IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

v.

ALLAN BAKKE,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE ANTIOCH SCHOOL OF LAW AMICUS CURIAE

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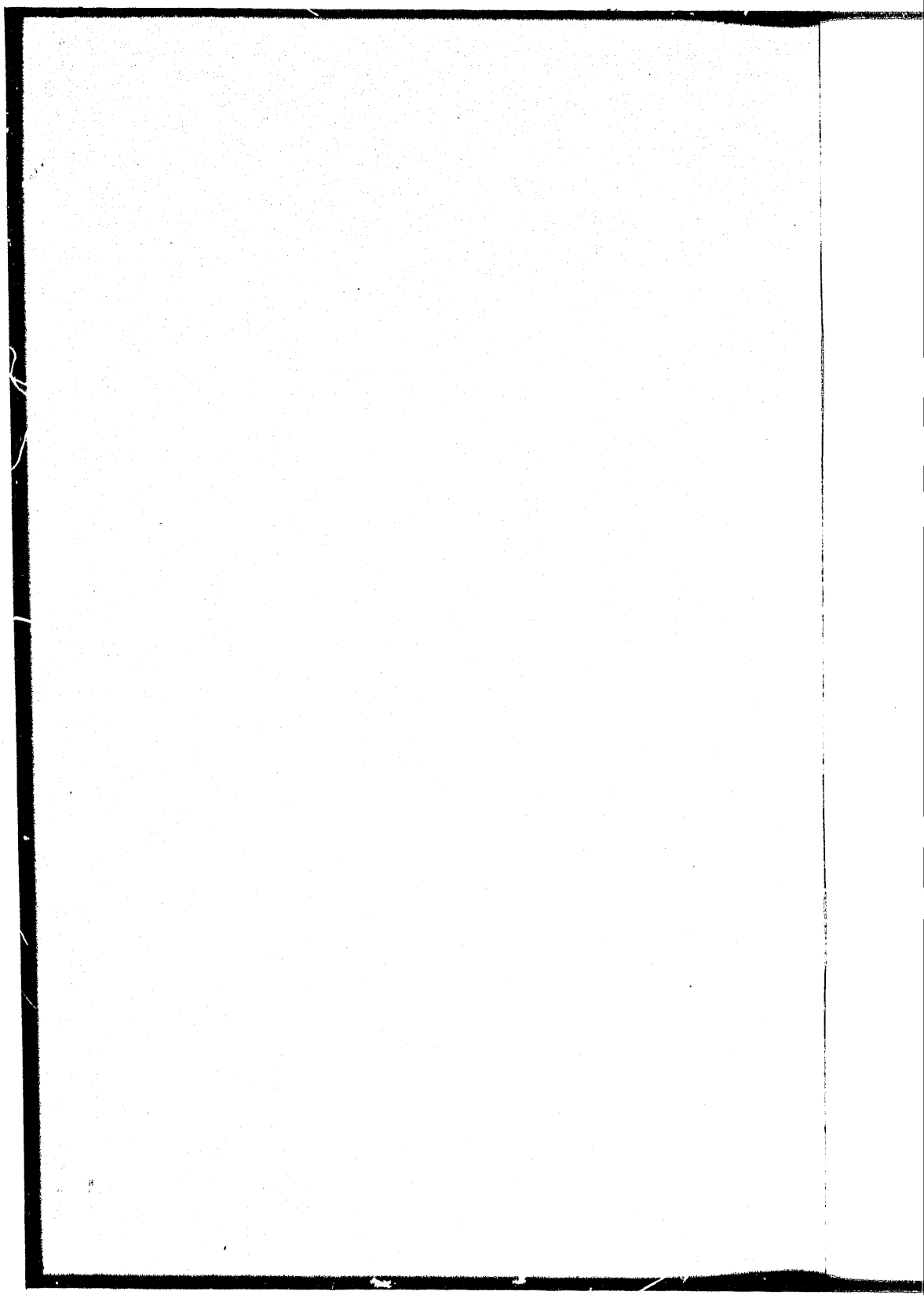

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MANNER OF FILING

This brief amicus curiae is filed with the written consent of the parties pursuant to U.S. Supreme Court Rule 42.

INTEREST OF THE AMICUS

The amicus is the Antioch School of Law, the only law school with its own faculty-staffed Teaching Law Firm and a three year clinical program expressly

designed to produce graduates competent to engage in the practice of law immediately upon completion of law school.

Since its inception, the Antioch School of Law has had a minority enrollment comprising 30% or higher of its entering student body without either a separate or a preferential admissions procedure for minority applicants.

The admissions process focuses on two factors: the applicant's potential to achieve competence as a lawyer, and potential contribution to equal justice under law and to improving the capacity of the legal system to respond to grievances. We cannot rely upon the Law School Admission Test (LSAT) or Grade Point Average (GPA) to predict either potential, competence or contribution, or even performance as a student in a law school clinic.

The decision below, if extended to law school admissions, would effectively destroy our ability to make predictions about the potential professional competence of applicants.* For reasons set forth within, the race of the applicant is highly significant to our interpretation of the evidence bearing on potential competence and potential contribution.

It is of utmost importance to the School that it be permitted to continue, develop and refine an admissions process which effectively assesses potential lawyering competence of both white and non-white applicants.

We believe that Antioch's experience sheds important light on the relationship between the race of an applicant and the interpretation of different types of evidence bearing upon their potential competence and contribution.

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* Any decision in this case would also affect private schools, *see Runyon v. McCrary*, 427 U.S. 160 (1976).

QUESTIONS PRESENTED

1. Whether the Equal Protection Clause prohibits all consideration of an applicant's race in the admissions process even where relevant to an inquiry into the potential of an applicant to achieve competence as a professional.

2. Whether the Equal Protection Clause prohibits all consideration of the applicant's race in the admissions process in determining the probable future contribution of an applicant to the profession's commitment to equal justice and requires the adoption of only "nonracial alternatives" to efforts aimed at remedying the dearth of professionals serving minority communities.

SUMMARY OF ARGUMENT

The court below erred in failing to distinguish between two different uses of race:

1. use of race to trigger the application of different (and arguably "lower") admissions standards;

2. use of race to interpret and evaluate evidence essential to the uniform application of uniform admissions standards to applicants of different races.

While the instant case involves admission to medical school, we believe most of the same considerations apply to admission to law school.

It is generally acknowledged that test scores—both the LSAT and the Medical College Admission Test (MCAT) do not purport to predict competence as a lawyer or a doctor. At best, they predict performance as a student—a law student or a medical student—on those examinations which measure what students have learned from academic courses. Nor do they purport to

predict student performance in a clinic—medical or legal.

I.

RACE IS IMPORTANT IN EVALUATING AN APPLICANT'S POTENTIAL FOR COMPETENCE AS A PROFESSIONAL.

There are at least three types of situations where an applicant's race bears directly upon the interpretation of test scores, grade point average, and other evidence. These situations become far more important if one shifts the focus in admissions from an inquiry into a candidate's potential success as a student to an inquiry into potential competence as a professional. They are:

1. Where communication skills are being evaluated by tests, poor test scores of minority applicants may understate the adequacy of present skills in communicating with clients or patients. Equally important, they may distort judgments about the applicant's potential to achieve proficiency in communicating with persons of different ethnic groups, whether by word of mouth or in writing. Knowledge of the applicant's race may be essential to interpretation of such data.

2. Where the definition of professional competence incorporates values, assumptions and perspectives held by the majority culture, poor test performance may only reflect the extent of the divergence between the majority and minority culture on assumptions about, for instance, the fairness of judges or the life situation of patients.

3. Where tests and grades only measure an applicant's readiness to benefit from one pedagogic method and to perform on one range of test instruments, they cannot be predictive of potential to achieve and demonstrate

professional competence via other pedagogic and testing methods such as those involved in programmed learning, simulation and clinical training. There is a new body of data suggesting that such procedures consistently understate the potential to achieve professional competence of all candidates with learning styles different from those required by conventional teaching and testing methods. In practice this operates to the detriment of minority candidates and economically disadvantaged candidates, for it measures academic acculturation rather than potential. It can also operate to the detriment of talented, upper middle class, white candidates who are poor test-takers. Admissions based primarily on academic acculturation appear least appropriate where clinical (applied or practical) training is available, where other assessment procedures can be utilized and where the ultimate objective is professional competence, not test-taking proficiency. The use of traditional predictors of academic performance as the sole or primary basis for admissions decisions[1] requires special scrutiny for minorities, economically disadvantaged persons and persons with distinctive learning styles lest unwarranted superiority be automatically attributed only to the educationally advantaged with learning styles that conform to the society's dominant class and culture.

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[1] Pipkin and Katsh, *Undergraduate Studies and Law School Gatekeepers*, 28 J. LEGAL ED. 103, 107 (1976).

II.

RACE IS IMPORTANT TO EVALUATION OF AN APPLICANT'S POTENTIAL CONTRIBUTIONS AS A PROFESSIONAL.

When white and non-white candidates make assertions about their intention to contribute to promoting equal justice by serving minority communities, and even when both marshall evidence of demonstrated commitment to do so, there is empirical data to support the proposition that a higher percentage of non-whites will, in fact, devote a considerable portion of their professional lives to serving minority communities. This is not because of greater selflessness but because such service may be virtually involuntary, it is frequently the product of demands of the minority community, of pressures, appointments and job offers from both the public and private sector, and of that community of interest to which members of racial minorities are heir because of the peculiar injustices to which they are subject. Accordingly, we submit that a professional school which desires to consider potential contribution of an applicant to provide services to minority communities is not free to ignore the race of the applicant or disregard empirical evidence on the differing predictive value to be assigned to similar assertions by white and non-white applicants.

ARGUMENT

INTRODUCTORY

If the opinion of the Supreme Court of California stands as an authoritative interpretation of the Equal Protection Clause, then all consideration of the race of an applicant to professional school is proscribed and only racially neutral or "nonracial alternatives" may be utilized to achieve policy objectives.

We believe that the court below has erred in failing to distinguish between two different uses of races:

1. Use of race to trigger the application of a different process and different (and arguably "lower") standards; and
2. use of race as essential to interpret evidence in order to secure the uniform application of uniform admissions standards to applicants of different races.

The Supreme Court of California appears to have proscribed both uses of race. The constitutionality of the first use of race to accomplish an important social objective, and the necessity of preferential admissions is being addressed by other amici.

This brief seeks only to challenge the prohibition on the second use of race by setting forth those contexts in which the applicant's race must be considered in interpreting critically important evidence if there is to be uniform application of uniform admissions standards to candidates of different races. Accordingly, we submit that the Equal Protection Clause, far from proscribing consideration of race may, in certain contexts, mandate an awareness of its significance. This brief draws primarily upon Antioch's experience and research in admissions and in assessment of professional competence.

For the past several years, Antioch has received funds from the Council on Legal Education for Professional Responsibility; the Exxon Education Fund; the Fund for the Improvement of Post-Secondary Education; the Goldman Foundation; the Legal Services Corporation (originally the Office of Economic Opportunity); the National Endowment for the Humanities; and the National Institutes of Education, among others, to develop definitions of the core competencies required of lawyers, to develop evaluation or assessment procedures to determine the level of competency achieved by students, and to develop teaching methods which impart professional competency more effectively. (See Appendix A for the latest revised definitions of lawyering competencies and the forms used in assessing student performance in the School's Teaching Law Firm.)

Since its founding, the Antioch School of Law has always utilized a distinctive admissions process which bases admissions on two factors:

1. Potential of the applicant to attain competence as a lawyer; and
2. potential contribution of the applicant to equal justice under law and improvement of the legal system's capacity to respond to grievances.

From the outset, this has involved a review of many types of evidence bearing upon these determinations: LSAT, grades, essays, recommendations, interviews, work products, term papers, community involvement and the like. During the past year, this process of analysis has been codified in the form of an admissions matrix which is used to score applications in terms of the weight to be given to different types of evidence in reaching an overall assessment of the candidate's potential (the current matrix appears as Appendix B).

This, in turn, will provide a basis for further research on correlations between ratings made at the time of admission and demonstrated competence as manifested in the performance of lawyering tasks in the School's Teaching Law Firm and both competence and contribution manifested following graduation through follow-up studies now being designed. Our initial study indicated that the Writing Score and GPA (but not the LSAT) correlate with both clinical and classroom performance only during the first year. There ceases to be any correlation whatsoever by the end of the second year.[2] It appears that the massive infusion of clinical training during the first two years reduces the correlation between the LSAT, prelaw school variables and grades in both the classroom and the clinic to zero or chance by the end of the second year.[3]

While the research is still in preliminary stages and it is perhaps premature to extrapolate from law to medicine, we wish to draw the Court's attention to a study at Temple University Medical School which found minority students performing *below* the median on objective knowledge tests in pathology but performing consistently *above* the median on clinical tests in pathology designed by the same instructors to test for the same knowledge by requiring the actual identification of organs or tissues and diagnosis of the pathological process on actual specimens.[4] The implications of these studies are discussed below.

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[2]J. George, The Domino Theory of Legal Education: An Empirical Analysis of Entry Barriers to the Legal Profession (1976) (unpublished thesis in Antioch School of Law Library).

[3]*Id.*

[4]J. Baum and C. Ireland, *Minority Student Performance on Pathology Examinations*, 67 J. NAT'L MED ASSOC. 324 (July 1975).

Our experience, supported by other data, indicates that the fact of an applicant's race has empirically demonstrable significance in evaluating evidence bearing upon potential competence and potential contribution. Through application of the admissions matrix the Antioch School of Law admissions process has consistently produced a minority enrollment of thirty percent or higher without resort to separate standards or a separate process.

The common denominator of the School's concern with both competence and contribution is ultimately the citizenry's right to counsel—counsel in whom they can have confidence with respect to competence, to zealousness and to improving the capacity of the legal system to provide redress through law.[5] We do not urge, in this connection, that Black, Latino, Native American, Asian and Appalachian clients can only be served by Black, Latino, Native American, Asian and Appalachian lawyers respectively, but we do assert that the absence of minority members of the bar and bench, along with the lack of minority lawyers as defense counsel, as judges, as prosecutors, and as decision-makers[6] taints the entire system and undermines all possibility of confidence in the system by those with greatest reason to distrust the legal system. The

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[5]For an articulate statement on the importance of such considerations, *see The Organized Bar: Self-Serving or Serving the Public? Hearing before the Subcomm. on Representation of Citizen Interests of the Senate Committee on the Judiciary*, 93rd Cong., 2d Sess. 73 (1974) (Statement of Orville H. Schell).

[6]Black lawyers still amount to scarcely two percent of the profession, Character, *The President Speaks*, 9 NATIONAL BAR BULL. 2 (Feb. 1977). Of the estimated 522,294 elected officials in the United States, eight-tenths of one percent (0.8%) are Black. NATIONAL ROSTER OF BLACK ELECTED OFFICIALS 1 (1975).

profession recognizes in its canons that the right of the public is not only that justice *be* done—but that it *seem* to be done; not only that the system *be* fair and equitable and non-discriminatory—but that it also *appear* to be so.[7] The final touchstone is trust. And a profession that is 97.5% white can assert its commitment to equality but it cannot compel trust from those to whom such self-serving statements make a travesty of meaningful equality before the law.

With this as foreword, we turn to those elements of the admissions process where we believe that race must be permitted to play a role if unitary standards are to be applied uniformly to data that is susceptible of different interpretation depending upon the applicant's race.

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[7] The American Bar Association states ". . . the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely on the merits. . . ." ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC9-4; because "Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law . . ." each lawyer must ". . . strive to avoid not only professional impropriety but also the appearance of impropriety." *Id.* at EC 9-6.

I.

THE COURT BELOW ERRED IN PROHIBITING CONSIDERATION OF AN APPLICANT'S RACE IN INTERPRETING EVIDENCE BEARING UPON THE POTENTIAL OF AN APPLICANT TO MEET THE ACADEMIC REQUIREMENTS OF THE SCHOOL AND/OR TO ACHIEVE COMPETENCE AS A PROFESSIONAL, AND IN REQUIRING THAT ONLY RACIALLY NEUTRAL LINES OF INQUIRY BE USED IN ASSESSING THE POTENTIAL OF AN APPLICANT TO SATISFY ACADEMIC REQUIREMENTS AND/OR ACHIEVE COMPETENCE AS A PROFESSIONAL.

The Supreme Court of California's opinion in *Bakke v. Regents of The University of California,* 132 Cal. Rptr. 680, 553 P.2d 1152 (1976) appears to foreclose all consideration of race in assessing the potential of an applicant to achieve competence: "To accept at the outset the premise that a minority applicant may be better qualified *because* of his race would foreclose consideration of the constitutional issue raised by the complaint." *Id.* at 1161. The court expressly does not require mechanical compliance with ranking by grade point average and test scores—though that may be the result of an affirmance:

> The University is entitled to consider, as it does with respect to applicants in the special program, that low grades and test scores may not accurately reflect the abilities of some disadvantaged students; and it may reasonably conclude that although their academic scores are lower, their potential for success in the school and the profession is equal to or greater than that of an applicant with higher grades who has not been similarly handicapped. 553 P.2d at 1166.

The court expressly gives it blessings to consideration of other factors such as personal interviews, recommendations, character, and matters relating to the needs of the profession and society. But the court is explicit in prohibiting utilization of race in applying admissions standards: "No applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied *without regard to race*" (emphasis added). *Id.* The court cites with approval Mr. Justice Douglas' statement in *De Funis v. Odegaard,* 416 U.S. 312, 336-337 (1974), that "[W]hatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner."

Our data and experience indicate that the fact of an applicant's race has empirically demonstrable significance in evaluating evidence bearing upon a candidate's potential to achieve professional competence. We assert that the court below erred in prohibiting all consideration of race where race or ethnic background must be known in order to ascertain whether a poor test score or low Grade Point Average evidences lack of potential competence or merely lack of acculturation. As the court properly points out, there are numerous factors which legitimately may alter assessment of the predictive value of test scores and grades. Race is not the only one nor always the dispositive one, but it is one. Antioch makes an individualized assessment of test scores and grades for all candidates (See Appendix B). We have found test scores and grades particularly suspect for predictive purposes for "late bloomers," for persons several years out of school, for poor whites from economically depressed regions, for candidates with records as poor test takers but high achievers, and for children of first generation immigrants. Our

experience indicates that consideration of the applicant's race, cultural background and class can be essential and in various situations compels a different interpretation of the predictive significance of test scores and grades. Race in particular operates in this fashion in at least three types of situations: where English is a second language and communication skills are being tested; where functional definitions of competence entail some degree of acculturation or adjustment to the institutions, mores, and assumptions of the dominant society; and where tests appear to understate the actual competence of minorities because linked to teaching or testing procedures which are geared to the learning styles and learned behavior patterns of the dominant culture. We shall consider each in turn.

A. Where Communications Skills Are Involved Race, Class, Culture Or National Origin Operate To Impair Or Otherwise Distort The Extent To Which Performance On Tests Accurately Reflects Potential Competence At Communication Skills.

The need to take race or "ethnicity" into account in interpreting test scores is most obvious where English is a second language. Except for the sweeping proscription of consideration of race, it would not seem startling to announce that cognizance should be taken of the fact that an applicant's primary language was Spanish or Navajo or Chinese. Cf. *Lau v. Nichols*, 414 U.S. 563 (1974). The same principle would apply to persons raised in homes where only German, Italian or Polish was spoken.

The function of race becomes more subtle in dealing with variations on Standard English such as dialects and

"Black English." No one disputes that the ability to utilize Standard English with precision and grammatical accuracy may be essential for the discharge of certain professional functions. But Antioch has defined competency in oral communications as "the ability to assess, control and vary verbal and non-verbal communications with an audience(s) in a given situation to maximize the accomplishment of objectives." This includes the ability to listen, understand and respond. In recent weeks, Antioch has had to review the implications of this competence in considering whether to admit deaf applicants and has responded affirmatively because of the special communications problems of deaf clients. In like fashion, because we believe it appropriate to consider the communications needs of Black clients, Latino clients, and Asian clients to be understood by their lawyers, we put clients' needs on a par with the needs of judges and decision makers who require communication in upper middle class English. Cf. Ralph R. Smith, *Double Exposure: The Sinister Magic that would turn Black Students into White Lawyers.* 2 LEARNING AND THE LAW 24-26 (Summer 1975). We submit that in situations involving potential competence in communications skills, instances arise where it is appropriate and even essential to inquire into race, just as in other instances it is essential to inquire into country or region of origin in order to interpret test scores and grades.

B. Where The Definition of Professional Competence Incorporates Values, Assumptions And Perspectives Held By The Majority Culture, Poor Test Performance May Only Reflect The Extent Of The Divergence Between The Majority And Minority Culture On Assumptions About, For Instance, The Fairness Of Judges, Or The Extent To Which Rules Determine Results.

There have been relatively few analyses of the reasons minority performance on the LSAT has consistently fallen behind the distribution of scores by white students. Some attribute it simply to past educational deprivation and to lack of practice at objective, multiple choice tests. We suspect other factors come into play at times. For example, applicants of considerable ability express the view that the LSAT is a kind of trick game which they cannot win. An analysis of the types of errors made by minority students in one study indicates that part of the problem may stem from a belief that the LSAT is a game, played in accordance with unknown rules—and that the stated rules or instructions are not to be trusted.[8] The study provides the following example in which minority students' understanding of applicable norms and values consistently produced error. The directions stated, "The principles may be either real or imaginary but for the purpose of this test you are to assume them to be valid."[9] In the following example, those directions were disregarded:

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[8] A. Carp, S. Johnson and E. Tibby, Report on LSAT/San Francisco Consortium Project in that Area, reprinted in LAW SCHOOL ADMISSION COUNCIL, REPORTS OF LSAC SPONSORED RESEARCH 174 (1976).

[9] *Id.* at 178.

> William, on his first date with Anne, surprised her with a kiss while they were attending a movie. Anne, who had been on numerous movie dates with boys in the community was startled and offended by his familiarity. In a suit by Anne against William,
>
> (A) Anne will win, because a kiss on the first date is not normal in the community in which Anne and William live;
> (B) Anne will win, because the proper activity in a theatre is watching the show;
> (C) Anne will lose, because kissing in the movie is common in some cities;
> (D) Anne will lose, because William did not hurt her in any way.
>
> "A" is the correct answer, but invariably the Golden Gate students chose "C" because kissing in the movies is apparently common in their ken. Their reasoning was that anyone knows kissing is an acceptable occurrence in theatres and to even attempt to sue someone for kissing a person in the theatre just can't be for real.[10]

Test-taking behavior fell into several patterns, all of which appear to be characterized by a "how to beat the game" approach.[11] In short, it appears that students

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[10] *Id.*

[11] *Id.* at 176-177. The study reports the following types of test-taking behavior:

(1) *The Key Word Theory.* In the Reading Recall sub-test, students would find a certain word in one of the answers that had also been in the paragraph they had read and the answer which contained that word would be their choice.

(2) *The Win-or-Lose Syndrome.* In the Principles and Cases sub-test, after reading the cases and before considering the possible answers some students would decide if it would be a

[footnote continued]

tended to stick to those "survival behaviors" which had worked for them in the past, rather than entering into conventions required by the test and taking the test expressly on its own terms.

We have observed that this same pattern is responsible for some of the difficulties encountered by minority students on first year law school examinations. Many of the logical processes demanded of law students require what we have described elsewhere[12] as an entitlement perspective. The entitlement perspective embodies a belief that rules which define rights determine outcome. Psychologically this amounts to a belief that one can control one's fate by knowing and invoking the rules. That belief is posited on the assumption that rules control the judge or decision-maker and that the person who is injured ought to be able to invoke those rules. Without that entitlement perspective, one tends to believe that everything rides on luck—on the whim, largesse, or prejudices of the judge. Marinda Harpole, the Director of the Basic Skills Program at Antioch explains that the acculturative dimension of legal education also involves a foreign set

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win-or-lose situation. Then, after reading the alternative answers, they would eliminate those which did not agree with their "decision."

(3) *Use of Independent Information.* On the Reading Comprehension sub-test, where knowledge of current events was a factor on some items, students often relied on their own knowledge, gained from TV, newspaper articles, informal conversations or school courses in answering the questions.

[12]Cahn and Cahn, Minority Students, Lawyering Competence and Bar Examinations (November 19, 1976) (unpublished paper presented at a Conference of the Council on Legal Education for Professional Responsibility).

of assumptions about the substantive importance of procedure:

> Justice – for the typical minority student, means the ultimate triumph of right over wrong. . . . The Anglo-American legal system is one in which the goal of situational justice (doing what is right in the case at hand) has been largely sacrificed to the goals of predictability, regularity, uniformity, and historical unity.
>
> Within the framework of this rule-bound legal system, justice is achieved when the process takes place in an orderly manner in conformity with all of the applicable rules. Another way of expressing this is that justice is simply "having your day in court." Justice inheres in the process, *not* the product.
>
> It is extremely difficult to acquire the process orientation when one has been imbued with a product orientation for most of one's life.[13]

Our analysis suggests that competence in law school is peculiarly culture bound—tied to assumptions about the legal system, the operations of rules of law, the perceptions of the rule of judges. However, minority students usually bring to law school a different perception of the legal system and a different perception of the causal rules which determine the outcome of cases. The Law School Admission Council study suggests that they will tend to stick to the "cause-and-effect" rules that they know and trust. We have selected some of the basic "outcome predictive" rules that law students are expected to master and contrasted them with the causal principles that a life-time of experience imparts to minority students.

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[13] Quoted in Cahn and Cahn, *supra*.

The most fundamental principle involved is that of *stare decisis*: "Like cases will be decided alike, on the facts, on the merits, without regard to the race or class of the parties." Minority students do not believe that. They start from the premise that one can best predict the outcome of a case by knowing the race and wealth of the parties. That and that alone is usually sufficient to predict what rules apply and who wins.

Similarly, law students must come to appreciate that judges are not legislators; they must apply the law; they cannot create a separate rule for each individual; they are not all-powerful because of the constraints imposed by their institutional role.[14] Minority students start from the opposite premise: that judges are all-powerful, that judges can decide a case any way they want and then rationalize the result after the fact. They read dissents as confirmation of that belief, and they tend to view decisions as simply expressions of the personal and political values of the decision-maker.

When engaging in rigorous legal analysis one must assume that the exercise has some utility, that judges are fair, that they will respond to sound legal argumentation and will be persuaded by a principled justification in terms of precedent, the literal wording of a rule, situation sense or underlying policy considerations. Minority students find it very difficult to believe that a judge whom they perceive as a "tool" of the "white power structure" will be unpersuaded by conclusory moral exhortation but will respond to esoteric distinctions, doctrinal manipulations and analysis of fact or policies. Many initially lack a sense of the audience they must address and persuade.

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[14] *See* ABA OPINION 242 (1942).

Other fundamentally different perceptions of law and lawyers control, at least initially, the response of many minority students. Some approach law school examinations as a game in which the object is to guess who wins and then to display as much knowledge of as many rules and cases as possible. Professor Charles Kelso, a Visiting Professor this past year at Antioch, decided to experiment with the hypotheses that the ability to take a law school examination involved a process of acculturation for minority students. Thirteen of the fifteen students who flunked his contracts examinations turned out to be minority students. He provided model answers, critiques of each paper and then gave a reexamination using different hypotheticals but applying the same qualitative standards. All but one of the students passed the reexamination; most reported that they had never taken an examination where the objective was to demonstrate that they could give reasoned analysis of the arguments for each side and where the outcome predicted was far less important that the rationales advanced for justifying the conclusion.

We believe that law school examinations are, in no small part, measures of the extent to which a candidate can articulate, utilize, and manipulate assumptions, inferences and causal principles held by the dominant class, race and culture. (*See* Appendix C for a paired list of those assumptions and counter-assumptions, held by minority students. Cahn & Cahn, *supra*). This may be true of medical education, but we lack the expertise to articulate the role which class or cultural assumptions may play in diagnostic and problem solving activities of physicians. It is at least possible that in interpreting symptoms, making inferences about the causes of illness, assessing possible psychosomatic components of physical illness, or prescribing an appropriate and

realistic course of treatment, some culture-related assumptions may be involved.[15]

We believe that a culture-bound definition of lawyering competence is functionally justified: lawyers must function in this society's legal system and within the framework of the dominant culture's laws—even when they seek to change those laws or that system. Tests which measure the degree of acculturation that has already taken place cannot be considered a definitive measure of potential to "become acculturated" or potential to achieve competence for persons who are not members of the dominant class, race or culture. The discriminatory impact resulting from reliance on tests which necessarily assume or measure that acculturation is a direct function of the degree of variance between the language, values, beliefs and inferences of the minority and majority culture.

Accordingly, we believe it to be of critical importance to know the race and class of the applicant in interpreting the data we receive. Otherwise we have no way of knowing whether poor scores or poor performance indicate lack of potential or merely lack of acculturation. Moreover, in distinguishing among minority candidates, we need to determine who has the greater potential to achieve that degree of acculturation entailed in attaining lawyering competence. That requires an assessment of intellect, of flexibility, of

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[15] COLORADO ADVISORY COMM. TO U.S. COMMISSION ON CIVIL RIGHTS, ACCESS TO THE MEDICAL PROFESSION IN COLORADO BY MINORITIES AND WOMEN 5-7 (1976).

willingness to entertain assumptions contrary to those known and experienced. It is difficult to believe that we can arrive at such a determination without consideration of race (and background factors associated with race) in assessing and interpreting the evidence.

We do know that in order for minority students to become competent lawyers, they must engage in a partial suspension of deeply-held and often personally confirmed beliefs about the legal system. To the extent this is so, it may help to explain the increasing body of evidence suggesting that practice-oriented tests and clinical assessment where feedback is reality-based appear to be less culture-biased and result in sharply different evaluations of minority students (both law and medical students) from more traditional essay or multiple choice examinations. These data are discussed in the following section.

C. Where Tests And Grades Only Measure An Applicant's Readiness To Benefit From One Pedagogic Method And To Perform On One Range Of Test Instruments, They Cannot Be Predictive Of Potential To Achieve Professional Competence Via Other Pedagogic And Testing Methods Such As Those Involved In Clinical Training And Practice-Oriented Examinations.

A study done at Antioch[16] examines the relationship between prelaw variables (i.e., LSAT, Writing Ability section of LSAT, and GPA) and law school variables (i.e., classroom and clinical performance during the first and second years of law school). The results indicate no

[16] J. George, The Domino Theory *supra*, note 2.

correlation between LSAT and grades at the end of the second year. The study also found a significant correlation existed between both clinic and class grades during the first year and Writing Ability scores and GPA but that there was no correlation between these variables by the end of the second year.[17] It appears that the massive infusion of clinical pedagogy in the first and second year eliminated the predictive value of the LSAT. The study also found that there was chance correlation between the LSAT, GPA, second year grades, and performance on an old multi-state scored by the National Conference of Bar Examiners as part of the research design.[18] By contrast, in other validation studies in the traditional law schools, the LSAT has correlated with second and third year grades and with subsequent performance on the multistate.[19]

Our study is strikingly mirrored by one from the University of California at San Diego School of Medicine[20] where two groups of students were compared—those admitted on the basis of MCAT scores and those from disadvantaged backgrounds admitted by a special "variance procedure." The difference in performance of the two groups appears to have decreased rapidly with the onset of internships or clinical rotations.[21]

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[17] *Id.* at 66.

[18] *Id.* at 22.

[19] A review of these studies appears in Educational Testing Service, Interpretive Booklet LSAT/LSDAS for (1974).

[20] H. Simon and J. Covell, *Performance of Medical Students Admitted Via Regular and Admission-Variance Routes*, 50 J. MED. ED. 237 (1975).

[21] *Id.* The basic clerkship in surgery had to be repeated twice by one member of the regularly admitted group whereas all students

[footnote continued]

The study concludes that although some differences between the groups remained, "The mean performance levels in clinical clerkships were nearly identical among the two populations; that of students granted admission variances was average, whereas that of their regularly admitted contemporaries was slightly better than average."[22]

A 1975 study at Temple University Medical School [J. Baum and C. Ireland, *Minority Student Performance on Pathology Examinations,* 67 J. NAT'L MED. ASSOC. 334 (1975)] raises similar questions about the relationship of testing methods to determinations about competence. The study evaluates the performances of two second year classes (1972-1973 and 1973-1974) on two different kinds of pathology examinations—an objective test and a practical/clinical test covering the same content. It was noted that,

> the practical examinations consisted of 16 stations provided for student identification of the organ or tissue and diagnosis. Based upon the complexity of the specimen, identification of the pathological process was an acceptable response in some cases.

Analyzing the differential performance of minority class members on these types of examinations, the researchers reported that many minority students performed below the median on the objective tests, but performed well above the median on practical examina-

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admitted through variance passed the surgical clerkship on their first attempt. The basic clerkship in medicine had to be repeated by one student in the regularly admitted group and by two students admitted by variance.

[22]Simon and Covell, *supra*, note 20 at 241.

tions designed and graded by the same faculty. *Id.* The authors advanced these two interpretations of the data:

> 1. It would appear that the format of the standardized objective examinations favors white students. . . .
>
> 2. The better than average performance of black and other ethnic minority students on the practical examinations suggests that their proficiency for achievement in an applied situation is greater than that of their white contemporaries. . . . *Id.* at 325

Analogous, albeit anecdotal, evidence came to light in a dispute at Harvard Medical School where one professor attacked minority admissions citing the example of a minority student who had failed Part I of the National Boards five times and yet was granted his M.D. degree. In rejoinder, another member of the medical school faculty pointed out:

> The student in question was granted his M.D. degree only after a year of highly satisfactory clinical performance on the wards of a distinguished hospital, documented by letters from all the chiefs of service under whom he served. Nor did Dr. Davis mention that the student had passed Part II of the National Boards. There is nothing to suggest that this man will be anything but a fine physician. To consider that he might be a danger to patients is ludicrous. R. Ebert, *Facts About Minority Students at Harvard Medical School* 294 NEW ENGLAND J. MED., 1402-3 (June 14, 1976).

Finally, our conclusions are corroborated by a recent survey of all the literature on the relationship between undergraduate performance, performance in medical school, and subsequent performance as a physician.[23]

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[23] J. Wingard and J. Williamson, *Grades as Predictors of Physicians' Career Performance: An Evaluative Literature Review*, 48 J. MED. ED. 311 (1973).

"[A]vailable research findings have demonstrated that little or no correlation exists between academic and professional performance."[24] Based on this conclusion, the authors suggest that there is a need to rethink the use of grades in making career decisions and urged the greater study of "performance" in the future.

We therefore conclude that test scores are of dubious predictive value for professional schools if

a. they are only predictive of performance as a student, not as a professional following graduation;

b. they are only predictive of performance as a student operating in a traditional classroom setting, not student performance in a clinical, applied, or practice setting;

c. they are only predictive of some, but not all of the most crucial competencies required.

Moreover, to the extent that professional education involves a process of acculturation, admissions procedures based on the entry examinations only measure the level of acculturation reached by the student prior to professional school. Other factors including personality type, motivation, flexibility, self-image, staying power and intellectual capacity determine the rate of adjustment and the extent to which adjustment can be made within the time limits and academic standards imposed by the institution. Neither the MCAT nor the LSAT purport to gauge capacity for personal growth and adjustment.

A primary reason for the development of the new MCAT was a finding by the Association of American Medical Colleges that the old MCAT did not adequately

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[24] *Id.* at 313.

test for relevant competency.[25] Yet Bakke's claim relates to his score on the old MCAT.[26]

It is germane to point out that the LSAT only purports to test two of the six basic lawyering competencies which Antioch has identified and defined. Thus, for instance, it appears to test for capacity at

legal analysis, and
written communications.

It does not purport to test for

problem solving
oral communications
professional responsibility
practice management.

Those competencies tend to be much more client-oriented, to require interactive and negotiating skills, and to demand greater definition of role and identity than traditional academic courses and examinations do. Clinical education places a premium on such competencies and it appears that students with learning styles that do not profit as readily from traditional classroom experiences acquire clinically the two competencies traditionally tested in academic examinations:

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[25] *See* ACCESS TO THE MEDICAL PROFESSION, *supra*, note 15 at 29-30; *See also*, Cooper, *The New Medical College Admission Test*, 52 J. MED. ED. 77 (January 1977).

[26] Conceivably the entire difference between the numerical ranking of Bakke and the other candidates could arise solely from differences in MCAT or undergraduate grades. An MCAT-based differential hardly justifies the court's characterization of "less-qualified."

legal analysis and written communication, thereby reducing the predictive value of the LSAT to zero.

The singular importance of problem solving was noted as a potentially major cause of the lack of correlation found between the MCAT and subsequent professional performance.[27]

It is premature to speculate further on the relation between test scores, cognitive styles, race, class and pedagogic method. But one thing is clear: tests measure acculturation or readiness to profit from the dominant culture's traditional instructional mode. Tests do not measure potential to achieve competence, or actual competence unless they have been validated against actual performance in practice settings. No such validation studies have been conducted in law; those in medicine have found *no* correlation. Whatever limited assumptions can be made about the predictive value of test scores for members of the majority culture cannot be automatically converted into statements about potential competence of minority members. At best, they can be said to be statements about the degree of acculturation achieved by minority members. Admittedly, this may be a critical indicator of chances of survival. It may not be, however, for it can just as readily be a measure of an impaired sense of identity.

The critical factor for survival may not be acculturation; it may be motivation. And there is some evidence that personality-type correlates directly with the chances of attrition, though not with grades. A study conducted in 1965 for the Law School Admission Council established a personality test that placed subjects on a continuum extending from scientific-analytic to sensuous-artistic.[28] The

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[27] *Supra, Grades as Predictors,* note 23 at 313-314.

[28] P. VanR. Metter, Personality Differences and Student Survival in Law School, reprinted in LAW SCHOOL ADMISSION COUNCIL, 1 REPORTS OF LSAC SPONSORED RESEARCH 299-310 (1976).

study noted that there was *no* correlation between personality type and test score but there was a marked correlation between personality type and attrition rate. The artistic-sensuous type was far more likely to drop out of law school than the scientific-analytic engineer type, but both types had equally good chances of scoring high on the LSAT. At the very least, issues of motivation, maturity, staying power, and sense of responsibility have an impact on professional competence—if professional competence includes professional responsibility, practice management and problem solving competencies.

Accordingly, we submit that race, like other factors cited by the court as pertinent in interpreting test scores—socio-economic background, educational opportunities, etc.—is a factor bearing directly upon the interpretation of test scores, grades and other evidence. To insist that the admission process must rely exclusively upon racially neutral criteria and must exclude consideration of race in the interpretation of data is in fact to require discrimination on account of race.

II.

THE COURT BELOW ERRED IN PROHIBITING CONSIDERATION OF AN APPLICANT'S RACE IN INTERPRETING EVIDENCE BEARING UPON THE POTENTIAL CONTRIBUTION AN APPLICANT WILL MAKE TO FURTHERING THE PROFESSION'S COMMITMENT TO EQUAL JUSTICE UNDER LAW, TO IMPROVING THE CAPACITY OF THE LEGAL SYSTEM TO RESPOND TO THE GRIEVANCES OF DISENFRANCHISED PERSONS AND GROUPS, AND IN REQUIRING THE ADOPTION OF ONLY "NONRACIAL ALTERNATIVES" IN EFFORTS AIMED AT REMEDYING THE DEARTH OF PROFESSIONALS SERVING MINORITY COMMUNITIES.

The court below concluded that reliance upon the race of an applicant in making a determination of future contributions was constitutionally repugnant, even though it conceded "that it is more likely that they [minority doctors] will practice in minority communities than the average white doctor."[29] The court reasoned that

> there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race.
>
> . . . .
>
> An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is *chosen entirely on the basis of race and disadvantage.* In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by con-

[29] 553 P.2d at 1167.

trast that another is more selfishly acquisitive.[30] (emphasis added).

We take issue both with the factual assertion—that there are no empirical data—and with the legal proscription the court placed on the use of race as a fact of evidentiary value in predicting probable contribution of a candidate to serve minority communities.

Law schools have not followed the admissions procedure suggested by the court below: inquiring of applicants of all races whether they would be willing to make a commitment to serve disenfranchised and minority communities. One of the most staunch defenders of affirmative action programs has defended the refusal to make this individual inquiry on grounds that it would prove prohibitively expensive, politically unpalatable, and administratively unfeasible.[31] To our knowledge, no law school, except Antioch, explicitly elevates the normative obligations of the profession to the status of an essential admissions criterion applicable to all applicants. Antioch regards this decision not as a matter of choice or policy but as a matter of fundamental obligation stemming from the canons, case law and the Constitution itself.[32]

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[30] *Id.*

[31] *See* Askin, *Eliminating Racial Inequality in a Racist World*, 2 CIV. LIB. REV. 96 (1975).

[32] Canons 2 and 8 of the ABA CODE OF PROFESSIONAL RESPONSIBILITY together with the accompanying Ethical Consideration, elucidate these obligations. The right of access to the legal system for redress of grievances as derivative from the first amendment is well established. *See NAACP v. Button*, 371 U.S. 415 (1963) and its progeny: *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1

[footnote continued]

Most of the empirical data only support the court's general observation that minority professionals are more likely to follow career lines serving minority communities than white professionals.[33]

(1964); *United Mine Workers v. Illinois State Bar*, 377 U.S. 217 (1967); *United Transportation Union v. Michigan*, 401 U.S. 576 (1971);(all held activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the first amendment). Cf. The 1974 Legal Services Corporation Act, 42 U.S.C. Section 2990 (1974). A lawyer has a duty to assure that legal services are made available to all persons regardless of race or income level, and to assure that all persons are treated equally in any court of law or during any legal proceeding. To the extent that these obligations apply to all attorneys, law schools may be obligated to incorporate criteria requiring a showing of normative qualificiations as well as intellectual qualifications respecting the capacity of an applicant to discharge the full range of professional duties and obligations. Now that the American Bar Association has amended its accreditation standards to make instruction in legal ethics and the responsibilities of the profession required for all law students, a determination in the admissions process of intellectual capacity can no longer be considered entirely severable from a determination respecting normative capacity.

[33] A 1974 study shows that of the 2,860 attorneys in legal service programs, 15% of them were minorities at a time when approximately 2% of the profession were minority attorneys, and at a time when approximately 6% of the law student population was minorities. (Figures provided by the Legal Services Corporation). At Rutgers Law School, Askin reports that "of the black and hispanic law graduates turned out by June 1973, most went into public service jobs; thirteen went to work for various OEO neighborhood legal services programs; eleven obtained jobs with state or municipal government agencies; seven went to work for various federal agencies, including three with the Equal Employment Opportunities Commission; two joined the staffs of Public Defenders; five served judicial clerkships; two joined the staffs of elected public officials; two were hired as judicial administrators. One was recently appointed a judge!" Askin, *supra*, note 31 at 100.

The National Bar Association, A SURVEY OF ECONOMICS AND OFFICE PRACTICES OF THE BLACK LAWYER (1971) produced the following conclusions:

> 1. The preponderance of Black attorneys reported a general practice with special emphasis on "people work" rather than commercial or business work. *Id.* at I-13;
>
> 2. Community and leadership activities are central to the Black lawyer's work and the economic lifeline of the Black bar as a whole has been related to the ability of the Bar to be part of the commercial, institutional and governmental activity of the Black community. The Black lawyer spends a greater proportion of his time in public activity than his White counterpart, and generally in areas needed by the Black community. *Id.* at 1-14.

Such statistics as there are support the Supreme Court of California's intuitive perception that minority lawyers tend to have a deep-seated commitment to civil rights and to serving minority communities. *See* Note, *The Negro Lawyer in Virginia: A Survey*, 51 VA. L. REV. 512 (1965).

The national picture, assembled by the National Association for Law Placement from data from eighty-two law schools, reveals that about 18% of employed minority law graduates were engaged in public interest practice or indigent legal services as contrasted with less than 5% of white law school graduates engaged in the same categories of employment. National Association for Law Placement, Employment Report on Law School Graduation Class of 1975 (1976) (mimeograph on file in Placement Office, Antioch School of Law).

Antioch's data draws uniquely upon a sample where all applicants are asked about their career expectations and where the School explicitly commits itself to

turning out graduates who will serve the public interest with particular emphasis on representing the disenfranchised and underrepresented segments of the community. Over 50% of the minority members of the graduating classes of 1975 and 1976 are engaged in employment providing some form of representation and enfranchisement to minority interests; only about 30% of the white graduates from those classes are engaged in providing representation to minority communities, though a substantially higher percentage are engaged in some form of public interest employment.

We do not assert that every minority applicant can be assumed automatically to be committed to serving minority communities. And to the extent that all applicants to Antioch are aware that an affirmative commitment may assist them in securing admission, it became essential to look to demonstrated commitment evidenced by some tangible or specific action. Racial identity is simply one piece of relevant evidence. It is not dispositive, but it should not be excluded from consideration. Some minority applicants evidence a seemingly total lack of awareness of the problems that beset the ethnic groups from which they come; others give indications of a desire to distance themselves from those origins; still others are clearly opportunistic. We believe these observations bear upon potential contribution, just as we believe it appropriate to take cognizance of the empirical evidence that membership in a minority group lends increased credence to statements of intention and commitment to serve minority communities.

The only data analogous to Antioch's experience comes from the Reginald Heber Smith Fellowship program, funded by the Legal Services Corporation to recruit law school graduates to begin their careers in legal services programs. [34] They report that approximately 40% of the

[34] As a part of that program, applicants are asked if they will make a long-term commitment to serve poor and minority communities. This is the kind of question the court below proposed.

applications received come from minority law graduates who comprise less than 7% of the law school population. Approximately 73.5% of all Smith fellows remain in poverty law following the end of their two-year fellowship, but there is no breakdown of the relative percentage of minority and white fellows who stay in the field of services to poor and minority communities.

Antioch's data and the Smith Fellowship program's data certainly tend to indicate that ethnic identity is at least a relevant predictor of career patterns and possibly a more accurate predictor than the stated objectives of an applicant.

We concur in the court's rejection of the view that "any one race is more selfishly socially oriented or by contrast that another is more selfishly acquisitive."[35] The reason for taking the race of the applicant into consideration is rather self evident. In this society, race is a fact of life. It cannot be shed voluntarily. Participation for minority professionals in the affairs of the minority community is not necessarily voluntary. As frequently as not, such representational roles are thrust upon minority professionals because of the affirmative action requirements that oblige governmental agencies to "conscript" minority professionals, because of the prevailing need for token minority representation on advisory and governmental bodies, because of the vulnerability (both legal and moral) to which both the public and private sector may be prone if there is not adequate minority involvement. One

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[35] 553 P.2d at 1167.

cannot divest oneself of racial identity or vulnerability to injustice based upon race merely by wishing to do so.

The recent confirmation hearings on the nomination of Patricia Roberts Harris to be Secretary of the Department of Housing and Urban Development are particularly instructive in this regard. Patricia Harris graduated from a predominantly white law school, George Washington; she served as Ambassador to Luxembourg, hardly a third world nation; the law firm of which she was a partner can hardly be characterized as specializing in poverty law or even in civil rights, irrespective of the considerable pro bono work done by individual members; her prominence in national Democratic politics was not primarily associated with the issues of poverty or race. At the same time, Attorney Harris did not lack other credentials—as former Dean of Howard Law School, as a member of the Board of NAACP Legal Defense Fund, as legislative chairperson of the National Council of Negro Women. Whether voluntarily or not, Patricia Roberts Harris was selected to head a cabinet department that dealt with the problems of cities, and she chose to characterize that stewardship as a special commitment to deal with the problems of minority communities. Whatever her own interests, class allegiances, or career preferences, her statement of commitment and her projection of herself as a spokesperson for minority concerns was accepted by the Senate of the United States:

> You do not seem to understand who I am. I'm a black woman, the daughter of a dining car waiter. I'm a black woman who even 8 years ago could not buy a house in some parts of the District of Columbia. Senator, to say I'm not by and of and for the people is to show a lack of understanding

> of who I am and where I came from. . . . You spoke of the unrepresented and the poor and I said I'm one of them. . . . I have been a defender of women, of minorities, of those who are the outcasts of this society, and throughout my life, and if my life has any meaning at all it is that those who start as outcasts may end up being part of the system, and I hope it will mean one other thing, Senator, that by being part of the system one does not forget what it meant to be outside it.
>
> *Nomination of Patricia Roberts Harris, Hearing before the S. Comm. on Banking, Housing and Urban Aff.*, 95th Cong., 1st Sess., 41 (1977)

Racial identity is not something that minority persons are permitted to shed in this country. The Equal Protection Clause cannot require graduate schools to ignore that reality, for to do so would be to require them to engage in racial discrimination by ignoring or denying the relevance of evidence favorable to the admission of minority applicants.

We regard the imposition of the requirement as reversible error.

In the alternative, we ask that any decision in this case be expressly limited to medical schools.

This case does not permit separate consideration of the distinctive status of the legal profession as Officers of the Court. Moreover, while a dearth of minority medical students will mean a dearth of minority doctors, the same lack of minority law students will mean not only a shortage of minority lawyers but a corresponding impact on the racial mix of public and private leaders that De Tocqueville noted the profession had supplied since the birth of the Republic. Minority underrepresentation in decision-making roles will be alleviated only by continued integration within law schools.

Accordingly, we ask that if this case is decided on principles that preclude all consideration of a candidate's race, that the decision be limited to the facts of this case and that any decision respecting the application of such principles to law schools be expressly reserved for a later case where the record will permit fuller consideration of the distinctive status and obligations of the legal profession.

CONCLUSION

We urge that the Court reverse and remand to the trial court to determine whether the facts will sustain a finding that race was utilized in a constitutionally permissible fashion for evidentiary and interpretive purposes to secure the uniform application of uniform admissions criteria.

Respectfully submitted,

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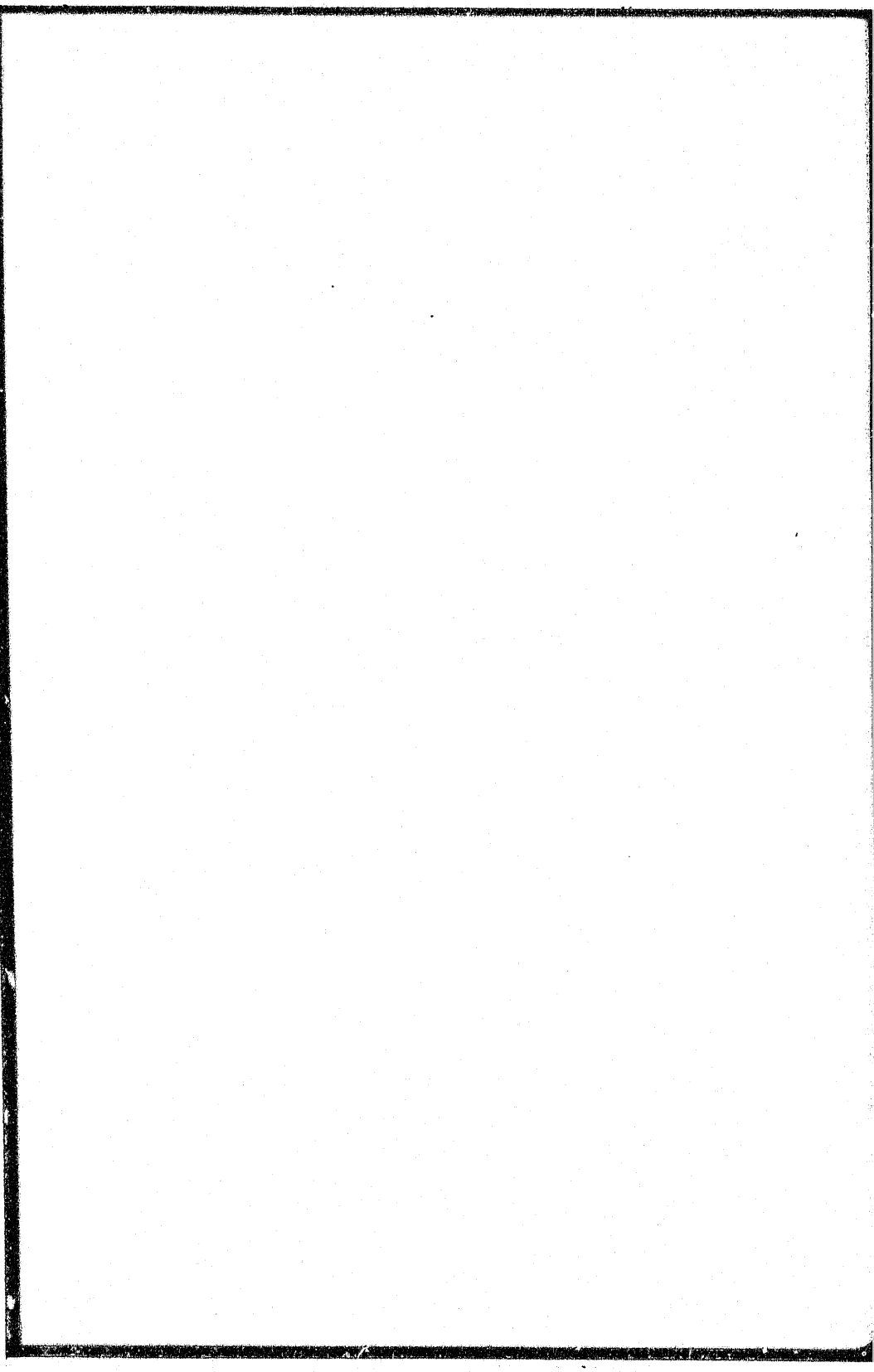
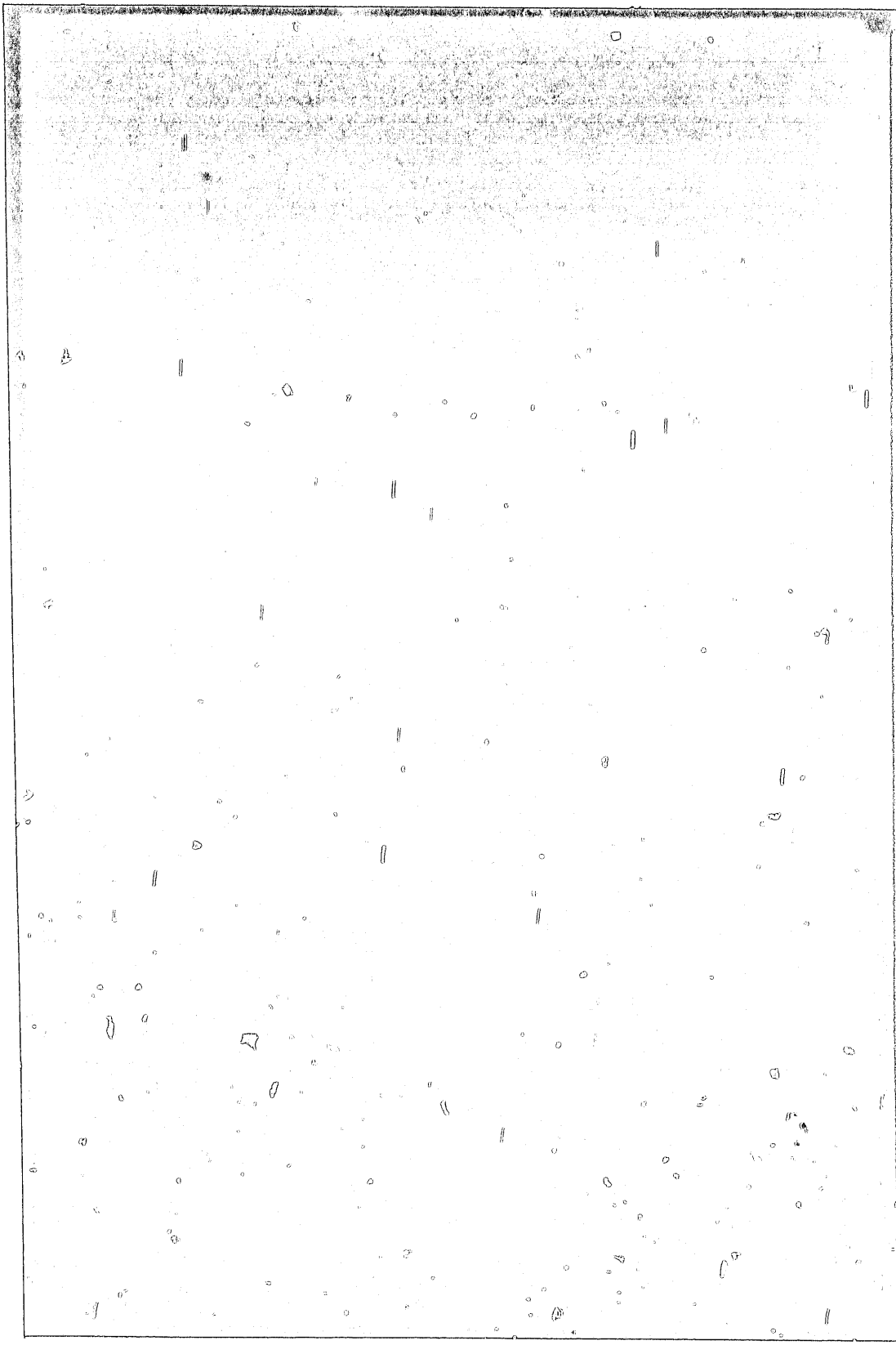
Counsel are indebted to:

CLAUDIA RIBET, J.D. Antioch School of Law 1977, and

GREGG H. MATHEWS, candidate for the J.D. degree, Antioch School of Law, 1978.



APPENDIX



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APPENDIX A

CLINICAL EVALUATION SUMMARY FORM

Student Name _____ Supervisor _____

Date _____ Division/Section _____

COMPETENCY RATING		
COMPETENCIES & DEFINITIONS	RATING	COMMENTS
ORAL The ability to assess, control, and vary verbal and non-verbal communications with an audience(s) in a given situation to maximize the accomplishment of objectives.		
WRITTEN The ability to control and vary written communications with an audience(s) in a given situation to maximize the accomplishment of objectives.		
LEGAL ANALYSIS The ability to combine law and facts in a given situation to generate, justify, and assess the relative merits of alternative legal positions.		
PROBLEM SOLVING The ability to use legal analysis and other information to identify and diagnosis problems in terms of client objectives and to generate strategies to achieve those objectives.		
PROFESSIONAL RESPONSIBILITY The ability to recognize the ethical considerations in a situation, analyze and evaluate their implications for present and future actions, and behave in a manner that facilitates timely assertion of rights.		

PRACTICE MANAGEMENT

assertion of rights.		

PRACTICE MANAGEMENT The ability to manage time, effort, available resources, and competing priorities in a manner which generates the maximum output of quality legal services.		

*INSTRUCTIONS: Rate student on each applicable general competency using a number from the Competency Scale provided here:

1= Serious deficiency 3= Marginal deficiency 5= Competency
2= Deficiency 4= Minimal competency 6= Superior Competency

TASK SUMMARY				RECOMMENDATIONS
Simple	Average	Complex	Tasks	

*INSTRUCTIONS: Identify tasks and write the number of times tasks have been of a simple, average, or complex nature.

Student Name _____ Supervisor(s) _____

Date _____ CLINICAL DIAGNOSTIC RECORD Division/Section _____

COMPETENCIES	SUBDIVISIONS	SPECIFIC COMPETENCIES (Ability to:) / TASKS / COMPLEXITY	
ORAL		use the mechanics of language	
		express a thought with clarity and economy	
		express thoughts in an organized manner	
		speak appropriately to a given audience	
		communicate so as to advance immediate and long-term objectives	
		identify and use appropriate non-verbal aspects of communications	
		perceive others' communications and actions	
WRITTEN		use the mechanics of the language	
		express a thought with clarity and economy	
		express thoughts in an organized manner	
		write appropriately to a given audience	
		write so as to advance the immediate and long-term objectives	
LEGAL ANALYSIS	Identifying Facts and Relevant Law	identify relevant facts	
		identify inconsistencies among facts	
		identify the reliability of asserted facts	
		distinguish facts from conclusions of law	
		determine rules of law relevant to framing legal issues	
	Formulating Legally Analytical Theories	determine trends in interpretation or application of law	
		group and categorize facts in terms of the concepts or language of the law	
		select aspects of the facts which appear to call for the application of a legal rule or concept	
		select aspects of a legal rule or concept which appear to call for its application to the facts	
		show why legal rule or concept calls for extension, limitation, or rejection of another rule or concept	
		separate, combine,, and sequence arguments and counter-arguments to formulate legal theory	
	Evaluating Legal Theories	identify predispositions of a particular decision-maker	
		identify compelling equities recognized by the law or inherent in the fact situation	
		determine relative effectiveness of alternative legal theories by analysis and evaluation	

PROBLEM SOLVING	Identifying & Diagnosing Problems	identify client objectives and priorities
		identify obstacles and facilitating factors that bear on realization of objectives and priorities
		state alternative definitions of client's problem(s)
		identify and develop information and steps needed to clarify alternative definitions of problem(s)
		make a tentative choice among alternative definitions of the problem(s)
	Developing Solutions	develop a range of solutions and strategies
		assess and order the range of alternative solutions
		reach informed consent with client on prefered solutions and strategies
	Implementing Strategies	prepare a work plan
		take the actions (or assure that assigned others do) to carry out the work plan
		check results at determined steps and adjust as necessary
PROFESSIONAL RESPONSIBILITY		identify and analyze ethical problems
		determine available courses of action
		evaluate available courses of action based on client interest, self-interest, & social interest
		act consistently with ethical decisions and commitments
PRACTICE MANAGEMENT		allocate, time, effort, and other resources necessary to carry out case load tasks
		coordinate efforts with others
		work according to applicable systems, rules, and procedures governing handling of cases & files
		assess and design improvements in system, rules, & procedures governing handling of cases & files
		maintain a level of productivity that conforms with applicable standards and expectations
		judge the point at which further commitments cannot be realistically be discharged competently
		supervise others

*INSTRUCTIONS: At the top of the column identify each task you evaluate in the order it occurs. (Refer to Catalog of Illustrative Tasks for examples of tasks.) Enter next in the column the complexity of the task based on 1=simple, 2=average, and 3=complex. Go down the column for each task and enter a rating after each Specific Competency you consider involved in this task using the six point Task/Competency Scale shown here. Leave a blank for any Specific Competency that is not applicable or not observed.

TASK/COMPETENCY SCALE

1= Serious deficiency: could not be trusted with client(s) or to perform task(s).
2= Deficiency: required continous supervision.
3= Marginal deficiency: did some work with minimal supervision, but could cause problems if not carefully supervised.
4= Minimal competency: usually performed task(s) satisfactorally with some supervision.
5= Competency: performed task(s) satisfactorally with virtually no supervision (except for final review).
6= Superior competency. performed task(s) in outstanding manner with virtually no supervision (except for final review).

CATALOG OF DEFINITIONS OF COMPETENCIES

I. ORAL COMPETENCY

General Definition — The ability to assess, control, and vary verbal and non-verbal communications with an audience(s) in a given situation to maximize the accomplishment of objectives.

Specific Competencies:

1. Ability to use the mechanics of language, e.g., grammar, syntax, citation, articulation.
2. Ability to express a thought with clarity and economy.
3. Ability to express thoughts in an organized manner.
4. Ability to speak appropriately to a given audience.
5. Ability to communicate so as to advance immediate and long-term objectives.
6. Ability to identify and use appropriate non-verbal aspects of communications, e.g., appearance, poise, gestures, facial expressions, posture, and use of spatial relationships.
7. Ability to perceive others' communication and actions (verbal and non-verbal).

* * * *

II. WRITTEN COMPETENCY

General Definition — The ability to control and vary written communications with an audience(s) in a given

situation to maximize the accomplishment of objectives.

Specific Competencies:

1. Ability to use the mechanics of the language, e.g., grammar, spelling, punctuation.
2. Ability to express a thought with clarity and economy.
3. Ability to express thoughts in an organized manner.
4. Ability to write appropriately to a given audience, e.g., tone, format, citation form.
5. Ability to write so as to advance the immediate and long-term objectives.

* * * *

III. LEGAL ANALYSIS COMPETENCY

General Definition — The ability to combine law and facts in a given situation to generate, justify, and assess the relative merits of alternative legal positions.

Analyzing Facts and Identifying Relevant Law — Given a fact situation and knowledge of rules of law, ability to identify relationships between facts and law in a way that will facilitate the formulation of alternative legal theories.

Specific Competencies:

(Analysis of Facts)

1. Ability to identify relevant facts.
2. Ability to identify inconsistencies among facts.
3. Ability to identify the reliability of asserted facts.
4. Ability to distinguish facts from conclusions of law.

(Identification of Relevant Law)

5. Ability to determine rules of law relevant to framing legal issues, e.g., statutes, regulations, case law, court rules, secondary authorities.
6. Ability to identify discrete legal issues.
7. Ability to determine trends in interpretation or application of laws.

Formulating Legal Theories — Given fact analysis, the law, and the resulting identification of legal issues, the ability to identify and organize arguments and counter-arguments in terms of claims, defenses, or other legal results.

Specific Competencies:

1. Ability to group and categorize facts in terms of the concepts or language of the law.
2. Ability to select aspects of the facts which appear to call for the application of a legal rule or concept.
3. Ability to select aspects of a legal rule or concept which appear to call for its application to the facts.
4. Ability to show why some aspects of a legal rule or concept calls for an extension, limitation, or rejection of another rule or concept.
5. Ability to separate, combine, and sequence arguments and counter-arguments to formulate a legal theory.

Evaluating Legal Theories — Given alternative legal theories, the ability to predict the decision of an authoritative source.

Specific Competencies:

1. Ability to identify predisposition of a particular decision-maker, e.g., characteristics of the decision-maker, workings of the decision-maker's institution, patterns of previous decisions, reasons given for previous decisions.
2. Ability to identify compelling equities, recognized by the law or inherent in the fact situation.
3. Ability to determine relative effectiveness of alternative legal theories by analysis and evaluation of 1 and 2 (above).

* * * *

IV. PROBLEM SOLVING COMPETENCY

General Definition — The ability to use legal analysis and other information to identify and diagnose problems in terms of client objectives and to generate strategies to achieve those objectives.

Identifying and Diagnosing Problems — Given a situation, ability to isolate the problem and to identify, generate, and organize information in a way that will facilitate the formulation of alternative solutions.

Specific Competencies:

1. Ability to identify client objectives and priorities.
2. Ability to identify obstacles and facilitating factors that bear on the realization of client objectives and priorities.
3. Ability to state alternative definitions of client's problem(s).

4. Ability to identify and develop information and steps needed to clarify alternative definitions of the problem(s).
5. Ability to make a tentative choice among alternative definitions of the problem(s).

Developing, Evaluating, and Selecting Alternative Solutions and Strategies -- Given diagnosis of a problem, the ability to develop and evaluate alternative courses of action designed to advance some or all of the client objectives and make a justifiable selection.

Specific Competencies:

1. Ability to develop a range of solutions and strategies which include consideration of types of strategy, risk, legal and social consequences, party control, forums, cost, and ethics.
2. Ability to assess and order the range of alternative solutions with respect to client's objectives and priorities, probability of success, consequences of partial success or failure, available resources, and ethics.
3. Ability to reach informed consent with client on prefered solutions and strategies.

Implementing Strategies -- Given selection of solutions and strategies, the ability to implement and modify those strategies by taking action and evaluating results in light of objectives and other criteria.

Specific Competencies:

1. Ability to prepare a work plan that identifies who will do what, with whom, where, when, and with what expected results.

2. Ability to take the actions (or insure that assigned others do) to carry our the work plan.
3. Ability to check results at determined steps and adjust as necessary.

* * * *

V. PROFESSIONAL RESPONSIBILITY COMPETENCY

General Definition – The ability to recognize the ethical considerations in a situation, analyze and evaluate their implications for present and future actions, and behave in a manner that facilitates timely assertion of rights.

Specific Competencies:

1. Ability to identify and analyze ethical problems.
2. Ability to determine available courses of action.
3. Within the context of the Code, the ability to evaluate available courses of action based on client interest, self-interest, and social interest.
4. Ability to act consistently with ehtical decisions and commitments.

* * * *

VI. PRACTICE MANAGEMENT COMPETENCY

General Definition – The ability to manage time, effort, available resources, and competing priorities in a

manner which generates the maximum output of quality legal services.

Specific Competencies:

1. Ability to allocate time, effort, and other resources necessary to carry out case load tasks.
2. Ability to coordinate efforts with others.
3. Ability to work according to applicable systems, rules, and procedures governing the handling of cases and files.
4. Ability to assess system operations and design improvements in the system, rules, and procedures governing the handling of cases and files.
5. Ability to maintain a level of productivity that conforms with applicable standards and expectations.
6. Ability to judge the point at which further commitments cannot realistically be discharged competently.
7. Ability to supervise others.

APPENDIX B

ANTIOCH SCHOOL OF LAW ADMISSIONS MATRIX

Applicant: _____ Circle One: Undergraduate / Graduate

Evaluator: _____ Date: _____ Age: _____

Financial Status: (based on parents' occupation and the "live-in" response for an indication of applicant's pre-undergrad years; and based on applicant's occupation and the "live-in" response for an indication of the applicant's present position)

U UM M LM L (Pre-undergrad)

U UM M LM L (Present)

None or Unacceptable	Some or Least Acceptable	Below Norm	Norm	Above Norm	Preferable	Numerical Maximum or Ideal
1	2	3	4	5	6	7

1. COMPETENCY POTENTIAL

A. Traditional Measures

1. Scholastic and Test Performance

●LSAT: ___/___ ___/___ ___/___ LSAT Average: ___/___

(Overall Scale)	283 or Below (1)	284-371 (2)	372-483 (3)	484-584 (4)	585-670 (5)	671-756 (6)	757 (7)
(Minority Scale)	241 or Below	242-323	324-405	406-501	502-609	610-717	718 or Above

College Mean (- or +30 pts. = norm) ____ ASL score ____ (College score + ASL score) x 1/2 = ☐

ASL minority score ___ ☐

● G.P.A.: ___.___

1	2	3	4	5	6	7
1.9 or Below	2.0 2.4	2.5 2.8	2.9 3.3	3.4 3.6	3.7 3.9	4.0

College Mean & Above: _____ ASL Norm score: _____ (College score + ASL score) x 1/2 = ☐

e Scholastic Achievement (add 1 for each):

3.5 cum + _____
Deans list _____
Graduation w/honors, etc. _____
Honor Society _____
Scholarship _____
Other: (Identify) _____

Scholastic Ach. Total: ☐

Total: Sec. A1: _____

2. Behavioral Elements (This pertains to the time frame of up to and including undergraduate years, whether done in an uninterrupted sequence or extended, e.g., stopped to work, then returned, etc. Please identify persuasive factor(s)).

a. Extracurriculars and/or work. ____ x 1.5 = ____

b. Range of life experience. ____ x 1.5 = ____

c. Ability to deal with unstructured, uncertain, ambiguous ASL-type environment. ____ x 1.5 = ____

d. Effort expended, e.g. combination of LSAT, GPA, and performance. ____ x 1.5 = ____

e. Undergraduate record; erratic or consistent, irrelevant or soft major, (e.g., fine arts, etc.) v. disciplined or strong major; consistently poor performance in analytic courses, e.g., math, biology, etc.; very low class rank or percentile ranking; large number of courses not included in GPA. (Please note persuasive factor(s)). ____

f. Worked a number of hours per week for 1/2 semesters in undergrad. (15 is norm, 37 is max.) ____

Total: Sec. A2:_____

3. Moderating Elements (related to background, growth in undergraduate or graduate experience. Please note which.)

a. Educationally different or deprived; underachiever. (add 1) ____

b. Bilingual (add 1) ____

c. Late bloomer (in undergrad or grad marked improvement from year to year by at least .8 GPA increase from 1st to present semesters.) (add 1) ____

d. Remediation (prior to entry or during undergrad; CLEO) (add 1) ____

e. Bona fide LSAT low tester (upper 25th percentile of graduating class, but LSAT falls below college mean; handicap impedes optimal performance). (add 1) _____

f. Maturity/persistence (evidence of having overcome adversity -- survival; e.g., first family member to receive BA, supporting family member, physical handicap, etc.) (add 1) _____

Total: Sec. A3: _____

B. Non-traditional Measures (with an eye toward clinical performance)

1. Essays, personal statement. (Content & construction: analysis, organization, syntax, style, creativity & tone. Please note persuasive factor(s)). _____

2. Recommendation(s) (noteworthy recommendation from informed recommender whose judgment is tested or seems true) _____

3. Graduate school (Note substance: difficulty of area; amount and/or quality of work; reputation of school) _____

4. Work (work in law-related area or in a job involving a lot of responsibility or academic/intellectual facets) _____

Total: Sec. B: _____

C. Supplemental Evidence (Note if pertinent.)

1. Interview _____

2. Work Product _____

3. Other: _____

D. Special Problems (Receives no rating but must be noted.)

1. Law school failure _____

2. Criminal conviction _____

3. Other: _____

Max. Points			Points Earned
(G = those applicants who have graduated; U = those who are presently undergraduates)			
G	U		
116	(102)	Ideal	_____
84	(72)	and above Preferable	_____
70	(60)	- 83 (71) Above Norm	_____
56	(48)	- 69 (59) Norm	_____
below 56	(48)	Below Norm	_____

	Checklist		Comments
	Positive	Negative	
II. CONTRIBUTION POTENTIAL			
A. Long-Term Probability of Dedication to Equal Justice			
• Papers, studies, academic focus in college and/or graduate school	____	____	
• Public service employment: Legal Services, Public Defender Education Government	____	____	
• Extracurricular activities	____	____	
• Extended post-college career	____	____	
• Specific, constructive career goals	____	____	
• Demonstrated sensitivity, maturity, humanity	____	____	
1. Negative Elements			
a. Immaturity	____	____	
b. Egotism	____	____	
c. Personal insecurity	____	____	
d. Lack of evidenced concern	____	____	
e. Lack of staying power	____	____	
2. Counteracting Factors			
a. Youth	____	____	
b. Limited opportunities	____	____	

	Positive	Negative	Comments
B. Enfranchisement Contribution			
• Membership in disenfranchised group; race, nationality, language, sex, age, geographically depressed, class.	_____	_____	
• Negatives: Evidence of dissassociation, disinterest, insensitivity, sheltered	_____	_____	
• Voluntary commitment to representation of disenfranchised			
- work record	_____	_____	
- career goals	_____	_____	
- application	_____	_____	
- extracurriculars (women's rights, etc.)	_____	_____	
• Quality or significance of commitment: maturity, sophistication, sense of responsibility, family background, "roots", references, perceptiveness of injustice answer	_____	_____	
• Work products	_____	_____	
• Graduate or interdisciplinary work product already utilized (with demonstrated application)	_____	_____	
C. Supplemental Evidence			
1. Interview	_____	_____	
2. Checks with references	_____	_____	

Max. Points		Points Awarded
90-100	Long and short term winner - exceptionally principled, responsible, committed - may not go into poverty law immediately but will make an exceptional contribution to scholarship or service or profession.	_____
80-89	Solid, not necessarily extraordinary in talent but extraordinary in dedication; every evidence of career commitment to equal justice and enfranchisement.	_____

or

	Credit to the profession - will be able, competent, compassionate. May never go into poverty law or contribute to enfranchisement; will be a credit to Antioch; distinguished career likely with much public service, public interest work.	_____
70-79	Short term winner - long on rhetoric but dubious depth of commitment; may spend a year in legal services; will spend life floating in liberal type things; not exceptional intellect or character but likeable.	_____
60-69	Filler - better than most, well intentioned or wouldn't have applied to Antioch; good impulses; noting that noteworthy.	_____
Below 60	Marginal - in contribution	_____

III. COMBINED COMPETENCY-CONTRIBUTION POTENTIAL

	G	U		Points Awarded
Ideal	226	(202)		_____
Preferable	164	(152) and above	Admit	_____
Above Norm	140	(130) and above	Interview	_____
Norm	116	(108) and above	Hold	_____
Below Norm	below 116	(108)	Reject	

IV. COMMENTS

Decision/Data

acc._____

intv._____

wt. lst._____

hold_____

rej._____

APPENDIX C

Official Rules	*Minority Student Rules*
1. Stare decisis: like cases will be decided alike—without regard to race or class.	1. The race and wealth of the parties will determine which rules apply and who wins.
2. Judges are not all powerful, judges are not legislators; they can only apply the law; they cannot make a separate rule for each individual.	2. Judges are all powerful; judges can decide a case any way they want; they can rationalize any result they want to.
3. Judges cannot respond simply to the individual equities; they need a "peg" to hang the decision on: a principled justification in terms of precedent, rules, situation sense of policy.	3. Only extraordinary pleas of suffering or hardship will reach the conscience of a judge when the poor or minorities are involved. Otherwise judges will try to circumscribe or circumvent the law if it is favorable.
4. Judges are fair; they perceive themselves as bound by the law; they will respond to sound legal argumentation.	4. Judges are not fair; they are tools of the power structure, especially the white power structure; no amount of legal argumentation will change a judge's mind—unless one can persuade the judge that it is in the interest of the power structure to do so and that one is not opening the way to further exceptions that might eventually prove threatening.
5. If a lawyer can convince the judge of the lawyer's own integrity, competence and sincerity, this will neutralize any prejudice and biases against the client that the judge may have.	5. The minority lawyer is not a member of the club in today's world and had better not forget it. The best minority lawyers can hope for is that the judge will not want to appear pre-

judiced which perhaps can be turned to the client's advantage.

6. Procedural due process is all important. Procedural requirements are of substantive importance; justice requires that every person have his or her day in court, that notice and opportunity to be heard be given, that opportunity to know the evidence against one; that charge the proven; the evidence that is not trustworthy be excluded. Procedural safeguards are, in fact the substance of law; they determine whether justice can be done.

6. Procedural technicalities are the enemy of justice; they are tricks used by lawyers; results are all that count.

7. One must adhere strictly to the assumptions of the adversary system. Do not try a case in the media, do not try to use intermediaries to communicate with the judge; the judge will not listen to ex parte communications.

7. Judges read newspapers, listen to television, talk to their friends, desire the approval of the public at large and prestigious individuals just like anyone else; your client has no protection against such factors and you will be blamed if you respond to or charge the other side with initiating such tactics and there will be subtle but fatal retaliation if you intimate that the judge could be influenced by such factors.

Both sets of assumptions are over simplified but the first in each pair is that which legal education, in one way or another, attempts to impart about the legal system. The second set of assumptions are those which,

in many cases, have been instilled from childhood on for the minority or poor law student, they describe the world; they are realistic assumptions for survival.

One need not believe these rules; but one must act in most forums as if they are the applicable ground rules necessary to effective dialogue on examinations with the teacher and in the court room with the judge and opposing counsel.

Those rules either implicitly or explicitly deny the reality of institutional racism in the legal system and in society. That makes them particularly difficult to accept—even as necessary fictions. From Cahn and Cahn, Minority Students, Lawyering Competence and the Bar Examination (November 19, 1976) (unpublished paper presented at a Conference of the Council on Legal Education for Professional Responsibility).
