. TIMES, July 7, 1995, at A 29. However, Governor Wilson rarely attends meetings. In fact, prior to the U.C. Regents July 20th meeting to end affirmative action, the last time Governor Wilson attended a U.C. Regents meeting was January 1992, when he voted to increase undergraduate fees 24%. *Id.*

11. See *infra* text at II.C for discussion of California legislation. Polls have shown that Anglo-Americans have opposed affirmative action 75% to 25% for the last five years. Charles Oliver, *Next Hot Button in California Anti-Quota Ballot Initiative Presages National Debate*, INVEST. BUS. DAILY, May 9, 1995, at A1 (quoting David Bositis, senior political analyst for the Joint Center on Political and Economic Studies).

lenge, given the recent decisions and composition of the Supreme Court.¹² Moreover, when these factors are combined with the mounting political pressures of white voter backlash, the move to end affirmative action would appear to be an unstoppable force.¹³

Opponents of affirmative action argue that the face of the national dialogue over affirmative action policies has changed. Thirty years ago, affirmative action policies were instituted to redress whites' historical, sometimes legally sanctioned, discrimination against minorities because of the color of their skin. Implemented under the Kennedy administration, and later expanded by the administration of President Lyndon Johnson, affirmative action policies were enacted in an attempt to even the playing field in education, employment and other areas; to provide minorities with the opportunity to gain access to professional and academic fields from which they had been historically excluded.¹⁴ Opponents of affirmative action claim that today, however, the policy has gone too far. Whites assert that they are

12. See *infra* text at part II.B for discussion of the recent Supreme Court rulings affecting affirmative action policies. Also, in a new twist in the growing affirmative action debate, Tarzana attorney Allan J. Favish has filed a lawsuit against U.C. law and medical schools contending that the U.C. system of admissions violates state business codes by requiring a \$40 application fee without divulging the importance of a person's race to the admissions process. Eric Slater, *UC Accused of Affirmative Action Consumer Fraud*, L.A. TIMES, June 9, 1995, at B3. Terry Colvin, spokesman for the Office of the UC president, has responded, "Providing the type of information Mr. Favish wants (printed on application materials) would imply that test scores, grade-point average and ethnicity are the only criteria used in admission." *Id.*

13. Some analysts have described what they term a "white voter backlash" to such events as the Million Man March, the O.J. Simpson verdict, and the Los Angeles Riots. See Yvette Collymore, *United States: Republicans Deaf, Dumb and Blind to Black March*, INTER PRESS SERV, Oct. 17, 1995 or 1995 WL 10134967; Brian McGrory, *White Backlash Feared Over Simpson Verdicts*, BOST. GLOBE, Oct. 8, 1995, at 1; K.L. Billingsley, *Students Back Affirmative Action Protests Add to Racial Discord in California After Simpson Trial*, WASH. TIMES, Oct. 14, 1995, at A2. Some say this backlash has already taken place, largely through the Republicans in Congress who have been promoting cuts to social programs as part of their "Contract with America." Yvette Collymore, *United States: Republicans Deaf, Dumb and Blind to Black March*, INTER PRESS SERV., Oct. 17, 1995, available in WL 10134967. And, in California, backers of the anti-affirmative action ballot, the CCRI, said they are anticipating a surge in support. See Brian McGrory, *White Backlash Feared Over Simpson Verdicts*, BOST. GLOBE, Oct. 8, 1995, at 1. However, a nationwide poll released in July by CNN/USA TODAY/GALLUP "found that two-thirds of Americans believe that affirmative action has been good for the country and only one quarter believe it should be eliminated." Dave Leshner, *Affirmative Action Raises Wilson Profile*, L.A. TIMES, July 31, 1995, at A3, A15. More than two-thirds also agree "with President Clinton's position that affirmative action programs do not have to discriminate against whites." *Id.* at A15.

14. Cruz Reynoso, Professor of Law at the UCLA School of Law and former California Supreme Court Justice, Symposium on Affirmative Action: Justice Through Opportunity, Excellence Through Diversity, at UCLA School of Law, in Los Angeles, CA. (Apr. 27, 1995).

falling prey to, and being discriminated against by the very same programs designed to compensate minorities.¹⁵

A. Republican Majority in Congress

The present hostility towards affirmative action may be traced to a broader anti-government sentiment that has developed in politics nationwide. Justice Clarence Thomas' *Adarand* concurrence illustrates this skepticism of government: "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law."¹⁶ In fact, skepticism of "big" government was at the heart of the GOP platform in the congressional elections of November 1994.¹⁷ As a result of those elections, the Republican Party gained control of both the House of Representatives and the Senate for the first time in four decades.¹⁸

Republican representatives and senators, elected to represent, among other interests, the fears of angry white males, began to whittle away at federal programs long considered liberal darlings. The *Contract with America*, the centerpiece of the Republican congressional platform, is a document which contains Republican promises to bring many issues to the floor of the House within the first one hundred days of the new Congress.¹⁹ The *Contract with America* specifically targeted ostensibly "fis-

15. A particularly characteristic example of this attitude is related by Senate Majority Leader, and Republican presidential candidate, Bob Dole (R-Kan.) in a February television interview: "The people of America are now paying a price for things that were done before they were born." Sheryl Stolberg, *Affirmative Action Gains Often Come at a High Cost*, L.A. TIMES, Mar. 29, 1995, at A1. Claims of "reverse discrimination" abound. See e.g., Howard Fineman, *Race and Rage/Affirmative Action: Republicans Hope It Will Drive a Wedge Between Liberal Democrats and White Swing Voters*, NEWSWEEK, Apr. 3, 1995, at 23. Perhaps the most ardent opponent of affirmative action in the state of California has been its governor, Pete Wilson. Gov. Pete Wilson has said, "Racial preferences are by definition racial discrimination . . . Abolishing [affirmative action] last July was not only necessary to meet our mission as an institution of higher learning committed to the fundamental American principles of equal opportunity and individual merit, it was critical to maintaining support from the millions of hard working Californians whose taxes finance this institution." Michael Howerton, *U.C. Delays Affirmative Action Decision*, DAILY BRUIN, Jan. 19, 1996, at 1.

16. *Adarand Constructors Inc. v. Pena*, 115 S.Ct. 2097, 2119 (1995) (Thomas, J., concurring).

17. The most successful Republican candidates for Congress typically fused that Reaganite anti-government message with a hard-line on social issues such as crime and welfare and a demand for congressional and political reform, especially term limits. Ronald Brownstein, *Partisanship Could Sour GOP Triumph*, L.A. TIMES, Nov. 9, 1994, at A1. Frank Luntz, a Republican pollster and adviser to Newt Gingrich remarked, "You'd have to go back to the 1890s to find so many different groups that have sprung up that are anti-Washington." *Id.*

18. Robert Shogan & David Lauter, *Republicans Score a Sweeping Victory*, L.A. TIMES, Nov. 9, 1994, at A1.

19. NEWT GINGRICH ET AL., *CONTRACT WITH AMERICA* 9-11 (1994).

cal" issues, such as balancing the budget, lowering taxes, cutting federal spending, and reforming welfare.²⁰ Such issues, however, have had a disproportionate impact on minorities and the socioeconomically disadvantaged.²¹

President Bill Clinton has voiced support of affirmative action, and vows to veto any legislation abolishing federal affirmative action policies.²² The President has declared that "affirmative action remains a useful tool for widening economic and educational opportunity . . ."²³ Moreover, if re-elected in 1996, President Clinton could feasibly create a Supreme Court majority which would loosen the strict scrutiny of affirmative action policies and possibly overrule *Adarand*.²⁴

B. Supreme Court Rulings

During its summer 1995 term, the Supreme Court, in a series of decisions, *Adarand v. Peña*, *Miller v. Johnson*, and *Missouri v. Jenkins*, sent a clear message to the nation that race-conscious remedies are under fire. Each decision has hacked away at what liberals regard as the major achievements of the civil rights movement.²⁵ In *Adarand*, Justice Sandra Day O'Connor, cautioned: "our decision today alters the playing field in some important respects."²⁶ In effect, the Supreme Court's decisions

20. Janet Hook, *The Long March to a Revolution*, L.A. TIMES, Apr. 7, 1995, at A1. In a recent New York Times-CBS poll, voters saw a potential conflict between House Republicans' push for massive tax cuts and efforts to balance the budget, and the polls show voters are thus far unconvinced by GOP arguments that they can do both. *Id.* Polls also suggest that ambivalent voters do not like big deficits but want to keep their Social Security benefits; they dislike welfare, but don't want to see homeless women with children on the streets. They chafe under federal regulations, but want to have clean drinking water. *Id.*

21. ASSOC. PRESS, *NAACP Chief Warns of Society with More Anger than Power*, L.A. TIMES, May 3, 1995, A18.

22. Paul Richter, *Clinton to Back Preferences for Race, Gender*, L.A. TIMES, July 19, 1995, at A1. Although the Republican party holds the majority of seats in both the House of Representatives and the Senate, it does not have sufficient numbers to oppose a Presidential veto. *Reality Bites*, USA TODAY, Nov. 14, 1994, at A14. A piece of federal anti-affirmative action legislation would require bipartisan support to be ratified. *Id.*

23. President William Clinton *No Quotas in Theory or Practice*, L.A. TIMES, July 20, 1995, at A12 (excerpts from President Clinton's remarks on affirmative action).

24. Terry Eastland, *Rule of Law: Congress and Clinton*, WALL ST. J., June 14, 1995, at A19. Two of the dissenters in the *Adarand* decision were Clinton appointees: Justice Ginsburg and Justice Breyer. *Id.* See discussion of *Adarand* *infra* at part II.B.

25. Paul M. Barrett et al., *Budding Backlash? Race, Sex Preferences Could Become Target in Voter Shift to the Right/Some in GOP Plan Assault, And California May See a Grass Roots Initiative/A Case Before the Supreme Court*, WALL ST. J., Jan. 11, 1995, at A1.

26. *Adarand Constructors Inc. v. Peña*, 115 S.Ct. 2097, 2118 (1995).

have not only altered the playing field, but have changed the game.

On June 12, 1995, in *Adarand*,²⁷ the Supreme Court placed all federal set-aside programs on the defensive, when it held that "all racial classifications, whether imposed by the federal, state or local government, must be subjected to strict scrutiny."²⁸ In order to survive strict scrutiny, racial preferences are justified only if they are narrowly tailored to redress past discrimination. Very few cases satisfy this strict scrutiny standard.²⁹

The *Adarand* Court also took the unusual step of formally overturning *Metro Broadcasting v. FCC*, an inconsistent precedent case, where the Supreme Court held that racial classifications imposed by the state government must be strictly reviewed, whereas racial classifications imposed by the federal government need only undergo intermediate scrutiny.³⁰ Justice O'Connor pronounced in dicta that "all governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the law has not been infringed."³¹

On the same day as the *Adarand* decision, the Supreme Court held, in *Missouri v. Jenkins*, that court-ordered desegregation of the Kansas City School District could be ended despite the fact that the achievement scores of minority students in the school district were below national norms.³² The *Jenkins* Court rejected the notion that whether minority student scores were below national standards should be the test of whether the school district had reached partially unitary status.³³ The *Jenkins* Court underscored that the basic task is to determine "whether the reduction in achievement by minority students has been remedied

27. In 1989, Mountain Gravel & Construction Co. (Mountain Gravel) was awarded a contract for a highway construction project in Colorado by the federal government. Mountain Gravel then solicited bids from Adarand Construction, Inc. ("Adarand"), a Colorado-based construction company, and Gonzales Construction Co. ("Gonzales") to complete the guardrail portion of the highway project. Adarand lost the contract to Gonzales despite having submitted a lower bid. According to the terms of the Mountain Gravel contract with the federal government, Mountain Gravel would receive a bonus if it subcontracted the guardrail work to a minority-owned business ("MBE"). The owner of Adarand is white; the owner of Gonzales is a minority. Adarand sued. *Id.* at 2102.

28. *Id.* at 2113.

29. Justice O'Connor also made a concerted effort "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* at 2117 (quoting Fullilove v. Klutznick, 448 U.S. 448 (1980)). What, however, this would mean in practice remains to be seen.

30. *Metro Broadcasting v. FCC*, 497 U.S. 547, 564-565 (1990), *overruled by Adarand Constructors Inc. v. Pena*, 115 S.Ct. 2097 (1995).

31. *Adarand*, 115 S.Ct. at 2113-14.

32. *Missouri v. Jenkins*, 115 S.Ct. 2038, 2055 (1995).

33. *Id.*

to the extent practicable.”³⁴ For consideration of that question, however, the *Jenkins* Court remanded the case to the District Court.

Finally, in *Miller v. Johnson*, the Supreme Court undercut black and Latino voting power by ruling that a congressional re-districting plan in Georgia, which carved the district into racial blocs by using race as a “predominant factor,” violated the Fourteenth Amendment.³⁵ Under the current regime, when a minority brings a claim of voter dilution under the Voting Rights Act and the Fifteenth Amendment, the minority must prove actual harm to her voting power and intent to discriminate on the part of the district line drawers. Yet, when a nonminority brings a claim of voter dilution under the Fourteenth Amendment, based upon racially drawn districts, the nonminority need not prove any actual harm to her voting power, such harm is presumed. The nonminority need only prove that race was a predominant factor in the drawing of district lines.

This conservative shift is hardly surprising if one considers the changed composition of the Supreme Court.³⁶ Chief Justice Rehnquist, Justice Scalia,³⁷ and Justice Thomas have repeatedly opposed affirmative action programs. Justices O’Connor and Kennedy have also expressed serious doubts about affirmative action programs in past decisions.³⁸ Justices O’Connor and Kennedy have joined the Chief Justice Rehnquist, Justice Scalia, and Justice Thomas to make the 5-4 majority in *Adarand Constructors, Inc. v. Pena*, *Missouri v. Jenkins*, and *Miller v. Johnson*.

34. *Id.*

35. *Miller v. Johnson*, 115 S.Ct. 2475 (1995).

36. Since the Supreme Court’s 1990 decision in *Metro Broadcasting v. FCC*, Justices Blackmun, White, Marshall, and Brennan have left the bench. They have been replaced by Justices Clarence Thomas, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. The latter two are Clinton appointees.

37. Perhaps the most vociferous opponent of affirmative action, Justice Antonin Scalia has endorsed a color blind interpretation of the Constitution. “To pursue the concept of racial entitlement—even for the most admirable and benign purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred.” *Adarand Constructors Inc. v. Pena*, 115 S. Ct. 2097, 2119 (1995) (Scalia, J., concurring). “[O]nly a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment that [our] Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *City of Richmond v. Croson*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

38. “Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” *City of Richmond v. Croson*, 488 U.S. 469, 493 (1989); “More disturbing still is the renewed toleration of racial classifications that its new standard of review embodies.” *Metro Broadcasting v. FCC*, 497 U.S. 547, 610 (1990) (O’Connor, J., dissenting). “I regret that after a century of judicial opinions we interpret the Constitution to do no more than move us from ‘separate but equal’ to ‘unequal but benign.’” *Id.* at 637-8 (Kennedy, J., dissenting).

C. California Legislation

The focal point of the country's anti-affirmative action sentiment in 1978, when the Supreme Court, in *U.C. Regents v. Bakke*, held racial quota systems to be unconstitutional,³⁹ California has once again garnered the national spotlight with the politically correct-sounding California Civil Rights Initiative⁴⁰ ("CCRI"). The CCRI, authored by two obscure academics at Cal State Hayward, proposes to excise the consideration of race, sex, color, ethnicity and national origin from all state employment, education and contracting decisions.⁴¹ According to polls, the CCRI is receiving wide support and will likely become law after the November 1996 elections.⁴²

"As California goes, so goes the nation," observed one commentator.⁴³ Therefore, it is unsurprising that the initiative's authors hope to create enough momentum to pressure the federal government to ban affirmative action, even in the private sector.⁴⁴ Endorsed by the California Republican Party and heralded

39. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978).

40. "Neither the State of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education or public contracting." *Text of proposed California Civil Rights Initiative*, ASSOC PRESS, Feb. 12, 1995. The California Civil Rights Initiative goes on to exempt federally mandated affirmative action programs and court ordered consent decrees. The initiative would leave private-sector affirmative action programs unaffected.

41. See Hugh Dellios, *Anti-Affirmative Action 'Wildfire' Smolders in California Measure Proposal Would Ban Preference for Race, Gender*, CHI. TRIB., Dec. 4, 1994, at 7. Of course, this point is now moot in the case of U.C. admissions, employment and contracting. See Amy Wallace, *U.C. Regents Refuse to Yield on Affirmative Action Ban*, L.A. TIMES, Jan. 19, 1996, at A1. However, the initiative's success would mean that the U.C. Regents could not reverse the ban on affirmative action.

42. The most recent Field Poll, taken in September, showed 58 percent support for CCRI with 33 percent against. Among Democrats, 41 support CCRI, which is favored by 78 percent of Republicans and endorsed by the state Republican Party and Gov. Pete Wilson. K.L. Billingsley, *Students Back Affirmative Action Protests Add to Racial Discord in California After Simpson Trial*, WASH. TIMES, Oct. 14, 1995, at A2. However, the CCRI authors have had considerable difficulty gathering the nearly 700,000 signatures needed to place their initiative on the 1996 ballot. Dan Moran, *Initiative Backers Duel for Dollars*, L.A. TIMES, Jan. 16, 1996, at A3. Gov. Pete Wilson, in a recent letter to CCRI supporters, wrote: "There is no time to lose"; Wilson noted that the CCRI backers have a month to gather the final 300,000 signatures to ensure that the measure will be on the November ballot. *Id.* Also, a nationwide poll released in July by CNN/USA TODAY/GALLUP found that two-thirds of Americans believe that affirmative action has been good for the country and only one quarter believe it should be eliminated. Dave Leshner, *Affirmative Action Raises Wilson Profile*, L.A. TIMES, July 31, 1995, at A3.

43. Terry Eastland, a conservative legal analyst, quoted in Paul M. Barrett et al, *Budding Backlash? Race, Sex Preferences Could Become Target In Voter Shift To The Right/Some In GOP Plan Assault, And California May See A Grass Roots Initiative/A Case Before The Supreme Court*, WALL ST. J., Jan. 11, 1995, at A1.

44. *Id.* "They want a return [sic] to a 'color-blind' system for determining who gets jobs and seats in high school and university decisions." *Id.* Los Angeles County

by conservatives such as William F. Buckley, Jr. and Pat Buchanan, the CCRI is the latest offensive in a rising backlash against affirmative action programs.⁴⁵ Civil rights advocates fear the measure will expose a generation's progress, in battling discrimination and providing equal opportunity, to the whims of angry voters eager to lash out against minorities.⁴⁶

The CCRI rises on the heels of another popular ballot initiative that polarized voters along racial lines—Proposition 187.⁴⁷ Proposition 187, passed in November 1994, would ban illegal immigrants from receiving public education, nonemergency health care and social welfare services.⁴⁸ One commentator has remarked, "The signal sent by 187 is that it's OK to go after immigrants and to go after minorities in general. It's no surprise that Proposition 187 is the first step in the onslaught against affirmative action programs."⁴⁹

III. UCLA SCHOOL OF LAW ADMISSIONS

The UCLA admissions process is centrally organized, mechanistic, and fundamentally implemented by one man, the

Supervisor Michael D. Antonovich became the first person to sign the initiative's ballot petition. David Bloom, *Affirmative Action Foes Open Drive For '96 Vote*, L.A. DAILY NEWS, Sept. 29, 1995, at N1. Antonovich remarked: "It will take its place alongside Proposition 13 in starting a nationwide movement . . . it will replace quotas with fairness and merit." *Id.*

45. See Hugh Dellios, *Initiative Afoot to End Affirmative Action in State*, S.F. EXAMIN., Dec. 4, 1995, at A1. A statewide poll by the Field Institute released in March showed that California registered voters support the initiative 60% to 35% with only 5% undecided. Charles Oliver, *Next Hot Button in California Anti-Quota Ballot Initiative Presages National Debate*, INVEST. BUS. DAILY, May 9, 1995, at A1. Anglo-Americans support the measure 65% to 29%; slim majorities of blacks, Hispanics, and Asians oppose the measure. *Id.* See *supra* note 40 and accompanying text.

46. Hugh Dellios, *Initiative Afoot to End Affirmative Action in State*, S.F. EXAMIN., Dec. 4, 1995, at A1.

47. Proposition 187 passed 59 percent to 41 percent. *Nervous Californians Fear Racial 'Witch Hunts'*, ASSOC. PRESS., Nov. 10, 1994. Whites number 54 percent of California's 32 million people; Hispanics, 29 percent. *Id.* Two-thirds of Hispanic voters opposed Proposition 187; two-thirds of whites voted yes, as did a majority of blacks and Asians. *Id.* Much like Wilson's use of Proposition 187 during his 1994 reelection campaign, affirmative action became the centerpiece of Pete Wilson's failed bid for the GOP presidential nomination. See Bill Stall, *Wilson Steps Up Affirmative Action Attack*, L.A. TIMES, July 19, 1995, at A3.

48. Marni McEntee, *Activists Examine Prop. 187 CSUN Panel Weighs Measure's Aftermath*, L.A. DAILY NEWS, Oct. 15, 1995, at N7. It would also require officials to report suspected illegal immigrants to state and federal authorities. *Id.* Despite Proposition 187's popular voter appeal, however, the effect of the measure has been narrowed considerably by a recent federal court ruling that the state is preempted by the federal government from barring health care and social services that are federally funded. See Paul Feldman, *Major Portions of Prop. 187 Thrown Out by Federal Judge*, L.A. TIMES, Nov. 21, 1995, at A1.

49. Marni McEntee, *Activists Examine Prop. 187 CSUN Panel Weighs Measure's Aftermath*, L.A. DAILY NEWS, Oct. 15, 1995, at N7 (quoting Economist Manuel Pastor, Jr.).

Dean of Admissions, Michael Rappaport. Rappaport describes himself as an administrator who only implements the faculty's admissions policies, particularly those set forth in the Karst Report.⁵⁰ However, those students who have worked with Rappaport insist that he has broad discretion to decide what diversity factors listed in the Karst Report will receive more weight than others.⁵¹ Although UCLAW's admissions process once involved student and faculty participation in the admissions process, student participation, in the form of minority advocate organizations, has dwindled to mere advisory positions and the faculty has retreated from the admission process, seemingly satisfied with delegating sole authority to the Dean of Admissions.⁵²

A. Policy

Until the regents' decision, UCLAW, in effect, employed two admissions policies.⁵³ Sixty percent of the first year class was admitted based solely upon demonstrated academic merit.⁵⁴ The remaining forty percent was admitted on the basis of academic merit plus other considerations, including age, life experience and background, work history, ethnicity, outstanding achievements, and disadvantages overcome.⁵⁵ The latter admissions pol-

50. Albert Y. Muratsuchi, Comment, *Race, Class And UCLA School Of Law Admissions, 1967-1994*, 16 CHICANO-LATINO L. REV. 90, 119 (1995). The Karst Report was an in depth analysis of UCLA's admissions process issued subsequent to the Supreme Court's 1978 *Bakke* decision. The Karst Report's diversity criteria included: (1) racial/ethnic background, (2) ability in languages other than English, (3) work experience or career achievement, (4) previous positions of leadership or other special achievements, (5) prior community or public service, (6) unusual life experiences, (7) physical handicap or other disadvantage, (8) career goals, (9) economic disadvantage. Memorandum from the Admissions Task Force to the Faculty 18 (Nov. 21, 1978) (on file with the UCLA Law Library) [hereinafter Karst Report].

51. Muratsuchi, *supra* note 50. For example, although economic disadvantage is listed in the Karst Report as a diversity criterion, Rappaport does not give it much weight. Rather, Rappaport considers economic disadvantage primarily to discern whether the applicant's grades and LSAT may not fully reveal the applicant's academic potential. *Id.* at 120.

52. *Id.* at 121.

53. A discussion of the history of UCLA's admission policy is beyond the scope of this project. For an excellent discussion of the historical development of affirmative action policies at UCLA School of Law, see Muratsuchi, *supra* note 50. For a discussion of admissions developments affecting Hispanic applicants, see e.g., Vincent F. Sarmiento, *Raza Admissions at the UCLA School of Law: An Update on Current Policies and Recent Developments*, 14 CHICANO-LATINO L. REV. 161 (1995). This project will limit itself to a description of the present UCLA admissions policy.

54. Merit is defined by the Admissions Office as the applicant's predictive index score, which is a composite of the applicant's UGPA and LSAT score. See Admissions Office Memorandum, Questions Most Frequently Asked About the UCLA School of Law, September 1995 (on file with the author). See also *infra* Part II.B for explanation of how predictive index score is derived.

55. Admissions Office Memorandum, Questions Most Frequently Asked About the UCLA School of Law, September 1995 (on file with the author). Students who have worked with Dean Rappaport insist that he has broad discretion in deciding

icy was referred to as UCLAW's diversity admissions program, the former was referred to as UCLAW's regular admissions program. This sixty/forty breakdown was the admissions office's general goal, although the actual breakdown varied from year to year.⁵⁶

B. *Practice*

An application for admission to UCLAW consists of a personal statement, two letters of recommendation, law school admissions test ("LSAT") score, undergraduate transcript ("UGPA"), and the option of indicating one's race. All applicants are assigned a predictive index score based on the formulaic combination of their LSAT and UGPA.⁵⁷ The predictive index score is based on a scale of one thousand. UGPA and LSAT are equally weighted for purposes of the predictive index score, each consisting of a maximum individual score of five hundred.⁵⁸ The UCLAW Admissions Office ("Admissions") converts an applicant's LSAT score, by means of a linear transformation, to a scale of five hundred. Likewise, Admissions converts an applicant's UGPA to a scale of five hundred.

However, Admissions subjects an applicant's UGPA to a more complex transformation than the LSAT score. An applicant's UGPA is adjusted in two respects. First, an applicant's UGPA is adjusted positively in consideration of the quality of the undergraduate institution. For example, a 3.6 UGPA from Yale University would outrank a 3.6 UGPA from Cal State L.A.⁵⁹ Second, an applicant's UGPA is adjusted negatively in consideration of the institution's grade inflation. Hence, a 3.6 UGPA from Stanford may be ranked less than a 3.6 UGPA from U.C. Berkeley. After Admissions performs these two adjustments, the result is converted to a scale of one thousand, known as the national grade point average. Admissions then divides the national grade point average in half, which results in a maximum score of five hundred. Finally, Admissions adds the converted

which diversity factors will receive more weight than others. *See also* Muratsuchi, *supra* note 50, at 119.

56. Muratsuchi, *supra* note 50, at 121.

57. Admissions Office Memorandum, Questions Most Frequently Asked About the UCLA School of Law (Sept. 1995) (on file with the author).

58. Interview with Richard Sander, Professor of Law at the UCLA School of Law, in Los Angeles, CA. (Nov. 6, 1995).

59. However, a 4.0 UGPA from either institution would be treated equally. Interview with Richard Sander, Professor of Law at the UCLA School of Law, in Los Angeles, CA. (Nov. 6, 1995). Differentiation between UGPA, based upon the quality of the undergraduate institution, appears as UGPA decreases from 4.0. *Id.*

UGPA and LSAT together, which results in the applicant's predictive index score.⁶⁰

1. *Regular Admissions*

All applicants to UCLAW, regardless of their individual UGPA and LSAT score, are considered candidates for admission.⁶¹ Admissions winnows all applications in accordance with their respective predictive index scores. The top fifteen percent of applications, which generally range in their predictive index score from 1000-850⁶², are designated by Dean of Admissions Michael Rappaport as "presumptive admits." These applicants are admitted unless they exhibit glaring problems (i.e., evidence of academic dishonesty, plagiarism, inability to write coherently, unfavorable letters of recommendation, ridiculously easy major, etc.)⁶³ Applicants that pass this minimal scrutiny are admitted. Those applicants who do not are placed in a "problem holds" drawer.

The next fifteen percent of applications, which range from 849-790, receive a more in depth review by Rappaport for academic promise, uniqueness, and demonstrated leadership. Applicants who survive this scrutiny are admitted. Applicants who do not are placed on the regular waiting list. Further, each application is read individually with the question in mind: "Is this person potentially admissible under the diversity admissions program?" If so, then Admissions places the applicant in a hold drawer for diversity admission candidates. Applicants whose predictive index scores fall below 790, and who are not eligible for consideration in the diversity admissions program, are placed on the waiting list. Generally, the percentage of applicants who accepted their offer of admission is twenty to twenty-five percent.⁶⁴

2. *Diversity Admissions*

Applicants who have been placed in the hold drawer for diversity admissions, or have a predictive index score of 790 or be-

60. A perfect predictive index score is one-thousand. Interview with Richard Sander, Professor of Law at the UCLA School of Law, in Los Angeles, CA. (Nov. 6, 1995).

61. Interview with Michael Rappaport, Dean of Admissions at the UCLA School of Law, in Los Angeles, CA. (Dec. 8, 1995).

62. Please note that the predictive index scores indicated herein are illustrative, and do not represent a definitive formula. Moreover, the academic composition of the regular admissions program and the diversity admissions program is likely to change from year to year.

63. Interview with Michael Rappaport, Dean of Admissions at the UCLA School of Law, in Los Angeles, CA. (Dec. 8, 1995).

64. *Id.*

low, but possess diverse characteristics (i.e., age, life experience and background, work history, ethnicity, outstanding achievements, and disadvantages overcome) may be considered for admission to UCLAW under the diversity admissions program. Those applications with the highest predictive index scores will be admitted first. Rappaport then reviews the remaining applicants who qualify for consideration under the diversity admissions program for academic promise, uniqueness, demonstrated leadership, etc. Applicants who survive this review are admitted.

Several minority student organizations at UCLAW advocate for the admission of a limited number of minority applicants each year.⁶⁵ The status of those minority student organizations in the admissions process is merely advisory, and the overall effect of the minority advocate programs upon the percentage of minority candidates admitted to the first year class has been negligible.⁶⁶ However, what the minority student organizations have accomplished is a greater representation of minority candidates whose stated motive is to return to, and practice in, underrepresented minority communities and involve themselves in campus politics. Although minority student organizations have failed to affect the overall quantity of minority candidates admitted to UCLAW, they have managed to advocate persuasively for the admission of a limited number of minority candidates with different qualities. Generally, the acceptance yield for applicants admitted under the diversity admissions program is fifty to sixty percent.⁶⁷

C. *Critical Remarks*

Admission to UCLAW has predominantly been based upon traditional gauges of academic merit, including UGPA and LSAT score. Sixty percent of the first year class is admitted to UCLAW in a mechanical fashion, the sole criterion in many cases being the applicant's predictive index score. And, although the file of an applicant in the regular admissions pool is reviewed, the applicant's file is reviewed less for the purpose of discovering an individual's strengths that make them unique, than to eliminate any candidates with glaring problems. Dean Susan Prager has observed, "Merit has been defined fairly narrowly, and equated solely with grades and test scores. If I were to make a criticism—

65. These student organizations include the Black Law Students Association ("BLSA"), La Raza Law Students Association ("La Raza") and the Asian Pacific Islander Law Students Association ("APILSA").

66. See Sarmiento, *supra* note 53, at 167.

67. Interview with Michael Rappaport, Dean of Admissions at the UCLA School of Law, in Los Angeles, CA. (Dec. 8, 1995).

we haven't looked as much at other factors. . . We have overvalued easily quantifiable portions of merit."⁶⁸

Yet, however much "other factors," (i.e., race, socioeconomic background, ethnicity, etc.), have been debated as complements to the predictive index score, it is surprising that its derivation has not been more closely analyzed and critiqued.⁶⁹ The predictive index score has been accepted by both proponents and opponents of affirmative action as a baseline assumption of the debate, rather than a term vulnerable to negotiation. And, although it seems reasonable that opponents of affirmative action would choose to preserve the *status quo*, including the present predictive index formulation, it is all the more remarkable that proponents of affirmative action have failed to cultivate this fertile territory.

Take, for example, the formulation of the national grade point average. In converting an applicant's UGPA to the national grade point average, the applicant's UGPA is adjusted positively, in consideration of the quality of the undergraduate institution, and negatively, in consideration of grade inflation. With regard to the former adjustment, a proponent of affirmative action might ask whether it is fair that a student should be awarded a boosted UGPA for attending a more expensive institution, if one accepts that higher quality institutions are generally more expensive than lower quality institutions, rather than simply being judged on his unadulterated academic record. For example, although a 4.0 UGPA from Harvard is equivalent to a 4.0 from Chico State under the current predictive index formulation, a 3.6 from Harvard is superior to a 3.6 from Chico State. Perhaps, an applicant's UGPA should not be adjusted for the quality of his undergraduate institution, but, rather, the student should be judged on his individual effort as indicated by his UGPA .

The latter negative adjustment for grade inflation would remain appropriate. Negative adjustments for grade inflation would eliminate the unfair bias achieved by grades unrepresentative of a student's individual effort. Thus, negative adjustments for grade inflation would even the academic playing field, and avoid a situation where a student could effectively purchase a higher UGPA.

A further criticism of the UCLAW admissions process may be that it is too centrally organized—that the power to select a first year law school class should rest in the judgment of more

68. Interview with Susan Prager, Dean of the UCLA School of Law, in Los Angeles, CA. (Nov. 17, 1995).

69. Interview with Kenneth Graham, Professor at the UCLA School of Law, in Los Angeles, CA. (Oct. 20, 1995).

than one person.⁷⁰ However, such a criticism assumes that that one person has broad discretion to select whomever he wishes. Under the present admissions system, there is little room for subjectivity. The present admissions process relies almost exclusively upon academic gauges of merit. Moreover, when additional criteria are considered, such as an applicant's race, they are considered for the narrow purpose of lowering the academic hurdle enough to include only the most highly academically qualified minority applicants.

The criticism of decision-making centralization fails to consider what, if any, benefits decentralizing the selection process would provide. Certainly, decentralization might spell a public relations boon for UCLAW.⁷¹ However, decentralization would not provide Admissions with any practical advantages over the present scheme. Because the present admissions system is simple and objective, additional decision-makers could accomplish little more than delaying the admissions process. Moreover, in those marginal cases where subjectivity is required, the Dean of Admissions consults with the Chair of the Admissions Committee and committee members for their insight, experience and judgment. Thus, in the cases where decentralization would be most effective, the present system of admissions already practices a form of decision-making decentralization.

IV. GUIDING PRINCIPLES

In the absence of an institutional mission, the task of selecting among competing admissions policy proposals would become all but impossible. Just as an individual's character dictates the types of choices that he will make among a myriad of possibilities, the character of an institution will also guide its selection of policies. In order to effectively weigh the varying admissions policy options, and to attempt to strike an optimal balance between competing interests, the principles underlying UCLAW's mission must be made explicit.

A. *UCLA School of Law's Mission*

Since 1967, UCLAW's mission has been in tension between two competing goals. On the one hand, UCLAW has sought to join the ranks of elite law schools throughout the country.⁷² On the other hand, UCLAW has recognized its obligation as a public

70. Presently, admissions decisions rest almost exclusively in the Dean of Admissions, Michael Rappaport. See *supra* part III.

71. Provided that the majority of people assume that central organization is inherently wrong, or questionable, regardless of the context of the organization.

72. See Muratsuchi, *supra* note 50.

institution, and as the only public law school in Southern California, to educate students that reflect the racial diversity of the community.⁷³ A consequence of this tension is the current UCLAW affirmative action policy, described *supra*, and its 60/40 split between the regular admissions program and the diversity admissions program.⁷⁴ However, just as the character of an individual may change with the passage of time, the character of an institution may change as well. UCLAW has been no exception to this possibility.

1. *Diversity*

The meaning of UCLAW's commitment to minorities has undergone a metamorphosis. During the initial years of UCLAW's diversity program, then known as the Legal Education Opportunity Program ("LEOP"), the purpose of the diversity program was to provide an opportunity to historically disadvantaged minorities. The LEOP program was viewed, in the spirit of the civil rights movement, as an attempt to make amends and an attempt to heal racial rifts, represented by such spectacles as the Watts Riots of 1965.

This commitment remained fairly constant until 1978, when the *Bakke* decision sent ripples through university admissions programs. From that point forward, UCLAW adopted its present diversity program. Under *Bakke*, UCLAW justified the diversity program, per Justice Powell's opinion, not as a system of preferential treatment for the benefit of minority applicants, but as a program designed to facilitate a "robust exchange of ideas," and thus a benefit to the majority student body.⁷⁵

Now, the U.C. Regents have kicked the chair out from under the present affirmative action policy by banning the consideration of race in admissions decisions, and UCLAW must again rethink its commitment to minority students. Yet, despite the U.C. Regents' decision to ban the consideration of race in admissions decisions, UCLAW appears to be firmly committed to racial diversity. In a recent memorandum to UCLAW applicants, the Admissions Office wrote, "The strong interest of UCLAW in attracting minority applicants remains steadfast. The school is interested in achieving a well-rounded and diverse student body which reflects the multiethnic makeup of society."⁷⁶ Moreover, Dean Susan Prager has noted in a memorandum to the UCLAW

73. *Id.*

74. One may also query whether the 60/40 split is indicative of UCLA's assignment of relative importance to these two competing goals.

75. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978).

76. Memorandum from the Admissions office, *Questions Most Frequently Asked About the UCLA School of Law* (Sept. 1995) (on file with the author).

student body that "the challenge facing us will be to design a program which produces the diversity that we believe is essential . . . while complying with the law . . ."77

However, we are left with a tangle of questions: "How will we maintain racial diversity in a post-Connerly resolution admissions regime?," "Is it ethically possible to pursue the goal of racial diversity without resorting to race?," and "Is it politically feasible to implement such a proposal?"78

2. *Academic Excellence*

Despite UCLAW's attempts to diversify its student body racial make up through the adoption of various policies of affirmative action, UCLAW has remained committed to the goal of admitting the best academically qualified students. To select the best and brightest, UCLAW has relied almost exclusively upon an applicant's LSAT score and UGPA as indicators of such academic merit. UCLAW's commitment to academic excellence has remained constant.

Originally, UCLAW admitted students on the basis of UGPA and LSAT score alone. In the 1960's, this admissions system resulted in an almost exclusively white student body.⁷⁹ In 1965, the faculty attempted to racially diversify the student body by means of the LEOP program. Along with the LEOP program, UCLAW adopted a more subjective admissions policy. However, in 1973, due to findings that significant correlations existed between LEOP students' low academic criteria and low bar passage rates, the faculty approved a new statement of purpose which placed greater emphasis on LSAT scores and college grades.⁸⁰

In 1978, UCLAW adopted a new admissions policy subsequent to the Supreme Court's *Bakke* decision. The new policy was similar to the LEOP program, except that a maximum of forty percent of the first year class was to be admitted under its guidelines. In 1985, concerns again grew regarding low diversity students' bar passage rates and their correlation to lower college grades and LSAT scores. In response to this trend, diversity admissions decision-making power was centralized in Dean of Admissions Rappaport in 1987. Rappaport re-focused diversity

77. Memorandum from Susan Prager, Dean of the UCLA School of Law, to UCLA law students (Oct. 5, 1995) (on file with the author).

78. Unfortunately, the latter two questions are beyond the scope of this Comment.

79. Muratsuchi, *supra* note 50, at 93.

80. *Id.* at 100-01.

admissions standards, and sought to admit only those minority students with the highest LSAT scores and college grades.⁸¹

In analyzing the following alternative admissions policies, I will use UCLAW's present admission numbers, when helpful, as an indication of an optimal balance. The preferable alternative admissions policy will be that policy which maintains a balance between racial diversity and academic excellence most similar to the present balance.⁸² Because of UCLAW's strong history of commitment to traditional gauges of academic merit, such as LSAT score and UGPA, I will favor academic excellence when a choice must be made either to sacrifice racial diversity or academic excellence.

V. ALTERNATIVE ADMISSIONS POLICIES

The following admissions policy proposals are not intended to displace an admissions policy which considers a candidate's demonstrated academic merit as represented by the predictive index score. The proposals are intended, however, to provide additional criteria to supplement the predictive index score, and to avoid the inequity of an admissions policy based solely upon demonstrated academic achievement as narrowly defined by LSAT and UGPA.

In analyzing the various alternative admissions policies, I shall simplify the problem to a considerable degree. I will factor out questions concerning the political feasibility of any given alternative admissions policy, and will deal exclusively with whether the proposal is the "right" course of action in an ideal system. This ideal system will be circumscribed by the two guiding principles that define UCLAW's mission: diversity and academic excellence.⁸³ Thus, to effectively weigh the varying admissions policy options, and to attempt to strike an optimal balance between competing interests, I will judge each proposal

81. *Id.* at 120.

82. However, in order to compare the probable effect of an alternative admissions policy upon the racial composition of the first year class to the present racial composition of the first year class, one must be able to accurately *project* what the probable effect of the alternative admissions policy. In the case of the subjective and hybrid admissions policies discussed *infra*, this is an impossible feat. The task is impossible because the questions which would be asked on a hybrid or subjective admissions policy application have never been asked before. Thus, we lack the information necessary to estimate what the average response would look like, and thereby how exactly such questions may affect the racial mix. Nevertheless, I shall attempt to compare and contrast hybrid and subjective admission policies with the present admission policy, not by the use of projected racial compositions, but by a consideration of how each admission policy satisfies UCLAW's stated mission: to foster diversity and academic excellence. See *infra* part V.

83. See *infra* part IV.A for discussion of UCLAW's stated mission.

in accordance with their satisfaction of these twin considerations.⁸⁴

In the following survey of alternative admissions policies, I will examine each policy in three distinct steps. First, I will present each alternative admissions policy in its most simple form. Second, I will describe how the policy may be implemented in practice. Finally, I will analyze the efficacy of such implementation and the degree to which the admissions policy fulfills UCLAW's aforementioned considerations. I will also comment on the existence of any practical barriers to the alternative admissions policy, and note any weaknesses inherent to the proposal.

A. *Individual Socioeconomic Disadvantage*

1. *Policy*

UCLAW would employ two admissions policies. A percentage of the first year class would be admitted based solely upon demonstrated academic merit. The remainder would be admitted on the basis of demonstrated academic merit plus the consideration of an applicant's individual socioeconomic disadvantage ("ISD"). In such an admissions policy, race would be replaced by an applicant's family income and the educational level of the applicant's parents. The latter admissions policy would be referred to as UCLAW's ISD admissions program, the former would be referred to as UCLAW's regular admissions program. The actual breakdown between the two programs would vary from year to year.

2. *Practice*

An application for admission to UCLAW would still consist of a personal statement, two letters of recommendation, LSAT score, and UGPA. However, the option of indicating one's race would have to be excluded. Also, a statement for disclosing the applicant's ISD would have to be added. In implementing an admissions policy based on an applicant's ISD, there are two main issues with which to contend. The first issue regards how ISD information is to be obtained. The second issue respects what percentage of the first year class will be admitted under the ISD policy, and, consequently, what percentage of the class will be admitted under the regular admissions program.

84. Although the numbers achieved by the present admissions policy will serve as a benchmark for judging the effectiveness of an alternative admissions policy, they will not be dispositive of the quality or appropriateness of any given admissions policy proposal.

There are several ways in which an applicant's ISD information could be obtained. First, the applicant could simply submit a statement indicating the highest educational level achieved by each parent, and the family's average household income.⁸⁵ The accuracy of such an ISD statement would be, like the present disclosure of an applicant's race, dependent upon the applicant's honesty. Second, Admissions could request that the applicant submit photocopies of his or her own income tax returns, as well as those of his or her parents, for the years in which the applicant was a dependent, and a statement signed by each parent indicating their highest educational level achieved. Third, Admissions could request the aforementioned tax returns, and that the parents submit photocopies of their degrees as proof of their educational level.⁸⁶

What percentage of the first year class should be admitted under the ISD policy is a more complicated issue. Under the present admissions policy, sixty percent of the first year class is admitted solely on the basis of demonstrated academic merit, the remaining forty percent on the basis of demonstrated academic merit plus other factors, including race. However, the adoption of an ISD policy would have two effects upon the admissions process that would make it almost impossible to maintain the present 60/40 split between programs. First, applicants most likely to benefit from the ISD program would have, on average, lower UGPAs and LSAT scores than their diversity program counterparts.⁸⁷ Second, students admitted under the ISD program would be less racially diverse than their diversity program counterparts.⁸⁸

Admissions is presented with a dilemma. Should Admissions increase the percentage of students admitted under the ISD program, thereby increasing the number of minority students admitted, but also decreasing the average predictive index score of all admitted first year students? Or, should Admissions decrease

85. However, the simplicity of such an ISD statement would be easily complicated. For example, the applicant's average household income should be averaged over how many years? And, of those years, how many was the applicant dependent upon his or her parents? Further, if the applicant's household income were to be averaged over the applicant's lifetime, would the applicant's family have held onto documentation over twenty years old? Even if the documentation were available, how do we account for inflationary affects upon household income, not to mention the time value of money?

86. This practice would not prevent a parent or applicant from withholding a photocopy of the degree, and thereby misrepresenting his or her educational level. However, such a practice may discourage such misrepresentation.

87. Memorandum from Admissions Task Force, Final Report on Law School Admissions (Apr. 11, 1996) (on file with the author).

88. Memorandum from Richard Sander, Professor of Law at the UCLA School of Law (Aug. 2, 1995) (on file with the author).

the percentage of students admitted under the ISD program, thereby decreasing the number of minority students admitted, but also increasing the average predictive index score of all admitted first year students? Or, should Admissions maintain the present 60/40 split and let the chips fall where they may?

To remain consistent with UCLAW's stated mission and institutional history, Admissions would likely choose to decrease the percentage of applicants admitted under the ISD program. Although this resolution would decrease the number of minority applicants admitted to UCLAW, it would increase the average predictive index score of admitted first year students, and hence maintain the academic reputation of UCLAW. However, the question remains: "By how much would Admissions decrease the percentage of applicants admitted under the ISD program?" That question cannot be answered until further information is obtained, which indicates how much lower predictive index scores of socioeconomically disadvantaged applicants are in comparison to those of diversity applicants under the present admissions policy.

3. *Critical Remarks*

An ISD program presents two major difficulties. First, an ISD admissions program would fail to maintain the current levels of racial diversity at UCLAW. Because socioeconomic disadvantage has a somewhat ambiguous relationship to race, the preference of the socioeconomically disadvantaged applicant would not necessarily benefit minority applicant. Although an admissions program based upon individual socioeconomic disadvantage would help to minimize the negative impact on the racial diversity at UCLAW, the present levels of racial diversity would diminish.

Second, predictive index scores of socioeconomically disadvantaged applicants would be lower, on average, than those of diversity applicants.⁸⁹ This fact would have several short and long term effects. In the short term, applicants admitted under the ISD program would require greater counseling and academic assistance than is currently available. A larger counseling pro-

89. Interview with Michael Rappaport, Dean of Admission at the UCLA School of Law, in Los Angeles, CA. (Dec. 8, 1995). Although diversity applicants score lower than regular applicants, diversity applicants score higher than socioeconomically disadvantaged applicants. This phenomena may be explained by the fact that there appears to be a high correlation between the predictive index score and household income. *Id.* The average household income of white, regular applicants is \$100,000, whereas the average household income of socioeconomically disadvantaged students is much less. *Id.* The average household income of diversity students, however, is \$60,000. *Id.*

gram would require a larger staff and greater funding. In the long term, UCLAW's national prestige and ranking may be undermined by low bar passage rates.

Furthermore, a lower national ranking may result in some professors leaving UCLAW for what they believe are more prestigious universities. In turn, this flight of professors may result in the diminishment of UCLAW's attractiveness in the eyes of highly academically qualified applicants, who would then think twice about applying to UCLAW. Thus, the long term effects of a large (i.e., forty percent of the entering class) ISD program may result in a diminishment of UCLAW's national ranking. This negative effect upon the average predictive index score can be corrected for, however, by decreasing the percentage of applicants admitted under the ISD program. Yet, at what point would this "correction" eviscerate the purpose of the ISD program?

B. *Group Socioeconomic Disadvantage*

1. *Policy*

UCLAW would employ two admissions policies. A percentage of the first year class would be admitted based solely upon demonstrated academic merit. The remainder would be admitted on the basis of demonstrated academic merit plus the consideration of an applicant's group socioeconomic disadvantage ("GSD"). In such an admissions policy, race would be replaced by an applicant's neighborhood and school socioeconomic status ("SES"). The latter admissions policy would be referred to as UCLAW's GSD admissions program, the former would be referred to as UCLAW's regular admissions program. The actual breakdown between the two programs would vary from year to year.

2. *Practice*

An application for admission to UCLAW would consist of a personal statement, two letters of recommendation, LSAT score, and UGPA. However, the option of indicating one's race would be excluded. Also, a statement indicating the applicant's GSD would have to be added. In implementing an admissions policy based on an applicant's GSD, as in an admissions policy based on an applicant's ISD, there are two main issues with which to contend. The first issue regards how GSD information is to be obtained. The second respects what percentage of the first year class should be admitted under the GSD policy.

As opposed to the difficulty of obtaining ISD information, GSD information could be more easily obtained due to its public nature. Admissions can reasonably ask applicants for informa-

tion on prior addresses and schools attended.⁹⁰ Census data can provide neighborhood poverty rates, thereby indicating an applicant's neighborhood SES.⁹¹ Moreover, under the new California educational testing regime, socioeconomic data on each high school and elementary school in the state is generated to aid in interpreting test results.⁹² Thus, this data can be used to establish an applicant's school SES. Thus, the accuracy of a GSD statement would still depend upon the honesty of an applicant in reporting his or her residential and academic history.

The question of what percentage of the first year class should be admitted under the GSD program is more difficult than under the ISD program. Although information on the probable effect of an ISD program on racial compositions has been widely publicized, and is touched upon *supra*, the probable effect of a GSD program on racial compositions is far less certain. We can venture a guess that the incorporation of an applicant's school SES and neighborhood SES into a socioeconomic admissions policy would draw the socioeconomic curve down further than merely an applicant's *individual* socioeconomics, and thereby increase the number of minorities admitted. However, this guess can be substantiated only if the following conditions are true: first, minorities generally live in poorer neighborhoods than whites; and second, minorities generally have poorer classmates than whites.⁹³

3. *Critical Remarks*

The greatest drawback to the GSD policy is that it leaves one with the impression that it is merely a semantic manipulation designed solely to increase racial diversity, rather than an admissions policy grounded in straightforward relationships for the purpose of removing socioeconomic barriers to success. Let us examine two quotations from a memorandum in which Professor Sander describes the GSD policy in order to better ascertain how the GSD policy could be perceived as a "manipulation."

"[I]f one compares an African-American family and an Anglo family that have identical. . . SES, the African-American family will, on average, live in a neighborhood with lower SES, and the family's children will, on average, attend schools where the

90. Memorandum from Richard Sander, Professor of Law at the UCLA School of Law (Aug. 2, 1995) (on file with the author).

91. *Id.*

92. *Id.*

93. Professor Sander claims that there is a strong relationship between race, neighborhood SES and school SES. Memorandum from Richard Sander, Professor of Law at the UCLA School of Law (Aug. 2, 1995) (on file with the author).

typical student is from a lower SES background.”⁹⁴ First of all, the African American family and the Anglo family have identical SES’s. Thus, under the ISD policy, discussed *supra*, both the African American family and the Anglo family would be treated equally. Second, the implication in the text quoted above is that, under the GSD policy, the African American family will be favored over the Anglo family with identical SES because the African American family, on average, lives in a neighborhood and attends schools with a lower SES.

“The relationship between neighborhood SES and personal SES is, in other words, strongly mediated by race (or, to be more exact, by the degree of racial segregation experienced by a particular group and the overall gap between that group and the rest of society).”⁹⁵ Thus, the African American family is permitted, under the GSD policy, to artificially lower its SES by grouping itself together with other less fortunate African American families. How does this amount to anything less than a group preference based upon race? Surely, the preference is based upon the fact that the African American family, on average, lives in racially segregated neighborhoods, and the fact that those neighborhoods generally have a lower SES than the African American family’s personal SES. But, insofar as race and lower neighborhood SES go hand in hand, how is this system any different from race-based affirmative action?

C. *Social Experience Diversity*

A social experience diversity admissions policy, like the present system of race-based affirmative action, would have as its end goal the promotion of student body diversity.⁹⁶ However, an

94. *Id.*

95. *Id.*

96. Two quotations from *Bakke*, regarding the importance of diversity in higher education, deserve our attention. First, the president of Princeton University has described some of the benefits derived from a diverse student body: “[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, ‘People do not learn very much when they are surrounded only by the likes of themselves.’” Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 n.48 (1978) (quoting Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUM. WEEKLY 7, 9 (Sept. 26, 1977)). Second, the Supreme Court, in *Sweatt v. Painter*, made a similar point with reference to legal education: “The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of

admissions policy based upon diversity of social experience, unlike one based upon race, would attempt to target directly an applicant's diverse social experience, rather than use race as a proxy of such diversity. "Social experience" refers to a number of factors which mold and direct an individual's character, and includes such things as an applicant's family economic level and educational level, neighborhood economic and educational level, geographic location, immigrant status, work history, second language, culture, and religion.⁹⁷

1. *Policy*

UCLAW would employ one admissions policy that would apply to one hundred percent of the applicant pool. Applicants would be admitted on the basis of academic merit plus degree of social experience diversity ("SED"). This admissions policy would be referred to as UCLAW's SED admissions program.

2. *Practice*

An application for admission to UCLAW would consist of a personal statement, two letters of recommendation, LSAT score, and UGPA. However, the option of indicating one's race would be excluded. Also, a statement addressing an applicant's SED, and a personal interview would have to be added. To implement an admissions policy based upon an applicant's SED, there are three main issues to explore. First, how would an SED admissions policy affect the Admissions bureaucracy. Second, and an issue related to the first, who is to make the decision as to what social experience is more diverse than another. Third, how would SED be quantified.

As a practical matter, an SED admissions policy would require a greater number of admissions officers to operate. As opposed to the present system, which can be implemented fundamentally by a single admissions officer because it relies upon objective criteria, an SED admissions policy would require

views with which the law is concerned." *Id.* at 314 (quoting *Sweatt v. Painter*, 339 U.S. at 634 (1950)).

97. Although religion presents a valid source from which an admissions officer could estimate the diversity of an applicant's social experience, it would have to be excluded from a UCLAW admissions policy due to constitutional problems regarding the separation of church and state. Moreover, the inclusion of religion would be in explicit violation of section three of the Connerly Resolution. See Connerly Resolution, § 3. However, I wish to note that this constitutional barrier is very unfortunate because the airing of religious perspectives on legal issues may be extremely rewarding to law students. Especially when one considers that, in practice, lawyers must deal with clients of various religious backgrounds, and that a client's religion may affect the nature of a legal problem, an introduction to how religion may affect legal issues would be most helpful.

the efforts of many admissions officers due to its subjective nature. Under the present admissions system, the majority of admittees receive a cursory review of their personal statement, their UGPA and LSAT providing the fundamental basis for their admission. However, under an SED admissions policy, admissions officers would have to review an applicant's personal and SED statement with an attention to details that may reflect an applicant's SED. Moreover, the provision of a personal interview for every applicant alone would require an increased number of admissions officers.

To insure that the individual biases of a single admissions officer would not produce a first year class that reflects those biases, a bureaucratic system that decentralizes admissions decisions would have to be created. The arbitrary biases of a single admissions officer would be diluted by the arbitrary biases of other admissions officers. The present Admissions Committee would cease to function merely in an advisory position to the Dean of Admissions, and would become the centerpiece of SED admissions operations.

To review applications and conduct personal interviews, the Admissions Committee could break up into subcommittees, each with the purpose of reviewing applications. Each subcommittee could consist of three admissions officers: one faculty member and two students. Although the students could function mostly as assistants to the faculty member, the students could also cast a vote, regarding the applicant's SED, that would amount to a total of one quarter of an applicant's total SED score. The faculty member's vote would amount to three quarters of the applicant's total SED score.

An applicant's SED score could be scaled from one to five, an applicant with a SED score of one would have the least SED to offer, and an applicant with a five would have the most SED to offer. The scale from one to five would translate as follows: five would indicate a unique applicant, four would indicate rare, three would indicate very interesting, two would indicate interesting, and, one would indicate an ordinary applicant. Each member of the admissions subcommittee would cast their vote after reviewing all the available materials, including the applicant's personal statement, SED statement, and personal interview. Each member's vote would be weighted accordingly, and result in the applicant's SED score. An applicant's SED score would be added to the applicant's predictive index score, and this sum would indicate an applicant's place on the admissions list.⁹⁸

98. The most difficult issue to contend with here is to what degree an applicant's SED score should increase his or her predictive index score. That is, to merely in-

3. *Critical Remarks*

The most damaging criticism of the SED admissions policy is that diversity of social experience can be better achieved through the use of a socioeconomic disadvantage admissions policy, and with less room for abuse of discretion. A socioeconomic disadvantage policy would create a better mix of "social experiences" by selecting for students who are socioeconomically disadvantaged. And, assuming that applicants who are socioeconomically disadvantaged have a different social experience than the majority of upper income admittees, an ISD admissions program would foster a more diverse first year class. The argument is even stronger for a GSD program which takes an applicant's neighborhood and school SES into account. Moreover, an ISD or GSD admissions program would be less subject to abuse of discretion, or at the very least, a public *perception* of abuse of discretion on the part of the admissions officers.

Finally, in considering an applicant's SED, an admissions officer may ask questions, or receive replies that inadvertently reveal an applicant's race. Because the Connerly Resolution specifically bans the use of "race as [a] criteri[on] for admission to the University,"⁹⁹ a question may be raised as to whether these revelations will muddy the policy's supposedly race-less waters. However, if race is not used as a criterion for admission to UCLA, but an applicant's family economic level and educational level, neighborhood economic and educational level, geographic location, immigrant status, work history, second language, and culture are used instead, then the mere disclosure should not injure the integrity of the admissions process. Again, the public perception of the admissions process may be quite different. The public and the U.C. Regents may perceive an SED admissions policy to be little less than an attempt to circumvent the Connerly Resolution and a violation of it. Perhaps, a better political choice would be to avoid the very appearance of impropriety.

crease an applicant's predictive index score by a maximum possible SED score of five would not accomplish the purpose of the SED admissions policy, which is to achieve a first year class with a diversity of social experiences. Increasing an applicant's predictive index score by five points would not achieve the admissions policies goal because, assuming that lower predictive index scores correlate to lower socioeconomic and minority status, and that lower socioeconomic and minority status correlate to greater social experience diversity, five points would not be enough to increase such an applicant's predictive index score to make the admit pool. Perhaps an increase to the applicant's predictive index score of the applicant's SED score multiplied by twenty five, or predictive index score + (SED score x 25). Thus, the maximum possible score would be $1,000 + (5 \times 25)$, or 1,125.

99. Connerly Resolution, § 2-3.

D. Diversity/Disadvantage

The diversity/disadvantage admissions proposal is a hybrid model because it combines an objective admissions policy with a subjective one. The objectivity of an individual socioeconomic disadvantage model would be coupled with the subjectivity of an admissions policy that attempts to produce student body diversity by paying careful attention to materials that may shed light on an applicant's unique qualities, such as a personal interview, personal essay, and letters of recommendation. The diversity/disadvantage model would have the efficiency of an objective admissions policy, yet also have the comprehensiveness of a subjective policy. Thus, the diversity/disadvantage model would combine the best of both quantitative and qualitative worlds.

Moreover, the diversity/disadvantage model would provide a more effective, efficient, and equitable distribution of valuable resources than the present admissions system (i.e. race-based affirmative action). By addressing the underlying concerns of race-based affirmative action, namely, diversity and disadvantage, the diversity/disadvantage model would avoid the over and under inclusiveness of race as a proxy of those concerns. Only those who are truly diverse or truly disadvantaged¹⁰⁰ would receive the benefits of such a policy. Also, the diversity/disadvantage model, would not drive the wedge of racism between beneficiaries and non-beneficiaries because preference would not be based upon the color of an applicant's skin, but on the content of his or her character.

The "disadvantage" aspect of the diversity/disadvantage model is identical to the ISD model discussed in depth *supra*, so I will not discuss it at further length here. However, the "diversity" aspect is different from the SED model discussed *supra*. SED, or "social experience diversity," refers to a number of factors which mold an individual's character, such as an applicant's family economic level and educational level, neighborhood economic and educational level, geographic location, immigrant status, work history, second language, and culture. "Diversity," as intended by the diversity/disadvantage model, includes all of the above mentioned factors except family and neighborhood eco-

100. When I say those who are "truly" diverse or "truly" disadvantaged, I mean those applicants whose applications and records indicate a history of socioeconomic disadvantage, or a history of diversity as indicated by the following factors: (1) cultural background, (2) ability in languages other than English, (3) work experience or career achievements, (4) previous positions of leadership or other special achievements, (5) prior community or public service, (6) unusual life experiences, (7) physical handicap or other disadvantage, (8) career goals, and (9) age. Who I do not mean are those applicants assumed disadvantaged or assumed diverse because of their minority status.

conomic and educational level.¹⁰¹ Family and neighborhood economic and educational level are already addressed by the objective, "disadvantage" portion of the diversity/disadvantage model.

1. *Policy*

UCLAW would employ two admissions policies. First, sixty percent of the first year class would be admitted on the basis of demonstrated academic merit plus diversity. Second, the remaining forty percent would be admitted on the basis of academic merit plus the consideration of an applicant's individual socioeconomic disadvantage plus diversity. The latter admissions policy would be referred to as UCLAW's socioeconomic diversity admissions program. The former admissions policy would be referred to as UCLAW's regular diversity admissions program.

2. *Practice*

An application for admission to UCLAW would consist of a personal statement, ISD statement, diversity statement, two letters of recommendation, LSAT score, and UGPA. The option of indicating one's race would be excluded. Also, a personal interview would be made available to those applicants who survive an initial admissions "cut."

The diversity/disadvantage model incorporates two admission policies previously presented, the present UCLAW regular admissions program and the proposed ISD admissions program. The "diversity" aspect of the diversity/disadvantage model is superimposed on the regular and ISD admissions programs. Because the diversity/disadvantage model is a hybrid admissions model, I will discuss only those elements that have not yet been touched upon. First, how must Admissions' bureaucratic structure change to accommodate the greater subjective review of applications. Second, how would "diversity" be quantified. Third, how many applicants would be granted interviews. Finally, how would interviews be rated.

A major goal of the diversity/disadvantage admissions program is to admit a class of first year students who have a rich blend of diverse experiences and perspectives. Thus, the present admissions practice of designating the top fifteen percent of regular pool applicants as "presumptive admits" would cease. Under the present system, "presumptive admits" are admitted unless they have a glaring problem that bars their admittance. However, this minimal standard of scrutiny fails to reveal an appli-

101. See *supra* text accompanying note 94.

cant's unique qualities. If anything, this practice reinforces applicants' popular conception that their UGPA and LSAT score are the beginning and end of their application's interest to admissions officers. To insure that UCLAW admits a diverse first year class, all applications would receive an in-depth review.

In order to review each and every application for diversity, the present bureaucratic structure would have to be altered. The present system can be implemented fundamentally by the Dean of Admissions due to its reliance upon numerical qualifications, such as UGPA and LSAT score. The new system, however, would require more admissions officers due to its subjective nature. Therefore, to handle the increased workload, the present Admissions Committee would cease to function merely in an advisory capacity, and would become the center of admissions operations concerning diversity.

To review applications for diversity, the Admissions Committee would break up into subcommittees. Each subcommittee would consist of three admissions officers: one faculty member and two students. Although the students would function mainly as assistants, they would also cast a vote regarding the applicant's diversity, which would amount to a total of one quarter of the applicant's total diversity score. The faculty member's vote would amount to three quarters of the applicant's total diversity score.

An applicant's diversity score would derive from nine factors: (1) demonstrated cultural background, (2) ability in languages other than English, (3) work experience or career achievements, (4) previous positions of leadership or other special achievements, (5) prior community or public service, (6) unusual life experiences, (7) physical handicap or other disadvantage, (8) career goals, and (9) age. Each member of the subcommittee would cast their vote only after reviewing all the available materials, including the applicant's personal statement, diversity statement, and letters of recommendation. An applicant would receive one point for each diversity factor the subcommittee finds to be "reasonably substantiated" by the applicant's application materials. Thus, the maximum diversity score an applicant could receive would be nine points.¹⁰²

The top two thousand applicants would be designated "admission candidates," and would be granted a personal interview. According to table seven of Appendix one, the average total number of admittees is one thousand applicants for an average

102. Again, we are faced with the question of how to scale these points. See *supra* text accompanying note 101.

first year class yield of three hundred students.¹⁰³ To insure that the interview process amounts to more than merely a "rubber stamp," the number of applicants interviewed would have to be twice the total number of admits slots. Thus, each interviewee would have a 50/50 chance of admission.

However, because the number of interviewees would far exceed the interviewing capacity of the Admissions Committee, Admissions would have to delegate some of the responsibility to the UCLA Alumni Association. Admissions would assign a UCLA alumnus to as many interviewees as he or she could handle. The alumnus would choose the forum for the interview, and would thereafter submit an interview report to Admissions. Interviews would be scored on a scale from one to nine,¹⁰⁴ and would be added to the candidate's application file. Admissions would then admit the top one thousand interviewees as reflected by their interview reports.

3. *Critical Remarks*

The troublesome aspect of the diversity/disadvantage model is its interview process. One could argue that the model gives too much weight to the arbitrary judgment of one interviewer. Furthermore, one could argue that the judgment of an interviewer could do more harm than good—that a better practice would be to base admission judgments upon objective criteria, rather than one's perceptions which can be easily biased.¹⁰⁵ However, an interviewer's perceptions are extremely valuable insofar as they reflect the experience and judgment of a legal professional. Also, an interview may be the only opportunity that Admissions has to catch a first hand glimpse of the applicant's personality, interests

103. Please note that because the matriculation yield for regular admissions students is 25%, 800 applicants would have to be admitted for 200 slots. Also, because the matriculation yield for diversity admits is 50%, 200 applicants would have to be admitted for 100 slots in the first year class. I have assumed, for the sake of argument, that the matriculation yield for diversity applicants and socioeconomic diversity students would be the same.

104. "0" would indicate that no interview was conducted. "1" would indicate an unrealistic candidate. "3" would indicate a candidate that is probably below average in UCLA competition. "5" would indicate a solid candidate who is competitive in the UCLA pool. "7" would represent an extremely strong candidate, outstanding in many respects. "9" would stand for a truly extraordinary candidate, the "one-in-a-hundred sort." The number "4," "6," and "8" would fall in the continuum between the aforementioned ratings. (Rating system based on that of the Yale Alumni Schools Committee).

105. "Even if you have absolutely no prejudice, you are influenced by your expectations," said Diane Halpern, professor of psychology at Cal State San Bernardino. "A small woman of color doesn't look like a corporate executive. If you look at heads of corporations, they are tall, slender, white males. They are not fat. They are not in a wheelchair. They are not too old. Anything that doesn't conform to the expectation is a misfit." K.C. Cole, *Brain's Use of Shortcuts Can Be a Route to Bias*, L.A. TIMES, May 1, 1995, at A1.

and background. Given that the candidate selected for interviews is already academically qualified, the interview cannot result in the admission of an undeserving candidate.

CONCLUSION

Although the U.C. Regents banned the use of race-based affirmative action, the need for affirmative action in higher education still exists. I have attempted in this Comment to articulate and to survey a set of possible admissions policies which would both satisfy the Connerly Resolution, yet attempt to balance the twin goals of UCLAW's stated mission, namely diversity and academic excellence. Of those admission policies, the Individual Socioeconomic Disadvantage policy and the Diversity/Disadvantage policy appear to be the most promising.

The present levels of racial diversity at UCLA School of Law are almost certain to decline regardless of which admissions policy is adopted. With that in mind, we should not choose an admissions policy merely to attempt to approximate the levels of racial diversity achieved under race-based affirmative action. We should, instead, select an admissions policy that symbolizes a new goal—a redefinition of diversity. The Diversity/Disadvantage policy provides us with such a new vision. By addressing the underlying concerns of race-based affirmative action, namely, diversity and disadvantage, the Diversity/Disadvantage policy avoids the over and under inclusiveness of race as a proxy for those concerns. Consequently, the Diversity/Disadvantage policy would not drive the wedge of race between beneficiaries and non-beneficiaries of the policy.¹⁰⁶ Finally, “diversity” would lose its monochromatic meaning and embrace truly diverse perspectives and backgrounds not limited by race.

EPILOGUE

In the wake of the Regents' mandate to eliminate “race, religion, color, ethnicity or national origin” as criteria for admissions, the Dean formed the Task Force on Admissions. Its charge is to recommend an admissions policy for the UCLA School of Law. The members of the Task Force are: Professors Cruz Reynoso, Al Moore (Co-Chairs), Grace Blumberg, Kris Knaplund, Grant Nelson, and David Sklansky, and law students Marco Firebaugh, Teresa Magno, and Leo Trujillo-Cox. Attached to this memorandum are two admissions proposals prepared by the Task Force. Although there was substantial

106. I understand that in some instances, I have left the reader with many more questions than answers. However, in a period of transition such as this, sometimes the answers are unclear and one must simply wait and see.

support for both of these proposals, the Task Force voted 6-3 in favor of proposal No. 1. . . . [T]he Task Force believes that the Regents prohibition on the use of race and ethnicity as criteria for admission will interfere with the Law School's educational mission. . . . Nevertheless, we must comply with the Regents' directive and the Task Force believes that all of the attached proposals will do so. However, the Task Force believes that none of these proposals is likely to produce a class as racially and ethnically diverse as our current system.¹⁰⁷

A year has passed since the completion of this article, and the crisis and sense of urgency which surrounded its construction has waned. Nevertheless, the debate over affirmative action at UCLA persists, although in perhaps a less volatile, less personal way. The stakes are no longer as high; the future of affirmative action at UCLA School of Law has been decided. Yet, this article may serve as a landmark, a glimpse of the circumstances which surrounded this turning point in the law school's history. Like the creation of the Legal Education Opportunity Program in the era of the civil rights movement of the 1960's, and the formulation of the Diversity program per the Supreme Court's *Bakke* decision of 1978, the present adoption of the Socioeconomic Disadvantage program in response to the U.C. Regents' Connerly Resolution of 1995 will recast the student body. A new face will appear; a different law school will result. Nonetheless, the time may be ripe once again to take affirmative action.

Appendix I

UCLAW SCHOOL OF LAW ADMISSIONS INFORMATION, 1990-1995

Table 1: Average Undergraduate Grade Point Average (UGPA) and LSAT for UCLAW Regular Admitees (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
UGPA	3.66	3.68	3.65	3.64	3.67	3.67
LSAT	44	44	44	167	167	166

107. Memorandum from Admissions Task Force, Final Report on Law School Admissions 1 (Apr. 11, 1996) (on file with the author). Unfortunately, a presentation and critique of UCLAW's new admissions policy is beyond the scope of this article.

Table 2: Average Undergraduate Grade Point Average (UGPA) and LSAT for UCLAW Diversity Admittees (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
UGPA	3.24	3.25	3.32	3.36	3.28	3.37
LSAT	37	38	37	158	158	158

Table 3: Regular Admittees by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	685	748	726*	954	749	821
White	613	650	625	757	585	650
Black	1	0	3	3	3	1
Latino	8	11	14	22	19	18
Asian	63	87	89	171	140	149
Am Indian	0	0	1	1	2	3
Total Minority	72	98	107	197	164	171

* Error in original: the sum total of the racial groups, 625+3+14+89+1, is 732, not 726. Percentages in Tables 1-5 in Appendix II are calculated using the corrected sum, 732.

Table 4: Diversity Admittees by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	266	278	301	265	299	209
White	26	27	49	40	32	21
Black	104	113	110	98	115	81
Latino	89	85	88	83	94	69
Asian	42	46	44	34	46	31
Am Indian	5	7	10	10	12	7
Total Minority	266	251	252	225	267	188

Table 5: Regular Enrollees by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	206	198	160	247	179	193
White	194	177	144	197	139	151
Black	1	0	1	0	0	0
Latino	0	2	2	3	4	2
Asian	11	19	13	47	36	40
Am Indian	0	0	0	0	0	0
Total Minority	12	21	16	50	40	42

Table 6: Diversity Enrollees by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	118	114	134	103	158	79
White	11	10	25	15	18	7
Black	39	31	34	21	47	20
Latino	39	42	45	47	53	27
Asian	27	27	23	18	35	22
Am Indian	2	4	7	2	5	3
Total Minority	107	104	109	88	140	72

Table 7: Total Admittees by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	951	1026	1033	1219	1048	1030
White	639	677	674	797	617	671
Black	105	113	113	101	118	82
Latino	97	96	102	105	113	87
Asian	105	133	133	205	186	180
Am Indian	5	7	11	11	14	10
Total Minority	312	349	359	422	431	359

Table 8: Total Enrollees by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	324	312	294	350	337	272
White	205	187	193	212	157	158
Black	40	31	35	21	47	20
Latino	39	44	47	50	57	29
Asian	38	46	36	65	71	62
Am Indian	2	4	7	2	5	3
Total Minority	119	125	101	138	180	114

Table 9: Applicant Pool by Race (Source: UCLA School of Law Admissions Office)

	1990	1991*	1992	1993	1994	1995
Total	6,281	7,261	7,134	5,226	5,072	4,553
White	4,640	4,986	4,569	3,052	2,826	2,500
Black	438	624	695	487	458	380
Latino	443	599	696	563	653	545
Asian	715	991	1,094	1,051	1,060	1,059
Am Indian	45	61	80	73	75	69
Total Minority	1,641	2,275	2,565	2,174	2,246	2,053

* This may be the height of what Professor Julian Eule terms the "L.A. Law" effect. Interview with Julian Eule, Professor of Law at the UCLA School of Law, in Los Angeles, CA. (Nov. 14, 1995).

APPENDIX II:
*DERIVATIVE UCLAW SCHOOL OF LAW
 ADMISSIONS INFORMATION, 1990-1995*¹⁰⁸

Table 1: Regular Admittees by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	100%	100%	100%	100%	100%	100%
White	89.5	86.9	85.4	79.4	78.1	79.2
Black	0.1	0	0.4	0.3	0.4	0.1
Latino	1.2	1.5	1.9	2.3	2.5	2.2
Asian	9.2	11.6	12.2	17.9	18.7	18.1
Am Indian	0	0	0.1	0.1	0.3	0.4
Total Minority	10.5%	13.1%	14.6%	20.6%	21.9%	20.8%

Table 2: Diversity Admittees by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	100%	100%	100%	100%	100%	100%
White	9.8	9.7	16.3	15.1	10.7	10.0
Black	39.1	40.6	36.6	37.0	38.5	38.8
Latino	33.5	30.6	29.2	31.3	31.4	33
Asian	15.8	16.6	14.6	12.8	15.4	14.8
Am Indian	1.8	2.5	3.3	3.8	4.0	3.5
Total Minority	90.2%	90.3%	83.7%	84.9%	89.3%	90.0%

Table 3: Regular Enrollees by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	100%	100%	100%	100%	100%	100%
White	94.2	89.4	90.0	79.8	77.7	78.2
Black	0.5	0	0.6	0	0	0
Latino	0	1.0	1.3	1.2	2.2	1.1
Asian	5.3	9.6	8.1	19.0	20.1	20.7
Am Indian	0	0	0	0	0	0
Total Minority	5.8%	10.6%	10.0%	20.2%	22.3%	21.8%

Table 4: Diversity Enrollees by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	100%	100%	100%	100%	100%	100%
White	9.3	8.8	18.6	14.6	11.4	8.9
Black	33.1	27.2	25.4	20.4	29.7	25.3
Latino	33.1	36.8	33.6	45.6	33.5	34.2
Asian	22.8	23.7	17.2	17.5	22.2	27.8
Am Indian	1.7	3.5	5.2	1.9	3.2	3.8
Total Minority	90.7%	91.2%	81.4%	85.4%	88.6%	91.1%

108. The margin for error in the calculation of individual racial group percentages is + 0.1%.

Table 5: Total Admittees by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	100%	100%	100%	100%	100%	100%
White	67.2	66.0	65.2	65.4	58.9	65.1
Black	11.0	11.0	10.9	8.3	11.3	8.0
Latino	10.2	9.4	9.9	8.6	10.8	8.4
Asian	11.1	13.0	12.9	16.8	17.7	17.5
Am Indian	0.5	0.6	1.1	0.9	1.3	1.0
Total Minority	32.8%	34.0%	34.8%	34.6%	41.1%	34.9%

Table 6: Total Enrollees by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	100%	100%	100%	100%	100%	100%
White	63.3	60.0	65.6	60.6	46.6	58.1
Black	12.3	9.9	11.9	6.0	13.9	7.4
Latino	12.0	14.1	16.0	14.3	16.9	10.6
Asian	11.8	14.7	12.2	18.6	21.1	22.8
Am Indian	0.6	1.3	2.3	0.5	1.5	1.1
Total Minority	36.7%	40%	34.4%	39.4%	53.4%	41.9%

Table 7: Applicant Pool by Race (Source: UCLA School of Law Admissions Office)

	1990	1991	1992	1993	1994	1995
Total	100%	100%	100%	100%	100%	100%
White	73.9	68.7	64.0	58.4	55.7	54.9
Black	7.0	8.6	9.8	9.3	9.0	8.3
Latino	7.0	8.2	9.8	10.8	12.9	12.0
Asian	11.4	13.7	15.3	20.1	20.9	23.3
Am Indian	0.7	0.8	1.1	1.4	1.5	1.5
Total Minority	26.1%	31.3%	36%	41.6%	44.3%	45.1%

APPENDIX III:

*U.C. REGENTS: WHO THEY ARE,
AND HOW THEY VOTED*¹⁰⁹

- William T. Bagley, 68, a San Francisco attorney and former member of the California Legislature. Appointed by Gov. George Dukemejian in 1989. Abstained from vote.
- Roy T. Brophy, 73, a Sacramento developer who has served on governing boards at all levels of California's higher education system. Appointed by Gov. George Dukemejian in 1986. Voted to keep race-based admissions.
- Clair W. Burgener, 75, served in Congress from 1973 to 1983 and the California Senate and Assembly before that. Appointed by Gov. George Dukemejian in 1988. Voted to repeal race-based admissions.

109. *U.C. Regents: Who They Are, and How They Voted*, ASSOC. PRESS, July 22, 1995.

- Glenn Campbell, 71, an economist and director emeritus of the Hoover Institution. Appointed by Gov. Ronald Reagan in 1968. Voted to repeal race-based admissions.
- Frank W. Clark, Jr., 78, a Los Angeles attorney who earned his undergraduate degree at UCLA. Appointed by Gov. Jerry Brown in 1980. Voted to repeal race-based admissions.
- Ward Connerly, 55, a Sacramento land use consultant who was chief deputy director of the state Department of Housing and Community Development from 1971 to 1973. Appointed by Gov. Wilson in 1993. Voted to repeal race-based admissions.
- John G. Davies, 60, a San Diego attorney and Pete Wilson's judicial appointments secretary. Graduate of Boalt Hall, U.C. Berkeley's School of Law. Appointed by Wilson in 1992. Voted to repeal race-based admissions.
- Tirso del Junco, M.D., 70, a Los Angeles surgeon who chaired the California Republican Party in 1981 and 1982. Appointed by Dukemejian in 1985. Voted to repeal race-based admissions.
- Alice J. Gonzales, 67, former director of the state Employment Development Department who develops and runs social service programs. Appointed by Dukemejian in 1990. Voted to repeal race-based admissions.
- S. Sue Johnson, 54, a longtime civic and volunteer leader in Riverside. U.C. Riverside graduate. Appointed by Dukemejian in 1990. Voted to repeal race-based admissions.
- Meredith J. Khachigian, 52, a volunteer on educational matters. U.C. Santa Barbara graduate. Appointed by Dukemejian in 1987. Voted to repeal race-based admissions.
- Leo S. Kolligian, 79, a Fresno attorney who earned his law degree from Boalt Hall. Appointed by Dukemejian in 1985. Voted to repeal race-based admissions.
- Howard H. Leach, 65, an agribusiness businessman. Appointed by Dukemejian in 1990. Voted to repeal race-based admissions.
- David S. Lee, 58, chairman of the Board of Cortelco Systems Holding Corp. in Milpitas. Appointed by Wilson in 1994. Voted to repeal race-based admissions.
- Velma Montoya, 57, a commissioner on the U.S. Occupational Safety and Health Review Commission. Appointed by Wilson in 1994. Voted to keep race-based admissions.
- S. Stephen Nakashima, 73, a San Jose attorney who earned his law degree at Boalt Hall. Appointed by Dukemejian in 1989. Voted to repeal race-based admissions.
- Tom Ayles, 44, former secretary of the California Business, Transportation and Housing Agency. Appointed by Wilson in 1994.

- Dean A. Watkins, 74, co-founder and chairman of the board of the Watkins-Johnson Co. in Palo Alto. Appointed by Reagan in 1969. Voted to repeal race-based admissions.
- Edward P. Gomez, 28, a student regent, is a graduate student in history at U.C. Riverside. Voted to retain race-based admissions.
- Ralph C. Carmona, 44, an ex-officio alumni regent, is director of public affairs and economic development for the Sacramento Municipal Utility District. Earned his masters and doctorate degrees from UC Santa Barbara. Appointed by the alumni association in 1994. Voted to keep race-based admissions.
- Judith Williack Levin, 53, a former elementary school teacher who has worked with the alumni association for 15 years. Appointed by the alumni association in 1994. Voted to keep race-based admissions.
- Pat Kessler, a non-voting member, was a founding director of Lamorinda National Bank and a graduate of U.C. Berkeley. Appointed by the alumni association in 1995.
- Richard Russell, a non-voting member, a Pasadena attorney and a graduate of U.C. Berkeley. Appointed by the alumni association in 1995.
- Governor Pete Wilson, an ex officio regent. Voted to repeal race-based admissions.
- Lt. Gov. Gray Davis, 54, an ex officio regent. Voted to keep race-based admissions.
- Speaker of the Assembly Doris Allen, 59, an ex officio regent. Voted to keep race-based admissions.
- U.C. President Jack W. Peltason, 71, an ex officio regent. Voted to keep race-based admissions.
- State Superintendent of Public Instruction Delaine Eastin, an ex officio regent. Voted to keep race-based admissions.
- Daniel Simmons, a non-voting faculty representative, is chairman of the U.C. Academic Senate.
- Arnold Leiman, a non-voting faculty representative, is vice-chairman of the U.C. Academic Senate.