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DIVERSITY AND MERITOCRACY IN LEGAL EDUCATION: A CRITICAL EVALUATION OF LINDA F. WIGHTMAN'S "THE THREAT TO DIVERSITY IN LEGAL EDUCATION"

*Stephan Thernstrom**

The debate over racial preferences in admissions to higher education has grown more heated than ever, now that a vote by the Regents of the University of California and the passage of Proposition 209 have compelled the university to admit students on a color-blind basis.[1] Those who have drawn far-reaching policy conclusions from the California numbers have neglected the elemental point that a one year experiment in one state cannot yield definitive results. Thus it is fortunate that the results of a massive investigation of the impact of affirmative action in law schools across the nation have recently become available. Linda F. Wightman's article, "The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions," published in the April, 1997 issue of the *New York University Law Review*, has received considerable publicity. It includes remarkably rich and compelling evidence about the effects of racially preferential policies in law school admissions.[2] Unfortunately, Professor Wightman does not herself draw the most

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1. For an assessment of the effects on graduate admissions, see Stephan Thernstrom, *Farewell to Preferences?*, 130 The Public Interest 34 (Winter 1998). For the undergraduate admissions picture see Stephen Thernstrom and Abigail Thernstrom, *The Consequences of Colorblindness*, Wall Street Journal A18 (Apr. 7, 1998).

2. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. Rev. 1 (1997).

important conclusions that her own data support. Indeed, her interpretations run directly counter to her own evidence at many points. A thorough critical evaluation of her analysis will help to clarify the issues in a vital current dispute about legal education.

For a highly technical piece appearing in a law review, Professor Wightman's study attracted a surprising amount of national attention, doubtless because of its apparent relevance to the current heated debate over racial preferences in higher education. Her study purported to show both that the number of minority law school students would drop drastically in the absence of racial preferences in admissions, and that students admitted under affirmative action double standards were nonetheless just as successful as anyone else after they began their legal studies. Their inferior academic qualifications at the time of admission did not hinder their progress through law school or their entry into the profession.

These conclusions were welcome news to many writers, particularly the highly optimistic findings about the alleged academic success of students admitted as a result of affirmative action preferences. According to *Time*, the study established that African American and other minority students admitted to law schools due to preferential policies "had graduation and bar-exam pass rates similar to whites.'"[3] *Newsweek* columnist Ellis Cose declared that Professor Wightman had found "no real difference . . . between those minorities who would have been admitted without affirmative action and those admitted because of it."[4] NPR's "All Things Considered" featured an interview with the author that stressed the same conclusions.[5] Professor

3. S.C. Gwynne, *Back to the Future; Forced to Scuttle Affirmative Action, Law Schools See Minority Enrollment Plummet to 1963 Levels*, Time 48 (June 2, 1997). Time also claimed that Wightman's study had shown that the "payoff" from "recruiting minorities" was great, because they "had an incalculable value to the black community, as both professionals and role models." In fact the study included no data that had any bearing whatever on this alleged "payoff."

4. Ellis Cose, *The Color Bind*, Newsweek 58, 60 (May 12, 1997). In the same vein, Carl Rowan did a whole column on the Wightman study, contending that her work proved that law students "without high grades or test scores who are admitted on the basis of other criteria [that is, their race] perform almost precisely as well as those with the high numbers"; Carl Rowan, *NAACP Needs Help Getting Out the Right Message*, Chicago Sun-Times E18 (July 19, 1997).

5. All Things Considered (NPR radio braodcast, May 19, 1997). Professor Wightman said that although minority students were "being admitted with lower credentials, they were passing and graduating from law school at the same rates." For another example of the uncritical use of the Wightman study, see Kenneth R. Weiss, *UC Law Schools' New Rules Cost Minorities Spots*, Los Angeles Times A1 (May 15, 1997).

Wightman, the public was led to believe, had established that affirmative action admissions policies in law schools had no significant costs. Although the beneficiaries of racial and ethnic preferences were admitted with distinctly weaker academic qualifications than other students, their initial handicaps apparently vanished in the course of their graduate education.

Only one criticism of the Wightman study has appeared in print thus far, a brief piece by Gail Heriot in the *Weekly Standard*.[6] An article that has attracted so much attention but so little critical evaluation clearly calls for more detailed scrutiny.

The research for Professor Wightman's article was conducted while she was Vice President for Testing, Operations, and Research for the Law School Admissions Council. The resources of the council allowed her to compile a formidable data base. She had information about more than 90,000 applicants to ABA-approved law schools for the academic year 1990-1991. A second sample, a subset of the first, consisted of some 27,000 of those applicants who actually enrolled in law school in the Fall of 1991. They represented about 70 percent of the entire entering class that year. These students were followed over time, making it possible to determine graduation rates and pass rates on the bar exams. This treasure trove of information could have done a great deal to advance our understanding of the effects of preferential policies. Unfortunately, the author's analysis is badly flawed. Much of the evidence she gathered contradicts the conclusions she draws from it, and key questions that could and should have been answered were never asked.

I

Professor Wightman's first set of findings concerns who was admitted to law school in the 1990-91 academic year. The central question here is how different the composition of the class of accepted applicants would have been if all admissions decisions had been made on the basis of college grades and LSAT scores alone. Some 6.8 percent of all the students who were accepted to law school during the 1990-91 admissions cycle were African Americans.[7] How much lower would the figure have been had race not been a factor in admissions decisions?

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6. Gail Heriot, *The Truth About Preferences*, The Weekly Standard 13 (July 21, 1997).

7. Wightman, 72 N.Y.U. L. Rev. at 16 tbl.2 (cited in note 2). I concentrate largely, though not exclusively, on black students in this essay, because preferential poli-

The author employs two different statistical models to estimate the answer. If admissions had been determined by GPA and LSATs alone, she calculates that only *one fifth* of the 3,435 black students who were accepted at a school to which they applied would have won a place at that school.[8] Four out of five—exactly 80 percent—had grades and test scores that would have put them in the reject pile if they had been white, according to this estimate; only one in five was admissible on straight academic grounds. The proportion who were admissible on the basis of grades and scores alone was lower still among the students who actually enrolled in law school in the Fall of 1991—only 8.9 percent![9]

This estimate does not answer the question of how many would have been able to secure admission to *some* law school. If racial preferences in admission were to end throughout the land, it is possible that black students would then apply to less selective and less prestigious schools that they could afford to spurn when their race gave them a big edge in the competition.[10] Professor Wightman employs a second model to estimate how much shifting towards less selective schools would have taken place in the absence of preferences. The conclusion she draws from this model is that overall black enrollment in law school would have dropped not by 80 percent but by at least half—that instead of being 6.8 percent of the pool of accepted students, African Americans would have been just 3.4 percent.[11]

Furthermore, Professor Wightman argues plausibly, this estimated 50 percent drop errs on the low side, because many of the lower-echelon law schools we might expect African Ameri-

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cies were originally adopted to facilitate their upward mobility, and because the strongest arguments that can be made for such policies continue to involve factors unique to the African American experience—slavery and Jim Crow. Remove blacks from the equation and it is hard to imagine that the United States would ever have adopted preferential policies in the first place.

8. Id.

9. Of the 1,847 black students who entered law school in the Fall of 1991, according to Wightman's Table 7, only 164 were admissible on straight academic grounds—8.9 percent. Why such a difference between those admitted and those who enrolled in the proportion with strong academic qualifications? It is curious that Professor Wightman did not notice this differential selectivity and attempt to provide some explanation. Disproportionate numbers of the African American students with the best academic qualifications for legal study went through the trouble and expense of applying to law school and were accepted, but for some reason they failed to attend. This is a bit of a puzzle.

10. This argument is advanced in Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. Tol. L. Rev. 377.

11. Wightman, 72 N.Y.U. L. Rev. at 22 tbl.5 (cited in note 2).

cans to attend in the absence of preferences are relatively expensive private institutions that many could not afford to attend.

II

The author glosses over a serious methodological problem with both models. Her calculations equate color-blind admissions with admissions strictly by the numbers—by GPAs and LSAT scores. But her own figures reveal that grades and test scores are far from the only determinant of admissions, even for whites. Almost 11 percent of the whites whose grades and test scores should have been good enough to have won them a spot in a law school class, it turns out, did not in fact receive an acceptance letter.[12] Something else in their records apparently offset their academic strengths. Conversely, fully 15 percent of the whites who were admitted to law school that year did not have strong enough academic records to be accepted on the basis of their grades and test scores alone.[13]

Considerations other than the two readily quantifiable measures of academic achievement thus often influence law school admissions decisions. For example, state institutions typically give preferences to applicants who are residents. Many schools give a plus for applicants from disadvantaged family backgrounds, a practice that a ban on racial and ethnic preferences would not call into question. Some candidates have letters of reference that attest to their character and personality in glowing terms; others have only letters that praise with faint damns at best. A record of unusual community service or having a parent who is an alumnus of the school can make a difference.

Professor Wightman concedes that her models are quite imperfect as predictors of the admission of whites.[14] But the only conclusion she draws from this limitation is that white applicants who are turned down by law schools despite having good grades and scores may be wrong to blame affirmative action preferences given to minorities; it is more probable that they lost out to whites with lower GPAs and LSATs.[15]

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12. Id. at 16 tbl.2.
13. Id.
14. Id. at 17.
15. Wightman does not work out the numbers to establish this point, but she is right. It can be calculated from her Table 2 that an estimated total of 6,321 whites were admitted to law school despite their unimpressive grades and test scores; 2,748 blacks

This is an interesting point, but there is a more important one that the author fails to notice. Her estimates of precipitous drops in black enrollment under color-blind admissions policies mistakenly assume that eliminating race as a factor amounts to eliminating all other factors except grades and LSAT scores. Surely the additional factors that were responsible for the admission of 15 percent of the successful whites—family economic background, for instance—would also have brought about the admission of *some* African Americans who would not have made it in on the basis of the two objective measures alone. After grades and scores have been taken into account, that is, all the remaining residual influences that explain admissions decisions cannot be classified as simply "race." That is what Professor Wightman does for the non-whites, though obviously not the whites, in her sample. The estimates of black enrollments under color-blind policies that can be derived from both of Professor Wightman's models thus have a downward bias. They are not true estimates of the effects of color-blind admissions—only of admissions based purely upon grades and LSATs.

Even with ample allowance for this methodological flaw, though, Professor Wightman is doubtless correct that strong racial preferences were given in the law school admissions process in the 1990-91 application cycle, and that in their absence the number of blacks admitted would have fallen very substantially.

III

Professor Wightman's data also reveal two interesting additional points about the admissions process, neither of which is accented sufficiently in her analysis. First, it is apparent that African American applicants to law school receive much heavier preferences than members of any other racial or ethnic minority. Table 1 compares the number of members of various groups who were admitted to a law school during the 1990-1991 admissions cycle with the number who would have been accepted if grade point averages and LSAT scores had been the only crite-

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and 2,313 members of other minority groups had similarly less-than-overwhelming academic qualifications and were nonetheless admitted. Whites who were admitted on the basis of factors other than grades and scores thus outnumbered the minority students admitted with the aid of affirmative action. On the other hand, it is highly likely the whites who were admitted despite their grades and LSAT scores received much weaker preferences than minority students, and particularly African Americans. Wightman does not provide any information on this point, but this conclusion can be drawn from the evidence about their bar exam pass rates provided in Table 4 below.

ria that were used. Nearly five times as many black applicants were accepted as the simple quantitative academic measures would warrant. Being black was a much greater plus than being Puerto Rican (3.10) or Mexican American (2.42), or belonging to any other racial or ethnic group.

TABLE 1

The Estimated Strength of Racial Preferences in Admissions to Law Schools: Ratio of Numbers Admitted to Numbers on the Basis of GPAs and LSAT Scores Alone

American Indian	1.97
African American	4.83
Asian American	1.55
Mexican American	2.42
Puerto Rican	3.10
Other Hispanic	1.93

[Calculated from Wightman, Table 5.]

Second, the better the law school, the greater the boost that it gave to African American applicants, a pattern that did not hold for other groups. Professor Wightman arranged the nation's law schools into six clusters, in descending order of selectivity and prestige, and estimated that in the highest cluster only *24* of the 6,453 students admitted were African Americans who merited a place on the basis of their quantifiable academic credentials.[16] In fact, these top-ranked schools admitted 420 black students, a stunning *17.5 times* as many as would have been the case if race (or other unmeasured extra-academic variables) had not influenced the admissions process (Table 2). The 17.5 ratio was nearly quadruple the 4.83 figure for African Americans in law schools overall. For the schools in the top three tiers combined, the black ratio was 10.86. By contrast, down in the very unselective and undistinguished fifth-tier law schools the ratio for blacks was a mere 3.15. In the sixth tier, made up of schools with primarily minority student bodies, the ratio was 1.96.

16. Wightman, 72 N.Y.U. L. Rev. at 30 tbl.6 (cited in note 2). An analysis of students taking the California bar exam for the first time in 1984 similarly found that 60.4 percent

For other groups, racial preferences were not only far weaker in general; they did not increase systematically with increasing selectivity and prestige of the school. There was a modest tendency for Mexican Americans to be given stronger preferences in schools in the three top tiers, but the prestige gradient was much less sharp than for blacks, and for other groups there was none. The admissions committees of the most prestigious law schools pushed for the admission of African American students who did not meet normal requirements with notably greater zeal than those in less eminent institutions.

TABLE 2

Variations in Levels of Racial Preference by School Prestige: Ratio of Numbers Admitted to Numbers Academically Admissible, by Race and Ethnicity

	lst-tier	*2nd-tier*	*3rd-tier*	*4th-tier*	*5th-tier*
Am. Indian	3.22	2.00	3.86	1.53	1.47
African Am.	17.50	7.02	13.95	5.65	3.15
Asian Am.	1.31	1.50	2.01	1.71	1.53
Mexican Am.	3.44	3.00	4.09	1.81	1.82
Puerto Rican	5.30	2.54	5.20	2.97	—
Other Hisp.	1.76	1.64	3.13	2.03	1.80

[Calculated from Wightman, Table 6. No percentages are given when the base was fewer than 20 cases. Data for Wightman's sixth cluster, predominantly black law schools, are not included here.]

Presumably black applicants to law schools received preferences that were so much greater than those for other groups because affirmative action policies were initially adopted out of concern over the status of blacks; although then extended to other groups, such policies were driven by a determination to

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of African Americans and 50.0 percent of Latinos but only 30.6 percent of whites had attended law schools that were highly selective. See Stephen P. Klein, *Disparities in Bar Exam Passing Rates Among Racial/Ethnic Groups: Their Size, Source, and Implications*, 16 Thurgood Marshall L. Rev. 517, 521 (1991).

expand opportunities for African Americans. It is likely that preferences for African Americans were so much stronger in the elite law schools than in more run-of-the-mill institutions because admissions to the former were so fiercely competitive that hardly any black students at all would have been admitted to them if admissions had been strictly color-blind. If Wightman's estimates are correct, admitting students by grades and test scores alone would have meant that the top-tier schools would have accepted just 24 African Americans, a mere 0.44 percent of the total. Instead, blacks received 6.51 percent of the admissions offers made by those institutions [17]

Once law schools in the top cluster had decided to give 6.5 percent rather than 0.44 percent of their places to black applicants, the consequences rippled through the system. The top schools had the prestige and financial resources to attract students whose academic qualifications should have assigned them second- or third-tier institutions. And schools a notch or two below the top, in turn, felt that it would be intolerable to have hardly any African American students at all, and thus were forced to accept black applicants whose grades and scores suited them for still less selective and competitive places. In order to secure more than tiny representation of blacks at the very top, African American students were mismatched to schools at every level of the system.

IV

This part of Professor Wightman's analysis, it should be underscored, punctures a myth that has long been propagated by advocates of preferential admissions to law schools—the myth that affirmative action policies do not give real preferences to minority applicants. Perhaps out of the need to make it appear that they were in compliance with *Bakke*, law school officials have claimed that they were using race to do little more than break ties between candidates who were difficult to distinguish on other grounds, gently placing their finger on scales that were otherwise pretty evenly balanced. At most, race was a bit of a "plus." Dean Herma Hill Kay of Boalt Hall was asked on the McNeil-Lehrer Newshour in April 1995 why there was "a widespread perception that the minorities who are admitted with those special considerations are the result of standards being

17. Id.

lowered?" Dean Kay answered, "Well, I don't think that it applies to the universe that I know best, which is the law school." There was no lowering of standards, she maintained. "When you have to choose between two equally qualified persons," it was appropriate to pick the "person of color" in order to "do something about the really fundamental problem of racial prejudice in this society."[18]

Such references to "equally qualified" candidates conveyed the impression that the minority students who were being admitted to the most prestigious and selective law schools as a result of affirmative action had exceptional academic records, but could only boast of 3.75 rather than 3.78 grade averages, perhaps, and LSAT scores in the 94th rather than the 96th percentile. Thus a typical journalistic description of the University of Texas Law School affirmative action program that was struck down by the Fifth Circuit in *Hopwood* asserts that it merely brought in minority applicants who had "slightly lower test scores than those of white students."[19] Obviously it was stupid and mean-spirited to reduce the diversity of the student body in exchange for "slightly" higher test scores.

In 1991, Georgetown University law student Timothy McGuire attempted to discover if the preferences given to his minority classmates were really just a matter of "slightly lower test scores." McGuire's part-time job at the school had given him access to student records, and he reported that African American students at Georgetown had dramatically lower GPAs and LSAT scores than their peers. Race was not just one of many possible "plus" factors, McGuire maintained; it was the *only* factor that could explain the admission of most black students. Defenders of the school's policy complained that McGuire's charge was based on "incomplete and distorted information," and that he was lending support to "the long-standing and intellectually dishonest myth" that black students were "less qualified than their white counterparts to compete in school."[20]

McGuire was in no position to conduct a thorough and systematic study of the matter, of course, and his complaint was

18. *McNeill-Lehrer Newshour* (PBS television broadcast, Apr. 24, 1995).

19. Sue Anne Presley, *Texas Campus Attracts Fewer Minorities*, Washington Post A1 (Aug. 28, 1997).

20. Anthony T. Pierre, Leslie M. Turner, and Steven M. Hilton, *Degrees of Success*, Washington Post A31 (May 8, 1991).

easily brushed aside. However, none of those who claimed that McGuire's information was "incomplete and distorted" saw fit to release complete and undistorted data that might have refuted his charges. If he had been all wrong, it should have been easy to demonstrate it. The magnitude of the preferences being given to minority applicants to law schools remained a closely guarded secret.

Whatever the facts might have been at Georgetown, McGuire had aptly characterized what was happening at the University of Texas Law School at about the same time. The current dean of the school has asserted that before *Hopwood*[21] the school's affirmative action policies were "strikingly successful." Having had the latitude to look "beyond the numbers," he claimed, had enabled the school to recruit students who brought "intellectual depth" to its educational program.[22] In the late 1980s, officials at the Austin law school were using the same rhetoric in public, claiming that its strenuous search for a "diverse" student body had not lowered academic standards at all. UT students were all "qualified." Thanks to documents that became public as a result of discovery in the *Hopwood* litigation, we now know that at the same time these administrators were saying something entirely different in confidential internal correspondence. According to the associate dean, the school had not been able to enroll "substantial numbers of black students" merely by taking in many with "slightly lower test scores."[23] It had done so only by judging them by "radically different admissions standards." White students at UT, according to this candid letter, were "overwhelmingly drawn from the very top of the national pool"; to admit more than a handful of African Americans, the school had been forced to reach down "well into the bottom half of the national pool." As we shall see further below, these students had very severe academic difficulties, and no one privately maintained that they somehow added "intellectual depth" that would have been otherwise lacking.

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21. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

22. M. Michael Sharlot and Herma Hill Kay, *Nation's Lawyers Should Reflect Our Diverse Society*, Houston Chronicle A25 (Sept. 3, 1997).

23. Draft of a letter from Dean Mark Yudof to Clara Meek, written by Associate Dean Guy Wellborn, (May 18, 1988) (on file with the author) ("Wellborn draft"). The associate dean was much more candid than his boss. Dean Yudof made a great many changes in the draft, all of them designed to obscure the painful truths set forth in the draft version.

Professor Wightman's analysis of law school applications for the 1991 entering class reveals that the University of Texas Law School was not in the least unusual in applying "radically different admissions standards" to minority applicants. The college grade point averages of the black students in her sample were "nearly one standard deviation below those of the white students" and their LSAT scores averaged "more than one-and-a-half standard deviations below."[24] These are enormous differences. Someone who scores one standard deviation below the mean is at the 16th percentile; one-and-a-half standard deviations below puts that person well into the bottom decile.

The debate over whether racial preferences in law school admissions entail real and very large differences in levels of academic qualification should be declared over. Such preferences may or may not be justifiable. But we cannot have an honest discussion of that question until it is candidly admitted that the preferences will have to be very large in order to obtain the racial mix in law school student bodies that proponents of "diversity" wish to see. There no longer is any excuse for an informed commentator to claim that the dispute is over accepting students with "slightly lower test scores." Professor Wightman's study demonstrates that the desire to apply meritocratic admissions standards and the objective of having a racially balanced law school class are sharply at odds. It is time to abandon the pretense that they are not.

V

The abolition of racial preferences in admissions to law school in Texas and California has been accompanied by sharp declines in the admissions of African American, American Indian, and Hispanic students. The decline was especially steep for black students, because they had received much heavier preferences in the past, and especially so at elite institutions like Boalt Hall, UCLA, and the University of Texas Law School.[25]

Some proponents of preferences, including the President of the United States, professed great "shock" at these declines, a deeply disingenuous response on the part of anyone who was

24. Wightman, 72 N.Y.U. L. Rev. at 36 (cited in note 2).

25. Thernstrom, 130 The Public Interest at 36-45 (cited in note 1). On the other hand, the media greatly exaggerated the drop. Minority admissions to medical school fell much less. Asian-Americans were the prime beneficiaries of color-blind admissions at the University of California.

remotely familiar with the facts.[26] Of course the abandonment of racial preferences in admissions altered the racial mix of law school student bodies. When the Ivy League colleges dropped their Jewish quotas after World War II, the number of Jewish students at such schools increased dramatically, and the number of non-Jews decreased correspondingly.[27] How could we expect the racial and ethnic proportions of students selected under a color-blind admissions system to match those from a time when admissions decisions were explicitly governed by a desire to maximize enrollments by members of certain racial or ethnic minority groups? The whole point of employing racial preferences in admissions is to change the composition of the student body—to bring more members of particular favored groups into the institution. When the preferences are abandoned, the numbers of such students who are accepted will inevitably fall, unless other countervailing influences operate. The magnitude of the drop in minority acceptances will be a good index of the magnitude of preferences that had been given in the past.

It cannot be assumed, though, that such a decline is an unmixed calamity. It is worth paying the price of a smaller minority presence in our law schools, critics of preferences argue, if restricting admission to those who meet normal standards eliminates or sharply narrows the racial gap in student performance in law school courses and on the bar examinations. Suspending meritocratic standards for some groups, they point out, can have highly negative consequences for the supposed beneficiaries of preferences. Students who are mismatched to an institution tend to end up at the bottom of the class, often drop out, and are much less likely to pass the bar exam. This hardly contributes to their self-esteem, nor does it impress other students with their intellectual capability. Indeed, if you wanted to convince whites that their race was intellectually superior, putting them into

26. President Clinton, Remarks to the National Association of Black Journalists, (July 22, 1997). As Stuart Taylor has recently observed, "[t]he untold story of President Clinton's approach to the issue of race is that he has helped put even the most benign forms of affirmative action at risk . . . by pandering so irresponsibly to proponents of unrestrained racial preferences."; Stuart Taylor, Jr., *Tough Love for Affirmative Action*, Legal Times 25 (Aug. 4, 1997). Clinton's comment to the National Association of Black Journalists that he was puzzled why "the people who promoted" Prop 209 "think it's a good thing to have a segregated set of professional schools" is a prime example of such pandering.

27. On the history of Jewish quotas, see Marcia Graham Synott, *The Half-Opened Door: Discrimination and Admissions at Harvard, Yale, and Princeton, 1900-1970* (Greenwood Press, 1979).

competition with students whose academic preparation is far weaker than theirs seems just the recipe.[28]

That these possible drawbacks to racially preferential admissions at selective institutions are not merely speculative may be seen from another glimpse behind the scenes at the University of Texas Law School. In the confidential 1988 draft letter quoted above, the associate dean of the school said that the effect of using "radically different admissions standards" had been that "few of our Black students have been able to finish above the bottom quarter or third of the class in terms of law school grades."[29] In addition, "approximately" 90 percent of UT's "non-minority students" passed the bar at their first try, but the figure for blacks was "consistently under 50 percent." "Even more seriously," he continued. "half of our minority graduates who fail the exam fail again upon retaking."[30] It "is not particularly desirable" to bring minority students to Austin for three years, the dean warned, "if they are likely to suffer repeated bar examination failures when they gradate." "Not particularly desirable" seems a striking understatement. It suggests that some UT officials embraced the goal of "diversity" with such enthusiasm that they were blind to the welfare of the African American students they were bringing into a competition for which they were ill-prepared.

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28. The minority mismatch argument, and indeed virtually all of the major arguments that have been advanced against preferential admissions in higher education were set forth a quarter century ago in Thomas Sowell's prescient *Black Education: Myths and Tragedies* (David McKay Co., 1972). See also Sowell's subsequent papers collected in his *Education: Assumptions vs. History: Collected Papers* (Hoover Institution Press, 1986). For a critique focused mainly on admissions at the college level, see Stephan Thernstrom and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* 386-422 (Simon and Schuster, 1997). There has been little empirical work on the issue, perhaps because institutions committed to preferential policies have not been eager to make the necessary data available to researchers. For conflicting studies of the issue, see Linda Datcher Loury and David Garman, *College Selectivity and Earnings*, 13 J. Labor Econ., 289, 303-06 (1995), and the chapter by Thomas J. Kane in a forthcoming book on the racial gap in education edited by Christopher Jencks.

29. Wellborn draft (cited in note 23).

30. Id. When University of Texas Dean Mark Yudof was questioned about the large racial difference in bar passage during the *Hopwood* litigation, he conceded that the gap was huge, and that the minority failure rate continued to be very high even on the second try. He asserted that "they still can take it a third time." But when he was pressed for evidence about what typically happened on the third try, he confessed that he did not know "what the final bottom-line percentage" success rate for such students was. Deposition of Mark Yudof 207-09 (Mar. 11, 1994) (on file with the author) ("Yudof deposition"). If the people who ran the University of Texas Law School truly did not know how many of their minority graduates never got past the bar exams and were kept out of the profession they spent three years training for, their amazing lack of curiosity suggests a desperate eagerness to remain blind to uncomfortable facts.

Even when viewed from the narrow perspective of the school's self-interest, this had serious drawbacks. The high bar failure rates of preferentially admitted students, the associate dean said, were "an embarrassment that does real damage to our reputation." The overall bar exam pass rate at the flagship law school in one of the nation's greatest state university systems, he complained, was lower than it was at Baylor, Southern Methodist University, and even lowly Texas Tech. Why? Because "Baylor, Texas Tech, and SMU have few minority students" to pull down the school's average. The "embarrassment" they felt was all the more painful because UT administrators committed to affirmative action could hardly make that explanation public; it could not be reconciled with their flat denial that they were using racial double standards in admissions.[31]

VI

Professor Wightman's study, we have seen, establishes that the University of Texas Law School was quite typical of the nation's law schools in applying "radically different admissions standards" to minority candidates. Was it also typical in the sense that preferentially-admitted minority students in other law schools had the difficulties described in the preceding two paragraphs? Professor Wightman maintains that the answer is no. According to her, those members of her sample who were admitted to law school as a result of preferential policies performed about as well as their peers. The abstract of her article prepared by the editors of the *New York University Law Review* declares that "Professor Wightman found no significant differences in the graduation rates and bar passage rates between those minority students who would have been accepted to law schools [without preferences] and those would not." Adopting a

31. Yudoff deposition at 207-09 (cited in note 30). In an effort to deal with the same "embarrassment" a few years later, another associate dean proposed to publish "quantitative outcome measures" that could be used to demonstrate the excellence of the University of Texas Law School. Under the category "measures of student performance," he proposed to include bar examination pass rates broken down by race, so that the public would know that the white students trained at the school were doing just fine on the exams, and that the only problem was the performance of minorities in the school. This was only a year after the Timothy McGuire controversy had stirred up at Georgetown, and Dean Yudof evidently thought that enduring the continuing "embarrassment" of ranking behind Baylor, SMU, and Texas Tech on this count was preferable to giving ammunition to critics of affirmative action. Where the words "by race" appeared on the memo under the heading "bar pass rate," Dean Yudof circled them and scrawled a very large "No!" Memorandum from Associate Dean Henry Hu to Christian Smith (Apr. 1992) (on file with the author).

color-blind admissions policy would thus have denied a legal education "to many minority applicants who were fully capable of the rigors of legal education and of entering the legal profession."

If these contentions could be sustained, they would have vital implications for the current national debate. In fact, though, the Wightman study provides little evidence to support them. When analyzed with the proper care, her numbers instead support the arguments of critics of preferential policies.

How well did the minority students who entered law school in the Fall of 1991 perform while there? The first evidence to look at in answering that question, one would think, would be course grades and class rank. Did the beneficiaries of affirmative action preferences in the Wightman sample mostly end up in the bottom of the class, as they did at the University of Texas Law School? An earlier study of the top ten law schools found that the grades of the average black student were at just the *8th percentile*, and that more than half of the African Americans in those schools ended up in the bottom tenth of their class.[32] In California in the late 1980s, Stephen Klein reports that the mean law school grade point average of black students was "around the 15th percentile."[33] Has anything changed since these studies? This is an important question that Professor Wightman's rich data base could have been used to answer, but she did not choose to address it.[34]

Professor Wightman does acknowledge that LSAT scores and college GPAs, especially the former, correlate strongly with first-year law school grades.[35] And she concedes that these objective measures "are as valid or more valid predictors of first-year grades in law school for black, Hispanic, and Mexican-American students as they are for white students."[36] This point

32. Robert Klitgaard, *Choosing Elites* 162-63 (Basic Books, 1985).

33. Klein, 16 Thurgood Marshall L. Rev. at 524 (cited in note 16). For more recent data supporting this conclusion, see Stephen P. Klein and Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, 66 The Bar Examiner 8, 14 (Nov. 1997).

34. The information she had available included "law school performance data," Wightman, 72 N.Y.U.L. Rev. at 5 n.8 (cited in note 2).

35. Id. at 29-34.

36. Id. at 34. Professor Wightman's earlier study of the 1986, 1987, and 1988 entering classes found that white students performed somewhat better than their college grades and LSAT scores predicted during their first year and that minority students did even worse than their below-average grades and scores would have led us to expect. Linda F. Wightman and David G. Muller, *An Analysis of Differential Validity and Differential Prediction for Black, Mexican American, Hispanic, and White Law School Stu-*

should be underscored, because there are still critics who claim that college grades and test scores are "biased"—that minority students tend to perform better than such objective measures would lead us to expect. The Wightman study fits with many preceding ones in indicating that this is not the case at all.

It follows from this statement that the affirmative action beneficiaries in the Wightman sample performed very badly academically in their first year. Did significant numbers of them catch up later, as she implies in stressing their success in graduating and passing the bar? What about their grades and class rank? Professor Wightman had the data that would answer these questions, but she regrettably failed to pursue it. The evidence from the top ten law schools two decades ago and the University of Texas more recently suggests that something on the order of half of all African American students do work of such poor quality that they end up in the bottom tenth of their classes, and very few of them have grades that are above average. If the picture has become any brighter, it has yet to be demonstrated.

Things are badly askew in any educational institution in which it is possible to predict with considerable accuracy which students will experience academic difficulty simply on the basis of their skin color, but strongly preferential policies run the risk of creating exactly that scenario. In at least one law school, some white and Asian students seeking high grades in courses graded on a curve claim that they pay attention to the racial composition of a course. They seek classes with large black and Hispanic enrollments because the competition for A's will be less severe.[37]

VII

Instead of measuring academic success in law school by grades and class rank, Professor Wightman looks at two other criteria—at whether or not students graduated from law school and at whether or not they passed a bar exam in some state. Both are indefensibly crude dichotomous measures of achievement, and her interpretation of what they show is badly flawed.

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dent, Law School Admission Council Research Report 90-03, Tables 15a, 15b, and 15c (June 1990). The "consistently lower performance by minority students" both on pre-admission academic criteria and in law school, the study concludes, "underscores the need for broad policy-based research on minorities in legal education." Id. at 21.

37. Student quoted in Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. Rev. 2059, 2067 n.16 (1996).

Professor Wightman thinks it impressive that a very high proportion of affirmative action beneficiaries made it through law school and collected their diplomas. We will look more closely at the details of her claim in a moment, but first we should notice that it can be calculated from Professor Wightman's data that the law school graduation rate for her entire sample is 89.1 percent (see Table 3 below). Not many students of any color fail to make it through these days. Whether it ever was as common to flunk out law students as frequently as *Paper Chase* would lead us to believe, it is extremely uncommon now. Thus, we could not expect this measure to be a strong discriminator.

Suppose that we were trying to find out if varsity athletes in college were in much better physical shape than the ordinary student and made the test their ability to cover a mile in twenty minutes. By that undemanding standard, athletes and non-athletes would look much the same. Raise the standard to a mile in ten minutes and you would see modest differences between the athletes and the others. Make it a six-minute mile and there would be sharp differentiation, with little overlap between the two groups.

Professor Wightman has employed a twenty-minute mile test. Only 10.9 percent of the students who started law school in the Fall of 1991 failed to get a diploma, and many of them doubtless dropped out of school not because of academic difficulties but because they decided they disliked the law—or at least law school.

VIII

Even though the graduation rate is a quite weak discriminator, Wightman's data do show significant differences that she overlooks. In the sample as a whole, students with good enough grades and LSAT scores to have been admitted on the basis of those alone were somewhat more likely to graduate than those who needed to have something else going for them—10.1 percent of the former and 13 percent of the latter did not complete law school successfully. This relationship, though, did not hold for whites; whites with strong academic backgrounds were slightly more likely to drop out than those with weaker credentials, though the difference was too small to be statistically significant. It is important that this was not the case for blacks or for members of other minority groups. Law students whose ad-

mission was assisted by their race did have a somewhat smaller chance of graduating, unlike students whose extra-academic bonus points were not related to race.

Professor Wightman maintains that the graduation rate data "strongly" support the view that law schools are careful to offer only to "those students of color who are qualified to meet the demands of law school academic work."[38] The graduation rate of African Americans who were not admissible on strictly academic grounds, she insists, was "not significantly below the graduation rate attained by those black students" who would have been admitted without preferences.[39]

TABLE 3

Proportion of Fall 1991 Law School Entrants Who Failed to Graduate, by Race and Academic Admissibility

	Percent	*Number*
Total sample	10.9	26,797
-admissible	10.1	18,862
-not admissible	13.0	7,935
Whites	9.7	22,436
-admissible	9.9	17,913
-not admissible	9.0	4,523
Blacks	21.9	1,847
-admissible	19.5	164
-not admissible	22.1	1,683
All others	13.5	2,514
-admissible	11.1	785
-not admissible	14.6	1,729

[Calculated from data in Wightman, Table 7.]

38. Wightman, 72 N.Y.U. L. Rev. at 36 (cited in note 2).
39. Id. at 36-37.

There are two problems with this conclusion. First, as we have seen, the vast majority of all law students these days manage to stick it out and collect their diplomas. The law schools of the nation today are evidently organized so as to insure that nearly everyone can make it through to the end. This, indeed, might be one result of the commitment to affirmative action; if you lower standards to admit more minority students, it is logical to also relax grading standards or retention standards to make it more likely that they will graduate. There could be other reasons for the high overall graduation rate, of course. In any event, it is obvious that about the same proportion of athletes and non-athletes will be able to do a mile a twenty minutes, and being able to do so does not prove that one is in exceptional physical condition. Being "qualified" by this measure is no great achievement, and neither is graduating from a law school.

Second, Professor Wightman fails to point out that her data reveal sharp racial differences in the proportions who fail to pass even this very easy test. No fewer than 21.9 percent of African Americans failed to collect a law degree, more than double the 9.7 percent white dropout rate. It is quite false to claim, as some journalists have, that the Wightman study shows that blacks are graduating from law school at the same rate as whites.[40] In fact, they are twice as likely to drop out, hardly an insignificant difference.

Professor Wightman avoids any mention of this glaring racial difference, and indeed does not calculate graduation rates by racial group at all (though she does provide the data that made it possible to construct Table 3). She ducks the whole issue of racial differences by restricting herself solely to comparisons *within* racial groups, between those who she estimates were admitted with the aid of preferences and those who were not. When she compares the two groups of African Americans and finds that their graduation rates varied by only 2.6 percentage points (19.5 percent of those admissible without preferences failed to graduate vs. 22.1 percent of those preferentially admitted), she is impressed that the latter group did nearly as well as the former.

That is a very optimistic way of looking at the data. To me the lack of difference indicates that the small group of African

40. See the examples given in notes 3-5 above.

American students who entered law school with strong academic qualifications are not doing nearly as well as they should have. For some reason, members of the black academic elite dropped out of law school at nearly double the rate of whites who were admissible on straight academic grounds.[41]

This is a familiar and troubling phenomenon—in many settings, black students with strong test scores and grades tend to perform considerably less well than predicted. A number of studies have shown that black college students do about as well in their courses as whites with the same high school GPAs but combined SATs that are 240 points *lower.*[42] In law school specifically, the study of the top ten law schools cited earlier found that African American students performed no better in their courses than whites who scored *50 points behind them* on the LSATs and had GPAs that were 0.4 lower.[43] An admissions policy that was designed not to maximize the number of black acceptances at a particular institution but rather at assembling a group of African American students who would perform at the average level for that school would not admit blacks with lower grades and scores; it would instead demand somewhat higher grades and scores for black applicants.

IX

The most sensational of Professor Wightman's conclusions concerns performance on the bar examinations. Although the Wightman study strangely does not mention any of the readily available evidence, it has long been known that black students fail bar exams at a far higher rate than whites. In California between 1977 and 1988, an average of 73 percent of white first-time test takers passed the bar exam but only 30 percent of blacks and 41 percent for Latinos.[44] In New York state in the 1985-1988 period, the average pass rate for blacks was 31 percent; for whites it was 73 percent.[45] In Florida in 1991, 76 per-

41. Perhaps the explanation is that, as a result of racially preferential admissions, even the best qualified African American law students tend to enroll in institutions where most of their classmates have much stronger records and that this has a discouraging effect upon their performance.

42. These studies are summarized in Klitgard, *Choosing Elites* at 164 (cited in note 32).

43. Id. at 162-63.

44. Klein, 16 Thurgood Marshall L.J. at 519 (cited in note 16).

45. Edna Wells Handy, *Blacks, the Bell Curve, and the Bar Exam*, N.Y. L.J. 2 (Apr. 15, 1996).

cent of whites and 46 percent of blacks passed the bar on their first attempt.[46] In 1992, 82 percent of whites taking the New York bar exam for the first time passed, as compared with 37 percent of blacks.[47] In California the differential was 81 percent vs. 53 percent in 1994, and 76.8 vs. 43.3 percent in 1997.[48] Some narrowing of the difference is evident in the California returns, but the national racial gap remains huge.[49] And of course we have already seen that officials at the University of Texas Law School were deeply disturbed that so many of their black graduates were failing the bar exam and failing it again upon retaking it. The subject was so painful that the dean of the school made no effort to learn the unpleasant details.

Thus, it comes as a considerable surprise that Professor Wightman claims to have found "little or no difference in the likelihood of passing the bar examination" between students admitted as a result of affirmative action and others. That assertion has been translated by journalists into the different but closely related claim that minority students admitted to law schools due to preferential policies had bar-exam pass rates "similar to whites'."[50] Close inspection reveals that the data support neither of these propositions.

First, it should be noted that the overall rate at which the students in Professor Wightman's sample passed the bar examination is surprisingly high—no less than 93.9 percent (Table 4). Clearing this hurdle is also like walking a twenty-minute mile. This is difficult to reconcile with the facts given in the previous paragraph about the very high bar exam failure rate for African Americans that a number of studies have documented. The explanation is that Professor Wightman does not examine pass rates for those taking the test for the first time, the usual measure employed in the literature. Having chosen to ignore earlier studies that revealed a huge racial gap in bar exam pass rates, she also fails to explain why she decided to measure perform-

46. Ken Myers, *Studies Suggest That Minorities Still Lag in Admissions, Tests*, National Law Journal 4 (Feb. 24, 1992).

47. Christopher A. Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, 43 U.C.L.A. L. Rev. 1953, 1982 n.124 (1996); Michael Ueda, *Affirmative Action Focuses Scrutiny on Legal Education*, Los Angeles Daily Journal 1, 5 (Feb. 17, 1998).

48. Ueda, Los Angeles Daily Journal at 5 (cited in note 47).

49. For a good rebuttal of the charge that the bar exams must be racially biased, see Stephen Klein, *Bar Examinations: Ignoring the Thermometer Does Not Change the Temperature*, N.Y. St. B.J. 28, 28-33 (Oct. 1989).

50. Gwynne, Time at 48 (cited in note 3).

ance on the bar exams in a very different way than other investigators. Presumably she had the data to do a refined analysis of the issue, computing not only the customary measure (pass rates for first-time test takers) but others as well.[51]

Professor Wightman records only the simple datum of whether or not students *ever* passed a bar exam at some time within *three years* of graduation. Since most states offer the exam twice a year, some of those she classifies as having passed did so on their *sixth* crack at it. If the beneficiaries of affirmative action only eke out a passing grade after two to three years—with as many as five or six tries—it is reasonable to wonder how firm their command of the law is. It is reasonable to be uneasy about riding in a car driven by someone who has flunked the road test five times, even though they did finally pass on their sixth attempt. Students who require a number of tries before they pass the bar are forced to undergo a very prolonged probationary period before they qualify to practice law, while their classmates are taking on more challenging assignments and moving ahead in their careers. Passing the bar sooner rather than later would seem a significant index of success at the start of a career in the law. Not for Professor Wightman, who wishes to blur such distinctions, and to convey the misleading impression that minority students perform every bit as well on the bar exam as anyone else.

X

Waiving these objections for the sake of argument and accepting for the moment the validity of the very crude measure of success on the bar exams that Professor Wightman has chosen to employ, what do her data reveal? The figures provided in her Table 8 are the basis for the study's conclusion that attracted so much attention—the conclusion that minority beneficiaries of admissions preferences did just fine on their bar examinations. Professor Wightman's discussion of this crucial table is astonishingly brief. The key paragraph simply states that "[t]he bar passage rates among those students who would not have gained

51. As Gail Heriot's *The Truth About Preferences* (cited in note 6) notes, it is also unfortunate that the study ignored in *which* state bar exams were passed. In some states the exam is quite tough; in many it is very easy and just about everyone passes. How well did preferentially admitted students do in states with relatively high standards, such as New York and California? Wightman does not look at this question.

admission" on the basis of grades and scores alone "are compelling."

What is "compelling" about these rates? All she says to explain the use of this adjective is that rates of passing the bar for preferentially admitted members of the various ethnic groups "ranged from 72.5 to 93.3 percent," while for "those who were predicted to be admitted" on the basis of objective academic measures, "the pass rates range from 85.2 to 96.6%."[52] Professor Wightman apparently wishes us to conclude from this minimalist summary statement that grades and test scores have very little bearing on a student's prospects of passing the bar.

Professor Wightman provides just one additional short paragraph bearing on this crucial issue, a paragraph stating that a logistic regression model to examine the relationship between LSAT score, undergraduate GPA, and bar exam pass rate showed that these objective academic measures did not explain much of the variance.[53] Thus, she draws the conclusion that having strong enough academic qualifications to win law school admission on that basis alone does not do much to increase the chance that you will succeed in passing the bar exam.

In an article that runs to 53 pages, these two brief paragraphs, remarkably, are all that Professor Wightman offers by way of analysis of her table on bar examination pass rates. The lack of predictive power in the logistic regression model, as the author acknowledges, is very likely due to the fact that the range of variance in outcomes was so restricted. Professor Wightman chose a simple measure that displayed very little variation—just about every student passed the bar eventually. A sophisticated analysis of how well bar examination performance can be predicted on the basis of college grades or LSAT scores would require more differentiated measures of success. How well does her model predict passing the bar on the first try? It is a pity that she does not examine that question.

XI

The data Professor Wightman assembles have much more to tell us than she realizes, and what they have to say runs directly counter to the general argument of the article. Table 4 rearranges the evidence supplied in Professor Wightman's Table

52. Wightman, 72 N.Y.U. L. Rev. at 38 (cited in note 2).
53. Id. at 38-39

8 in more comprehensible form. Even though the very high overall bar exam pass rate works to minimize differences, this evidence reveals that having strong academic credentials did substantially reduce a student's chance of failing the bar exam. In the sample as a whole, only 3.6 percent of the students admitted on the basis of grades and scores failed to pass the bar, but three times as many who entered with preferences of some kind did not make it. Among the subgroups included in the study, there were even sharper differences.

Among black students, who are of course at the center of the debate over preferential admissions to professional schools, the difference was particularly dramatic. Only 9.8 percent of blacks with strong academic records failed to pass the bar, but no less than 27.1 percent of those admitted through affirmative action. It is a mystery how the abstract that precedes Professor Wightman's article could possibly claim that her study found "no significant differences in the . . . bar passage rates between those minority students who would have been accepted to law school [without racial preferences] and those who would not."[54] Sloppy journalists translated this erroneous claim into the finding that students admitted as a result of racial preferences performed "almost precisely as well" as those who were not.[55] A 27.1 percent failure rate, that is to say, is "almost precisely" the same as a 9.8 percent rate. It happens that the difference between these figures is "almost precisely" the difference between the black and white poverty rates in 1995—29.3 percent vs. 11.2 percent.[56] Would anyone would dream of suggesting that these poverty figures show that there are "no significant differences" in the black and white poverty rates?

54. Id. at 2.

55. Rowan, Chicago Sun-Times at E18 (cited in note 4).

56. U.S. Bureau of the Census, Current Population Reports, P-60-194, *Poverty in the United States: 1995* at vii tbl.A (U.S. Government Printing Office, 1996).

TABLE 4

Proportion of Law School Graduates from the Fall 1991 Class Who Failed to Pass the Bar Exam within Three Years of Graduation, by Race and Academic Admissibility

	Percent	*Number*
Total sample	6.1	21,912
-admissible	3.6	15,675
-not admissible	11.2	6,237
Whites	4.1	18,635
-admissible	3.4	14,904
-not admissible	6.7	3,731
Blacks	25.5	1,302
-admissible	9.8	123
-not admissible	27.1	1,179
Other minorities	11.3	1,975
-admissible	6.6	648
-not admissible	15.1	1,327

[Calculated from data in Wightman, Table 8.]

In fact, the level of academic qualifications that students brought with them to law school had a strong effect on their chances of succeeding at the next stage of their career—getting through a bar exam. Despite her claims to the contrary, Professor Wightman's data show that clearly, and they would doubtless have had an even stronger predictive power if she had employed finer breakdowns. Instead of merely splitting her sample into students who were admissible on the basis of grade and test scores and those who were not, she could have classified them into a number of levels of academic qualification. A similar analysis of the career paths of black and Latino physicians who had been admitted to medical school as a result of preferences made more refined distinctions, and found that the rate at which

they became board-certified was a direct function of their grades in college and on the Medical College Admissions Test.[57] Professor Wightman's study would have been more useful if it had also made finer distinctions in both the outcome variable and the independent variable—if it had differentiated students who passed the bar on the first try from those who succeeded in the first year, the second year, and the third year, and likewise looked more closely at levels of academic preparation.[58]

Professor Wightman's failure to notice that black students admitted as a result of affirmative action were nearly three times as likely to wash out on the bar exams than those who were not is remarkable. So too is her failure to report the sharp overall racial differences in rates of passing the bar. Because of her odd decision to restrict analysis to differences within each

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57. The sample included 715 graduates of the medical school class of 1975 who were classified as minorities, 80.2 percent of them African Americans. Seven years out of school, only 49 percent of minority physicians had become board-certified, as compared with 80 percent of whites and Asians. When minority physicians were arranged in five categories based on an "undergraduate performance index," 83 percent of those in the top category passed their boards, 75 percent of those in the second, 56 percent of those in the third, 47 percent of those in the fourth, and just 32 percent of those in the lowest category. Not surprisingly, the same strong relationship between college records and success on the boards held for whites and Asians as well. See Steven N. Keith, Robert M. Bell, and Albert P. Williams, *Assessing the Outcome of Affirmative Action in Medical Schools: A Study of the Class of 1975* at 8, 36 tbl.27 (The Rand Corporation, 1987). The findings of this careful and virtually unknown inquiry contradict those of a much-publicized study of the University of California at Davis School of Medicine, published in 278 *Journal of the American Medical Association* 1153-58 on October 8, 1997. This article, which the *New York Times* uncritically reported as providing proof that preferences work extremely well, is junk social science in the Wightman tradition. Among its many glaring flaws, the most important is that it does not in fact examine students admitted to medical school as a result of racial preferences. It reports on the performance of *all* students admitted for extra-academic reasons, so that no valid conclusions can be drawn about the 43 percent who were members of "underrepresented" racial groups. We cannot assume that the same preferences were given to the two groups—those admitted on racial grounds and those admitted for other "special" reasons—nor can we assume that they performed similarly. Wightman's data show that whites in the not admissible category were not at all comparable to African Americans or other racial minorities in the not admissible category. The attrition rate of preferentially admitted blacks was 43.2 percent, and for whites not admissible on academic grounds it was just half that, 22.7 percent (see Table 5). We don't know, of course, whether equally dramatic differences in academic performance can be seen in the population of UC Davis Medical School graduates, but the possibility demands investigation. One hopes that the editors of the *Journal of the American Medical Association* are better judges of studies in medicine than they are of social science research. This study would not merit a passing grade in a graduate course in sociology. For further criticisms, see Gail Heriot, *Doctored Affirmative-Action*, Wall Street Journal A18 (Oct. 15, 1997).

58. As already suggested above, another distinction that would have been worth making is between the bar examinations in states in which failure is rare and those in states in which the exam is quite rigorous.

racial group and to ignore differences among those groups, she does not calculate the relevant percentages for the reader. But her data show that fully one out of four (25.5 percent) of the black students who graduated from law school failed to clear the next hurdle on the way to a legal career—more than *six times* the white bar exam failure rate of 4.1 percent. This is perhaps the most newsworthy and certainly the most depressing fact that can be gleaned from Professor Wightman's whole study, but the reader had to discover it with no help from the author. She did not even make such a calculation.[59]

XII

Finally, it will be useful to pull together in one place the information about graduation rates and rates of passing the bar that Professor Wightman treats separately. As has already been suggested, both measures are crude. It would have been preferable to distinguish students who graduated from law school with distinction from those who just scraped by, and to distinguish those who passed the bar exams on the first try from those who did it only on their sixth try. Still, the two pieces of information we do have will allow us to answer a basic question. What proportion of all the students who started law school in the Fall of 1991 completed their preparation for a legal career successfully, and what proportion fell by the wayside, either because they failed to earn their law degree or because they graduated but then failed to pass the bar examinations required for entry into the profession? As Table 5 reveals, five out of six (83.7 percent) of the young men and women who enrolled in law school

59. A further significant limitation of Professor Wightman's analysis of bar examination pass rates is there are a good many missing cases in this part of the analysis. Her sample of law school students (Table 7) included 23,874 people who graduated. But the information she tabulates on rates of passage on the bar exam (Table 8) are for only 21,912 people, 1,962 fewer. Bar examination data, she mentions in a note (note 89) were not available for all graduates, for unspecified reasons. Were the missing cases students who simply chose not to take any bar examinations? Can we safely assume that those 1,962 students for whom information was missing were as likely to have passed the bar as those we do know about? It seems unlikely. It is a reasonable surmise that disproportionate numbers of the missing cases are individuals who never passed the bar exams, who dropped out of the law altogether, and who refused to take the trouble to fill out questionnaires concerning their aborted legal careers. If this is true, then the rate of permanent failure on the bar exam is higher than Professor Wightman estimates. Furthermore, the missing cases are not randomly distributed across groups. Bar examination data is not available for 9.8 percent of black graduates, vs. 8.0 percent of whites, and 10.1 percent for blacks who were preferentially admitted. It is likely, therefore, that Wightman's estimates of differences in bar pass rates between blacks who received preferences and those who did and between blacks and whites are both biased downward.

cleared both hurdles; the overall attrition rate was 16.3 percent. Although some who started law school may simply have changed their career plans and pursued some other career with no regrets, many of these dropouts must have felt an acute sense of personal failure. Some had doubtless gone into debt to finance their legal educations, and would not be able to take high-paid legal jobs that would enable them to repay their loans easily.

Some groups failed with much greater frequency than others. For whites with strong academic credentials, the attrition rate was only 13.0 percent; a somewhat higher fraction—17.0 percent—of whites with weaker academic records stumbled at one of these twin hurdles.

African Americans failed far more often than students from other groups. The attrition rate of black students who entered law school as a result of racial preferences—the vast majority of them, we have seen—was a horrendous 43.2 percent. When they enrolled in law school for the first semester, they did have a better than even chance of eventually qualifying to become an attorney. But it was not *much* better than an even chance—57 to 43. More than four out of ten of them would never enter the legal profession. Nearly one in four would not make it through law school; one in four of those who did get their degrees could not display enough knowledge of the law on a bar exam to obtain a passing grade.

TABLE 5
Attrition Rates in Entry into the Legal Profession, by Race and Academic Admissibility, Fall 1991 Class

	% *entrants graduating*	% *graduates passing bar*	*completion rate*	*total attrition*
Total sample	89.1	93.9	83.7	16.3
-admissible	89.9	96.4	86.7	13.3
-not admissible	87.0	88.8	77.3	22.7
Whites	90.3	95.9	86.6	13.4
-admissible	90.1	96.6	87.0	13.0
-not admissible	89.0	93.3	83.0	17.0
Blacks	78.1	74.5	58.2	41.8
-admissible	80.5	90.2	72.6	27.4
-not admissible	77.9	72.9	56.8	43.2
All others	86.5	88.7	76.7	23.3
-admissible	88.0	93.4	82.2	17.8
-not admissible	85.4	84.9	72.5	27.5

[Calculated from Wightman, Tables 7 and 8.]

Even the small minority of black law students with strong grades and scores had a high attrition rate—27.4 percent. Other minority students with good academic qualifications did nearly as well as whites (17.8 percent vs. 13.4 percent). But blacks admitted without preferences had the same high attrition rate as other minorities whose admission had depended upon preferences (27.4 percent vs. 27.5 percent), a rate ten points higher than members of other minorities with comparable academic strengths. Not many blacks law students had strong prior academic qualifications, and those who did often failed to perform

up to expectation. Professor Wightman does not notice this troubling pattern, but her data reveal it.

XIII

Professor Wightman is to be commended for having raised important issues about legal education in the United States, and for assembling a body of illuminating evidence with which to explore those issues. She has made an important contribution to the current debate over racial preferences in higher education, even though her evidence often points to conclusions contrary to the interpretation she has given it. She is undoubtedly correct that, in the short run, eliminating any consideration of race from the law school admissions process will alter the racial mix of law schools substantially, and will particularly reduce the number of African American students admitted at the most selective and prestigious institutions. The reason is simple. Black students in the United States are much less well prepared academically, on the average, than their white or Asian peers.

The students followed in Professor Wightman's study entered law school several years ago. Is anything different now? Some current Law School Admissions Council figures have just become available, and they are stunning and depressing. In the 1996-1997 admissions cycle, some 2,646 white applicants placed in the top 7.7 percent of LSAT-takers and had college GPAs of 3.5 or better. These credentials are very good, obviously, but not phenomenal; the average student who was admitted to Boalt Hall this year had an LSAT in the 97.7 percentile and a GPA of 3.74. And yet a mere *16* African Americans in the United States and 45 Hispanics had records that strong![60] In this elite group of applicants, whites outnumbered blacks 165 to one. If we relax the standard substantially and look at students in the top sixth (83.5 percentile or better) on the LSATs. and a GPA of only 3.25, 7,715 whites and just 103 blacks qualify.[61] In this broader elite, there were 75 whites for every African American.

The huge racial gap is evident long before students are nearing the end of college. According to recent data from the National Assessment of Educational Progress (for 1994), black 17-year-olds were 3.9 years behind whites in reading skills, on

60. The figures were given in testimony before the state legislature by a University of California official, as supplied in John E. Morris, *Boalt Hall's Affirmative Action Dilemma*, The American Lawyer 4, 5 (Nov. 1997).

61. Id.

the average, 3.4 years behind in math, 5.4 years behind in science, and 3.3 years in writing skills.[62] Although the theory behind racial preferences in college admissions holds that these differences will shrink dramatically if African American students are admitted to better schools than their academic records would merit, there is no evidence that this is true.[63] Professor Wightman's 1990-91 data reveals that the black college students who apply to law schools were very far behind whites academically, and the Law School Admissions Council evidence for 1996-97 shows precisely the same thing.

Professor Wightman is far off the mark, I believe, when she suggests that African Americans *do* catch up during and shortly after their law school years. A recent summary of her study by a leading proponent of preferential policies claims that it shows that, "after a short period of adjustment," minority law school students "did as well as anyone," and that standardized tests "have little value" in predicting performance in law school and "after graduation, they have none."[64] This is an absurd assessment. The Wightman study does not demonstrate that African American students admitted on the basis of race truly catch up—merely that about three out of four (78 percent) of them do manage to graduate, and that three out of four of those who graduate (74.5 percent) eventually pass a bar exam. That the attrition rate is alarmingly high inexplicably escapes her attention. So does the fact that it is dramatically higher for African Americans admitted as a result of racial preferences than it for those who were not. Despite rhetorical claims that all students accepted to law school because of racial preferences are "qualified," and that students selected for diversity purposes somehow add "intellectual depth," the hard truth seems to be that a weak undergraduate record and poor test scores are handicaps that strongly affect performance in law school and afterwards. Lowering admissions standards for minorities does nothing to remedy these intellectual handicaps, and we have yet to see evidence that any of our law schools have found the secret to effective remediation. Rhetoric to the contrary notwithstanding, the goals of maximizing racial "diversity" and achiev-

62. Thernstrom and Thernstrom, *America in Black and White* at 355 (cited in note 28). The chapter in which this table appears (ch. 13) attempts to explain why the racial gap in educational achievement is still so large.

63. Id. at 386-422.

64. Richard Delgado, *Affirmative Action Critics Misfired*, Denver Post 2 (Nov. 2, 1997).

ing intellectual excellence in legal education do not go hand in hand. They are in sharp tension with each other. Although Professor Wightman does not explore the relevant evidence with nearly as much detail as would be desirable, virtually everything that has been published on this subject supports the unwelcome conclusion that the performance of African American students who are admitted to law school as a result of racial preferences is, on the average, mediocre at best. To those who give top priority to making the legal profession mirror the racial mix of the nation's population, the price will be worth paying. But to maintain that there is no price at all is dishonest.

If voters in other states follow California's lead and eliminate racial preferences in public institutions, or if decisions by other courts extend the reach of the principles set forth in *Hopwood*, in the short run we clearly will have fewer African American students receiving legal training. But they will be much better prepared than those who have entered as a result of racial double standards, and that should make the intellectual climate at law schools healthier than it can possibly be wherever academic performance is correlated very strongly with skin color. In the long run, we can hope that the performance of black students before they reach the age of applying to graduate schools will improve dramatically, rendering preferential schemes superfluous. For those concerned with racial equity, nothing can be more important than reforming K-12 education so as to close the large current racial gap in cognitive skills.