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### Merit and Diversity: The Origins of the Law School Admissions Test

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**MERIT AND DIVERSITY: THE ORIGINS OF THE LAW SCHOOL  
ADMISSIONS TEST**

WILLIAM P. LAPIANA\*

I. INTRODUCTION

This Article discusses the creation of the Law School Admissions Test (LSAT) and is based on surviving archival materials.<sup>1</sup> This story is particularly important today, fifty-five years after the first administration of the LSAT, because the use of an individual's LSAT score in law school admission is in some ways at the heart of the controversy regarding affirmative action in law school admissions, a role upon which the United States Supreme Court has recently ruled. In *Grutter v. Bollinger*, a divided Court found that the University of Michigan's admission policies, which were carefully tailored to take race into account as an element of diversity, did not violate the Equal Protection Clause.<sup>2</sup> In short, the so-called objective measures—grade point average and the LSAT score—need not be the only criteria by which applicants are judged. In the Court's view, the LSAT plays an important, though limited, role. It remains a useful law school admissions tool.

One thesis of this Article is that the LSAT was created to be a tool and that it was not intended to be the sole criterion for making admission decisions, an assertion strongly supported by the historical record. A second thesis is inferred from the record by placing it in context. Given the circumstances facing American law schools after the second World War, the creation of an "objective" test as an aspect of law school admissions increased access to legal education. Finally, this Article argues that it is reasonable to conclude that this expansion of access was the aim of at least some of the legal academics involved in the creation of the test.

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1. These materials form the records of both the Law School Admissions Council (LSAC) and of the Educational Testing Service (ETS). The author was given access to them by the LSAC, which has in its possession the relevant ETS records on microfiche. The interpretations and conclusions in this Article are those of the author alone and are not in any sense the official view of the LSAC or of ETS.

2. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003).

A thorough investigation of how the test, and indeed other “objective” measures, came to be regarded as the sole measure of whether an applicant is worthy of admission is beyond the scope of this Article, but the conclusions presented lead to some suggestions for investigation of that question.

## II. HISTORY OF ADMISSIONS TESTING

The first step in understanding the hopes and plans of the creators of the LSAT is understanding the history of admissions testing before the second World War. Two tests were well-known and used. In the mid-1920s, George D. Stoddard, a psychologist at the University of Iowa, and Merton L. Ferson, dean at North Carolina and then at Cincinnati, collaborated on a test published by West.<sup>3</sup> Starting in 1930, Yale Law School used a test developed by the university’s Department of Personnel Study.<sup>4</sup> Both of these tests were consciously and explicitly designed to supplement other criteria, and especially to provide some control on the wide variation in the meaning of college records. As one of the principal participants in the Yale effort put it, the purpose was “[t]o provide some check upon the validity of undergraduate records and to furnish a common denominator of educative promise.”<sup>5</sup> Fifteen years earlier, Dean Ferson made the same points, and also emphasized the possibility of using such a test as a tool for counseling prospective students.<sup>6</sup>

All those who discussed these tests in print, however, acknowledged that they were not, and neither could nor should be, the sole criteria by which admissions decisions were made. As Henry Witham of the University of Tennessee stated in reporting his school’s experience with the Stoddard-Ferson test: “[T]he tests discover inherent mental ability (as applied to law), but do not show the will to work nor the capacity for work.”<sup>7</sup> According to Witham, the test’s usefulness came in its ability to predict lack of success—students who did poorly on the aptitude test usually did poorly in law school.<sup>8</sup> The predictive value of the test, he added, was enhanced when it was combined with a judgment about the applicant’s desire and ability to work.<sup>9</sup> He explained those criteria:

Desire to work is self-explanatory. Under ability to work are included health and prior education, work outside of law school such as newspaper work, college annual, college sports, etc., social activities, and any number of outside

3. See Merton L. Ferson, *Law Aptitude Examinations*, 5 AM. L. SCH. REV. 563, 564 (1925).

4. See Albert B. Crawford & Tom Jay Gorham, *The Yale Legal Aptitude Test*, 49 YALE L.J. 1237, 1238 (1940). For a complete discussion of the Yale test, see *id.* at 1237-49.

5. *Id.* at 1238.

6. Ferson, *supra* note 3, at 563-65.

7. Henry B. Witham, Correspondence, *Legal Aptitude Tests*, 25 ILL. L. REV. 448, 449 (1931).

8. *Id.* at 450.

9. *Id.*

distractions which might claim the student's time and thought. A student has ability to work in direct proportion to perfect health and prior education and in inverse proportion to his interest in outside distractions.<sup>10</sup>

At Yale, according to the dean, the school's own aptitude test formed part of the second stage of a two-step admissions process.<sup>11</sup> Applicants who survived screening based on a written application, "which required the applicant to disclose most of his life history, good or bad," college grades, and two letters of recommendation were invited to take the test and have an interview with a member of the admissions committee.<sup>12</sup> While exact processes varied, it seems that schools that did use aptitude tests adamantly maintained that the resulting scores were but a part of the admissions decision. To an important degree, judgments were made on a subjective judgment of capacity and willingness to work.

Whatever role subjective judgments played in admission decisions, discussions of testing also revealed a strong underlying belief in the existence of "aptitude" and the ability to measure it. The Stoddard-Ferson and Yale tests resembled each other. Both made use of various tests of verbal skills, as represented by questions dealing with synonyms and antonyms, verbal analogies, reading comprehension and recall, and some sort of test designed to be specifically "legal."<sup>13</sup> The Stoddard-Ferson effort even included a test of reading comprehension based on an excerpt from Langdell's Summary of Contracts (which Dean Ferson, at least at one time, thought might be too difficult).<sup>14</sup> At the University of Wisconsin, a study of various predictive measures found that the Yale test had no advantage over a standard intelligence test,<sup>15</sup> which, according to one of the Wisconsin researchers, it resembled.<sup>16</sup> The point, of course, is that the "legal" tests were based on the sort of intelligence tests developed in preceding decades and widely used for the first time to test Army recruits during the first World War.

The very use of the tests indicates a willingness to sort young men on the basis of probability rather than on an individualized judgment of the character, intelligence, and prospects of each individual. In 1930, John Henry Wigmore wrote in the *Illinois Law Review* a short editorial about what he called the science of "juristic psychopoyemetrology," or "the science of measuring

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10. *Id.*

11. A.G. Gulliver, *The Use of a Legal Aptitude Test in the Selection of Law School Students*, 9 AM. L. SCH. REV. 560, 560 (1940).

12. *Id.*

13. See Ferson, *supra* note 3, at 564.

14. *Id.*

15. Richard Wellington Husband, *Prediction of Law School Success*, 1939 WIS. L. REV. 285, 291 (1939).

16. *Id.* at 286 n.3.

capacity for mental achievement.”<sup>17</sup> Wigmore believed that the cultivation of his newly-named science was a good thing. “Vocationally,” he wrote, “who can undervalue the immense saving of misguided effort that would be gained if, at the outset of preparation for a career, dependable advice could positively disparage one’s choice?”<sup>18</sup> Wigmore decided to put the Stoddard-Ferson test to the test, and had it administered to the class that entered Northwestern in October 1925.<sup>19</sup> Because the course of study was three years for those with a college degree and four years for those with three years of college study, the results were not tabulated until July 1929.<sup>20</sup> Wigmore found a novel, and probably unique, way to analyze the results. Rather than using statistics and especially correlation coefficients, he created charts, showing graphically where those who placed in the four quartiles of the aptitude scores placed in their law school work, measured both by the number of A’s and the number of A’s and B’s they received.<sup>21</sup> Wigmore believed that his charts showed the test to be gravely deficient.<sup>22</sup> Individuals from all four quartiles of the aptitude scores found themselves in the top quarter of the class.<sup>23</sup> The professor concluded, therefore, that the Stoddard-Ferson test was of little use in predicting any one individual’s capacity for success in legal study, at least at Northwestern.<sup>24</sup>

Not surprisingly, Wigmore’s article drew responses from advocates of testing. Both Albert Crawford of the Yale Department of Personnel Study (which created the Yale test) and George D. Stoddard, co-author of the test Wigmore used, emphasized the need to make admission decisions based on probabilities. As Stoddard stated: “There is only one way in which Professor Wigmore’s fervent hopes for adequate prognostication *for the individual* can be realized. That is by fixing to the individual student of known accomplishment, say on a test, a figure representing the *probability* of success for that category of students in which he is reliably placed.”<sup>25</sup> The advocates of testing, of course, promoted the tests as merely one factor in the admissions decision. Nevertheless, the small controversy occasioned by Wigmore’s criticism indicates the growing power of the idea of large-scale sorting based on standardized testing. The experience with similar tests during the first

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17. John H. Wigmore, *Juristic Psychopoyemetrology—Or, How to Find Out Whether a Boy Has the Makings of a Lawyer*, 24 ILL. L. REV. 454, 455 (1929).

18. *Id.*

19. *Id.* at 456.

20. *Id.* at 456-57.

21. *Id.* at 457.

22. Wigmore, *supra* note 17, at 463.

23. *Id.* at 461.

24. *Id.* at 463.

25. George D. Stoddard, Correspondence, *Legal Aptitude Tests*, 25 ILL. L. REV. 446, 447 (1931).

World War surely contributed to the acceptance of the probabilistic or statistical idea. As John Carson has written, the aptitude tests used by the Army marked “a significant break with civilian intelligence-measuring instruments.”<sup>26</sup> Besides the modifications necessary for mass administration and grading, more unusual “was the orientation of the test toward the production of qualified results completely objectively determined.”<sup>27</sup> In Carson’s view, the creation of the Army tests “completed a process—already begun, to be sure, within civilian psychology—of remaking mental testing into a new sort of endeavor, one in which professional judgment was subordinated to objective determination and statistical manipulation.”<sup>28</sup>

There are many ways to look at the transformation Carson describes when trying to place it in the context of admission to law school, setting aside for the time being any question of what the tests “really” measured or of their formal statistical validity. On the one hand, Wigmore’s objections speak to a world in which such decisions are made by measuring each applicant individually. The use of tests does not necessarily mean the complete abandonment of such measures. As Dean Gulliver reported, applicants to Yale first submitted to a preliminary screen based on a written application, the college record, and recommendations, and only then were invited to take the aptitude test and submit to an interview.<sup>29</sup> The relative weight given the “objective” measure of the test and the subjective impression of the interview is difficult to recapture, but there must have been wide latitude for interviewers to indulge their preconceptions, prejudices, intuitions, and guesses. The use of such factors, of course, not only allow one to identify those who do not test well or whose college efforts were handicapped by the need to work, but also allow the indulgence of invidious discrimination. Dean Henry Witham of Tennessee, in fact, used the results of the Stoddard-Ferson test in conjunction with his judgment of the student’s willingness to apply himself to law school work.<sup>30</sup> One can only imagine what factors, beyond those he openly discussed, went into that determination. On the other hand, if one believes in the relative validity of the test results, then their widespread use in the admissions decision can be seen as a net gain for fairness. To the extent that the role of individual prejudice is reduced, possibilities are assumed to be opened to more and more people. In this story, these possibilities even eventually would be extended to women.

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26. John Carson, *Army Alpha, Army Brass, and the Search for Army Intelligence*, 84 *ISIS* 278, 286-87 (1993). The unreliable and biased nature and the misuse of the results of the Army tests are fully examined in STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 192-233 (1981).

27. Carson, *supra* note 26, at 287.

28. *Id.*

29. Gulliver, *supra* note 11, at 560.

30. Witham, *supra* note 7, at 450.

In the pre-war period, however, aptitude testing of applicants for law school was seen as a device for weeding out those who would not be able to successfully complete the course of study. The goal was not identifying the best and the brightest to whom the bountiful opportunities of a legal career would be opened, but rather to be able to tell the least talented that attendance at law school would be a waste of time and money. Testing was not so much a means of selecting future lawyers as it was a means of discouraging the manifestly incapable from applying to law school and of increasing the “efficiency” of legal education. While it might be difficult to rigorously document, one of the stories told most often about law school admissions before the LSAT (and perhaps for sometime after its creation) is the admonishment given to first year students on their first day of class to look to their right and left and realize that one of the three will not make it past the first year.<sup>31</sup> How widespread the policy of admitting a large number of students and dismissing a significant proportion after the first year of study cannot be known with precision, but it could not be efficient and would certainly encourage a culture of competition and extreme individualism in first-year classes. Testing before admission was an alternative.

### III. LAW SCHOOL ADMISSIONS

#### A. *Pre-War Admissions*

Given the often-stated uses of testing, it seems that the gate to the legal profession was guarded not by admissions testing but by more subtle social pressures and attitudes that told young men—and certainly all but a very few young women—that certain goals were simply beyond their reach. Any attempt to understand the existence of invidious discrimination in law school admissions before the creation of the LSAT must begin with the fact that American law schools were not as homogenous in the first half of the twentieth century as they became at its end, and that a college degree was not a prerequisite to a legal education and admission to the bar until after the Second World War.<sup>32</sup> Although some members of the profession, both practitioners

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31. In 1925, Merton Ferson, author of one pre-LSAT admissions test wrote: “The student mortality continues high in law school, and it is not the indolent alone who fail.” Ferson, *supra* note 3, at 563.

32. Any study of the heterogeneity of American legal education in the pre-LSAT period must begin with two reports of the Carnegie Foundation, both authored by Alfred Z. Reed: *Training for the Public Profession of the Law*, published in 1921, and *Present-Day Law Schools in the United States and Canada*, published in 1928. A college degree followed by three years of full-time study, the accepted standard today, was the sole method of obtaining a degree at only three schools during the 1927–1928 academic year, and curricula varied widely. See ALFRED ZANTZINGER REED, *PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA* 169, 222-36 (1928). In the earlier study, Reed identified “four broadly distinguished types of law

and academics, did everything they could to eliminate part-time legal education (usually in night schools) and make a college degree a necessary credential for every lawyer, they did not succeed.<sup>33</sup> Throughout the 1920s and 1930s, the professionalizing and standard-raising ideology of some lawyers was met and to a great degree countered by the idea that becoming a lawyer was a peculiarly American way to advance in the world and become successful. Ritual invocations of the privations endured by Abraham Lincoln in his quest for education outside of formal institutions actually seemed to express a powerful belief that simply would not be denied.

Equally important to understanding the pre-LSAT world of admission to law school is an attempt to recapture the contours of discrimination and social stratification in the pre-war period. Specifically, the extent and virulence of discrimination against Catholics and Jews, whether or not they or their parents were actually immigrants, played an important role in shaping American life in the period before the second World War.<sup>34</sup> Prohibition, of course, has long been recognized as an attack on the culture of European immigrants and their descendants who were not of Anglo-Saxon stock.<sup>35</sup> The collapse of much of the power of these exclusionary sentiments—at least in the major urban areas of the United States—in the wake of the New Deal and the war, is only beginning to receive attention.<sup>36</sup> In short, admissions testing before the war was not needed to exclude cultural minorities. Discrimination against them was acceptable and quite frankly practiced.<sup>37</sup>

With the end of the second World War, American society found itself on the threshold of a new world. Returning veterans were promised educational benefits, which would mean that young men who had never imagined gaining a

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schools” based on the length of the course of study, entrance requirements, and whether students were considered part-time or full-time. ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 414-16 (1921).

33. WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 162-64 (1994).

34. For a useful summary of some of the literature and of the various schools of interpretation of the immigrant experience of “Americanization,” see Gary Gerstle, *Liberty, Coercion, and the Making of Americans*, 84 J. AM. HIST. 524 (1997).

35. WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980, at 41, 384-85 nn.51-52 (2001).

36. See, e.g., William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 WASH. & LEE L. REV. 3 (1995).

37. Educational institutions were not exempt from these attitudes. In discussing *Goldstein v. Mills*, 57 N.Y.S.2d 810 (N.Y. Sup. Ct. 1945) (suit challenging the tax exemption of Columbia University on the grounds that the New York City Tax Commission had not found that Columbia did not discriminate in admissions as mandated by statute, and ultimately dismissed on procedural grounds), William E. Nelson writes: “Everyone knew, of course, that Columbia, like most other colleges and universities, did discriminate, especially against Jews and occasional other groups such as Italian Catholics.” NELSON, *supra* note 35, at 152.



college education now had the financial ability to do so.<sup>38</sup> They also might have found the imagining somewhat easier. As the war continued and the need for trained enlisted men and officers increased, many young working-class white men not only received training in technical specialties, but also had the opportunity to become officers. Having had the experience of being leaders, they might have found it easier to believe that higher education was not beyond their abilities. For whatever reason, white male veterans returned from the war with new possibilities for making their place in American society. A significant transformation of American society was beginning. The story of the beginnings of the LSAT is an important part of the story of the birth of a new age.

*B. The Development of an Admissions Test*

As the second World War came to an end, higher education in the United States faced the challenge of accommodating the returning veterans whose ability to attend college and university had been greatly enhanced by the G.I. Bill's educational provisions.<sup>39</sup> It is not clear whether the potential influx of students made law schools more conscious of their admission procedures, but given the attention to testing in the pre-war period, it is not surprising to find a letter dated May 17, 1945 from Frank H. Bowles, admissions director at Columbia Law School, to the then-president of the College Entrance Examination Board (CEEB or College Board), John Stalnaker. Bowles suggested that the two men discuss the creation of "a law capacity test" to use in admissions decisions.<sup>40</sup> The current test used by Columbia, in Bowles's judgment, was unsatisfactory.<sup>41</sup> He set out seven criteria for the new instrument: (1) "[h]igh predictive value," defined as a correlation coefficient of .70 or higher; (2) "discrete measure of capacity for law study insofar as that capacity can be isolated;" (3) "[h]igh reliability;" (4) no more than one and one-half hours in length; (5) "[s]ensible and observable relation to the study of law;" (6) "[r]esults easy to interpret," and (7) low cost.<sup>42</sup> The reply came from the new head of the CEEB, Henry Chauncey. The project was of interest to the CEEB, but Chauncey cautioned Bowles that some of his aims might have to be

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38. ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 257-59 (1995).

39. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 287.

40. Letter from Frank H. Bowles, Admissions Director, Columbia Law School, to John Stalnaker, President, College Entrance Examination Board (May 17, 1945), *microformed on Educational Testing Service Archives Microfiche* (on file with the LSAC) [hereinafter ETS Archives] at Series 1, Box 1, Folder 1.

41. *Id.*

42. *Id.*

sacrificed to achieve others.<sup>43</sup> Bowles's aims were not different from those of the pre-war advocates of testing. All except Wigmore wanted something easy to administer, tried to tie the substance of the test to the actual study of law, and talked in terms of correlation in the realm of .50-.70 as acceptable and more than .70 as very reassuring.<sup>44</sup>

For whatever reason, matters appear to have gone nowhere until the summer of 1947, when representatives from Columbia met with representatives of the testing organization.<sup>45</sup> Present at that meeting, along with Bowles, was Professor Willis Reese of Columbia, who would play the leading role in the development of the LSAT.<sup>46</sup> William Turnbull's memorandum of the meeting, headed "Meeting with Columbia Representatives re Law Aptitude Examination," was dated July 30, 1947.<sup>47</sup> In his view, the primary purpose of the meeting was to familiarize Reese with the CEEB.<sup>48</sup> Bowles, whom Turnbull described as "apparently the person who has pushed to have the Board take over the problem" of improving Columbia's procedures, wished to invite Harvard and Yale to join the project to design a test, the results of which would correlate with first-year grades, "on the assumption that first-year performance is highly correlated with later success in law school and in legal practice."<sup>49</sup> Correlation with success in taking the bar examination was rejected because candidates take them several times and "virtually everybody passes them sooner or later."<sup>50</sup> In addition, there was preliminary discussion of the contents of the test, and "paragraph reading, analogies, syllogistic reasoning, 'inconsistencies,' and practical judgment"

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43. Letter from Henry Chauncey, President, College Entrance Examination Board, to Frank H. Bowles, Admissions Director, Columbia Law School (May 22, 1945), *microformed on* ETS Archives, *supra* note 40, at Series 1, Box 1, Folder 1.

44. See Crawford & Gorham, *supra* note 4, at 1241-42, 1241 n.6; Husband, *supra* note 15, at 290.

45. See Memorandum from William W. Turnbull, College Entrance Examination Board, *Meeting with Columbia Representatives Re Law Aptitude Examination* (July 30, 1947), *microformed on* ETS Archives, *supra* note 40, at Series 3, Box 8, Folder 1 [hereinafter Memorandum from William W. Turnbull].

46. See *id.* At the time Reese interested himself in the creation of a law school admissions test, Columbia University was still led by Nicholas Murray Butler who had imposed ceilings on the number of Jewish students at Columbia and whose administration had tried to impose ceilings on the dental school by merging it with the medical school, which did have admissions ceilings. NELSON, *supra* note 35, at 152. There is no evidence that this author has been able to find, but it is possible, and certainly pleasing to contemplate, that Reese was trying to find a way to stymie Butler and his supporters by creating an objective test of ability, which, at the very least, would make it embarrassing to turn away clearly qualified applicants because they were members of groups to which unpleasant characteristics were ascribed.

47. Memorandum from William W. Turnbull, *supra* note 45.

48. *Id.*

49. *Id.*

50. *Id.*

were all mentioned.<sup>51</sup> Finally, Bowles suggested that the project be financed by contributions of three or four thousand dollars per year from each of the three schools.<sup>52</sup>

All the important themes in the story of the creation of the LSAT are evident in this report of the first substantive meeting between the testing professionals and the legal educators. First, and perhaps most importantly, the validity of the LSAT was linked to its correlation with grades in the first year of law study. A similar correlation was used to measure the usefulness of the pre-war tests, and the dismissal of the criterion of success on the bar examination was even more telling. As the modern American law school solidified its position in the profession and extended, and to some degree realized, its claim to being the best possible preparation for the practice of law, its relationship to the bar examination became more and more problematic. Except for those few schools that retained the “diploma privilege,” which allowed their graduates to automatically become members of the bar, law schools and the bar examination authorities were forced into an often uncomfortable relationship.<sup>53</sup> The student with a law degree, the product of a legal education, had to pass yet another hurdle, one over which the school had no control. Langdell himself had tried to separate graduation from admission, emphasizing the differences between an examination in a course, set by a teacher who had taught a specific approach to a subject, and a bar examination, the content of which is determined by other criteria.<sup>54</sup> At the very beginning, then, the LSAT was linked to success in law school, not success at the bar. Of course, the use of first-year grades as the measure of validity was a practical decision. Access to those grades was completely within the schools’ control, and the use of first-year grades would allow the first validity studies to be made quickly.

The content of the test was also set at that first meeting. The items described in Turnbull’s memorandum were familiar: “paragraph reading, analogies, syllogistic reasoning, ‘inconsistencies,’ and practical judgment.”<sup>55</sup> It was not surprising, of course, that the test would look like other aptitude tests, especially if it was to be administered for the first time in a matter of months. Chauncey wrote to an assistant dean at New York University later that fall: “The first test which will be tried out will contain materials from our files that seem a priori to be appropriate. Later we will prepare, with the help of representatives from the law schools, materials that are tailor-made for this

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51. *Id.*

52. Memorandum from William W. Turnbull, *supra* note 45.

53. For a thorough discussion of the diploma privilege and its extent in the late 1920s, see REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA, *supra* note 32, at 53-72.

54. LAPIANA, *supra* note 33, at 56-57.

55. Memorandum from William W. Turnbull, *supra* note 45.

purpose.”<sup>56</sup> In fact, the composition of the test was the least of the problems to be faced and solved in the short time before the first administration. Spreading the word of the new project and finding law schools willing to participate were more important. Increased participation would provide greater numbers for testing validity and spread more widely the costs.

On August 15, 1947, representatives of Columbia, Yale, and Harvard law schools met with Chauncey and other representatives of the College Board to discuss the new test.<sup>57</sup> On August 18, 1947, Reese reported to his dean on the meeting. Columbia and Yale were reported to be very willing to go along with the plan, while the Harvard representative cautioned that he was less sure his faculty would be willing to participate, given their seeming satisfaction “with their present procedure and results.”<sup>58</sup> Chauncey then outlined the College Board’s plan, which included a policy committee of law school representatives (Policy Committee) to advise the College Board on the construction of the test, the administration of an experimental test in the fall of 1947 preparatory to a March 1948 administration for use in admissions to the fall 1948 class, the testing of all candidates rather than just those “whose college grades placed [them] in the ‘doubtful category,’” and an estimate of costs between \$10,000 and \$15,000 per year.<sup>59</sup>

It seems that the only real objection raised with respect to Chauncey’s plan concerned the cost of development of the test. Chauncey had suggested that each school contribute \$4,000 per year for three years with a like amount contributed by the College Board.<sup>60</sup> He further proposed that other “co-operating” law schools interested in taking part in the development of the test share in the cost.<sup>61</sup> The decision was made to write to all the members of the College Board that had law schools, as well as to the University of Michigan, and invite them to join with Harvard, Yale, and Columbia in planning and

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56. Letter from Henry Chauncey, President, College Entrance Examination Board, to Russell D. Niles, New York University Law School (Oct. 10, 1947), *microformed on ETS Archives*, *supra* note 40, at Series 1, Box 1, Folder 1 [hereinafter Letter from Henry Chauncey].

57. See Letter from William W. Turnbull, College Entrance Examination Board, to Edward S. Noyes, Board of Admissions, Yale Law School (Aug. 18, 1947), *microformed on ETS Archives*, *supra* note 40, at Series 1, Box 1, Folder 1 [hereinafter Letter from William W. Turnbull].

58. *Id.*

59. See Memorandum from Henry Chauncey, President, College Entrance Examination Board, *Proposal for Development of Legal Aptitude Test* (Aug. 18, 1947), *microformed on ETS Archives*, *supra* note 40, at Series 1, Box 1, Folder 1 [hereinafter Memorandum from Henry Chauncey]; Memorandum from Henry Chauncey, President, College Entrance Examination Board, *Conference with Dean Griswold and Professor Dodd on the Legal Aptitude Test October 20, 1947* (Oct. 21, 1947), *microformed on ETS Archives*, *supra* note 40, at Series 1, Box 1, Folder 1.

60. See Memorandum from Henry Chauncey, *supra* note 59.

61. *Id.*

financing the test.<sup>62</sup> Reese's narrative is carefully couched in the passive voice, making it impossible to know who first suggested seeking more participants.<sup>63</sup> It was a most important decision, however, because it helped ensure that the creation of the test would also create a new organization of law schools.

The next few months were spent seeking support for the project. In August, a form letter went to the deans of the law schools whose universities were members of the College Board, along with the dean of the University of Michigan's law school.<sup>64</sup> The letter invited the school to serve on the Policy Committee for the test, contribute to the cost of the test, and give one-quarter of a faculty member's time to work on test development.<sup>65</sup> An accompanying memorandum dated August 18, 1947, outlined what had been decided at the August 15, 1947, meeting, including the creation of the Policy Committee, testing of validity by comparison with law school grades, and financing arrangements.<sup>66</sup> The participating schools would provide \$12,000, while the College Board pledged \$4,000 and promised to repay the schools when the test became self-supporting.<sup>67</sup> After that, excess receipts would go into a reserve fund to cover future losses and perhaps pay for special research projects.<sup>68</sup> The CEEB would charge the test account all direct costs, a portion of overhead, and a seven and one-half percent override "to be used for basic research in the field of testing."<sup>69</sup> Chauncey also held out the promise that the test might help to study the relationship between success in law school and in later life.<sup>70</sup>

The replies were favorable, though no dean was willing to donate a portion of a faculty member's time to the project.<sup>71</sup> Even if a particular school did not use a test (though many did) or, like New York University's school, was "as

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62. See Letter from William W. Turnbull, *supra* note 57.

63. Emerson Spies believed "that that was sort of a private decision made by Willis Reese," and Lawrence Tepler remembered that "in the beginning it didn't seem to me that there was anything political." Oral History Transcript of Emerson Spies, in EDUCATIONAL TESTING SERVICE ORAL HISTORY PROJECT (on file with the LSAC) [hereinafter ORAL HISTORY PROJECT]. William Turnbull of the College Board described the decision to use the College Board's membership as a mailing list as "a logical compromise between the hundred or so accredited law schools in the country and the three prime movers." Letter from William W. Turnbull, *supra* note 57.

64. Letter from William W. Turnbull, *supra* note 57.

65. *Id.*

66. Memorandum from Henry Chauncey, *supra* note 59.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. See Letter from Russell D. Niles, New York University Law School, to Henry Chauncey, President, College Entrance Examination Board (Oct. 6, 1947), *microformed on* ETS Archives, *supra* note 40, at Series 1, Box 1, Folder 1.

yet unconvinced about the usefulness of an aptitude test as a method of selecting law students,” they had “an open mind” and were quite willing to participate in what most described as an experiment.<sup>72</sup> Monetary support would be forthcoming, too, although several schools first had to seek approval of the central university administration.<sup>73</sup>

On October 20, 1947, Chauncey had what was probably the most crucial meeting in the quest to create support for a law school admissions test. He traveled to Cambridge for an audience with Erwin Griswold, dean of the Harvard Law School.<sup>74</sup> Griswold told Chauncey that Harvard certainly could use such a test to make decisions on “those borderline on college record and those from unknown colleges.”<sup>75</sup> Harvard, as Tepler described many years later, had “a very complex system for the evaluation of college grades, and . . . had built up a lot of tables predicting what a certain average at a particular college meant.”<sup>76</sup> The dean told Chauncey that those tables were based on the classes of 1928–1934 and were hopelessly “out of date,” and that no new data could be expected until approximately 1954.<sup>77</sup> Tepler described the problem as “the return of the veterans and the flood of candidates from many places and many colleges” for which no data existed; “there wasn’t any reasonable way to work the old system anymore.”<sup>78</sup> The test would be of real benefit to the school and Griswold promised cooperation.<sup>79</sup>

Before meeting with Griswold, Chauncey had sent a letter to the dean of the law schools at Rutgers, Northwestern, Syracuse, Stanford, Cornell, the University of Southern California, New York University, the University of Pennsylvania, Yale, and Harvard that invited them to a meeting in Princeton to

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72. *Id.*

73. *See id.*

74. *Conference with Dean Griswold and Professor Dodd on the Legal Aptitude Test October 20, 1947*, *supra* note 59.

75. *Id.*

76. Oral History Transcript of Lawrence Tepler, in ORAL HISTORY PROJECT, *supra* note 63.

77. Memorandum from Henry Chauncey, *supra* note 59.

78. Oral History Transcript of Lawrence Tepler, *supra* note 76.

79. For details of Chauncey’s meeting with Griswold, see *Conference with Dean Griswold and Professor Dodd on the Legal Aptitude Test October 20, 1947*, *supra* note 59, and Oral History Transcripts of Emerson Spies, Lawrence Tepler, and John A. Winterbottom, in ORAL HISTORY PROJECT, *supra* note 63. Willis Reese had similar memories of the situation at the end of the war. He told Millard Ruud, who interviewed him for the LSAC oral history project, that “[t]here was increased demand from the veterans returning from World War II. So there were applications from a lot of individuals that we found it more difficult to evaluate.” Oral History Transcript of Willis Reese, in ORAL HISTORY PROJECT, *supra* note 63. At the time Ruud interviewed Reese, Reese was terminally ill. Even the transcript gives the impression that talking was an effort and the brevity and general nature of most of the conversation was no doubt because of Reese’s physical condition.

discuss the proposed test.<sup>80</sup> If the LSAT has a birthday, it is the date of that meeting, November 10, 1947.<sup>81</sup> In attendance were Chauncey, Director of the College Board,<sup>82</sup> his assistant director, Richard H. Sullivan, William Turnbull of the College Board, Dean Elwood H. Hettrick of Boston University, Willis Reese from Columbia, Livingston Hall from Harvard, Albert Newmann from Michigan, Francis Putnam from New York University, George Braden from Yale, Willard Pedrick from Northwestern, Dean George Harris from Rutgers, the Dean of Syracuse's law school, Paul Andrews, and two College Board research associates, Harold Guilksne and John French.<sup>83</sup> From this meeting came several decisions about the test that would shape it for the next fifty years.

### C. *The LSAT*

First was the name. Although the exact title "Law School Admission Test" was decided on administratively after the meeting, it was Willard Pedrick who suggested that the schools should avoid using the term "aptitude test."<sup>84</sup> Decades later he recalled:

My thought at the time was that we didn't want the people to think we were grading their aptitude, that we were grading their suitability for law school study, and apparently I felt then, I guess I would still feel today, that it's better to tell somebody that his/her qualities, however great they may be, are not well-tailored to law school.<sup>85</sup>

Pedrick's suggestion was not unproblematic. The test would henceforth be advertised as an "admissions" test—a test designed to predict the likelihood of success in law studies. On the other hand, the test would have some qualities of an aptitude test as well. The discussion at the November meeting brought out the ambiguity.

The law professors were presented with some sample questions that Braden, Reese, and Lon Fuller had helped to select after the August meeting in New York.<sup>86</sup> From the contemporary record of the meeting, it appears that the questions presented to the group involved memory and comprehension, word

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80. Transcript of Conference of Law Schools on Legal Aptitude Test 1 (Nov. 10, 1947), *microformed on* ETS Archives, *supra* note 40, at Series 3, Box 8, Folder 1 [hereinafter Transcript of Conference].

81. *See id.*

82. Chauncey would soon become the head of the ETS to be formed on January 1, 1948 by the merger of the College Board with the testing functions of the Carnegie Foundation and the American Council Testing Organization. *See* Transcript of Conference, *supra* note 80, at 1.

83. *See* Brief of the Conference on Legal Aptitude Tests 1 (Nov. 10, 1947), *microformed on* ETS Archives, *supra* note 40, at Series 3, Box 8, Folder 1.

84. *Id.* at 5.

85. Oral History Transcript of Willard Pedrick, *in* ORAL HISTORY PROJECT, *supra* note 63.

86. Transcript of Conference, *supra* note 80, at 7.

meanings, and sentence completion. The emphasis in the first group of questions was on memory; Chauncey indicated that the assumption was that memory was important in legal work, an assumption Dean Harris of Rutgers confirmed.<sup>87</sup> Dean Andrews then described the next group of questions as a vocabulary test.<sup>88</sup> Dr. Turnbull attempted to explain the rationale behind these particular questions: “The idea is to pick out the meaning and then select a word from a number which have been given different meanings. . . . It is a logical process rather than a vocabulary process.”<sup>89</sup> Andrews was also concerned that one question required knowledge of Greek philosophy.<sup>90</sup> Again, Turnbull demurred, pointing out that the question required the candidate to complete a sentence based on information given by the question.<sup>91</sup>

More interesting, and revealing perhaps, is the discussion of what did not appear among the proposed question types. Dean Andrews weighed in with the suggestion that the test include some sort of examination of knowledge of “general culture.”<sup>92</sup> In his view, “[t]he general cultural note strikes me as very important to determine whether [the candidate] will be a good lawyer or a licensed legal mechanic.”<sup>93</sup> Professors Braden and Reese disagreed. Braden went so far as to assert that a candidate is “eligible from a cultural point of view if you have a college degree and a good college record plus a legal aptitude test.”<sup>94</sup> He emphasized that, while Yale does take “men in the social sciences,” the admissions process takes into account both the college record and Yale’s aptitude test, but that an applicant from an “unknown” college needs a better score.<sup>95</sup> Andrews then remarked that he had denied admission to a candidate with an A average from “a college of applied science which is recognized as a good engineering education” because the applicant had taken only one English and one elementary history course and did “a fair job” on the verbal section of the test Syracuse used.<sup>96</sup> Livingston Hall of Harvard then added, “I don’t think I have ever seen a record that went that far,” presumably in its omission of “cultural study.”<sup>97</sup> Reese noted that, when faced with a candidate offering a record like the one Andrews described, Columbia had denied admission.<sup>98</sup>

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87. *Id.* at 9.

88. *Id.* at 10.

89. *Id.*

90. *Id.*

91. Transcript of Conference, *supra* note 80, at 10.

92. *Id.* at 12.

93. *Id.*

94. *Id.*

95. *Id.*

96. Transcript of Conference, *supra* note 80, at 13.

97. *Id.*

98. *Id.*



This colloquy on “general culture” would not end the discussion by any means. During the next several years, the LSAT would experiment with questions designed to test general knowledge before abandoning the whole enterprise. At this formative moment, however, it might have been significant that the advocate of testing for “general culture” was the dean of a local school in upstate New York and opposition to the idea was expressed at once by the representatives of Yale and Columbia. Although all seemed to agree that they had turned down applicants lacking a background in literature and history, the representatives of the national schools saw no need to include questions testing that knowledge as part of the new admissions test. These different views of what the test should include might have reflected the applicant pools of the schools. Perhaps Dean Andrews found himself attempting to judge among applicants whose cultural *bona fides* were less obvious than those of the applicants to the Ivy League schools. For him, the test would be more useful if it helped to discriminate on a “cultural” basis. The national schools, with applicant pools representing the best graduates of a number of colleges from throughout the nation, had no need for a cultural filter. Even more importantly, the discussion was about excluding those whose education was too technical and too rooted in the sciences. If we accept that the legal academics discussing the question meant what they said, they were not talking about excluding cultural minorities through the use of a test of general, cultural knowledge. William (Ben) Schrader, an Educational Testing Service (ETS) specialist in testing and statistics, remembered the view of the “law school group”: “As long as you went through college, you would be on an equal footing with anybody else.”<sup>99</sup> Because the G.I. Bill certainly made college more accessible to white male veterans, the decision to limit the test to aptitude and avoid testing specific knowledge might actually diminish cultural bias, at least toward some white males who might otherwise be stigmatized as working-class ethnics. The issue would be revisited, however, within the first decade of the LSAT’s existence.

The next topic to lead to extensive discussion is perhaps the most surprising to those who have grown up in a world in which the LSAT is taken for granted. The original proposal from the testing professionals did not include reporting of the test scores to the candidates.<sup>100</sup> Richard H. Sullivan’s memorandum of November 7, 1947 entitled “Legal Aptitude Test: Plan of Administration” suggested that candidates be told “that the scores are considered confidential and will be sent only to the law schools as requested by the candidate. No score reports will be issued to candidates themselves, to

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99. Oral History Transcript of William B. Schrader, in ORAL HISTORY PROJECT, *supra* note 63.

100. See Memorandum from Richard H. Sullivan, *Legal Aptitude Test Plan of Administration* (Nov. 7, 1947), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 8, Folder 1.

their families, or friends.”<sup>101</sup> The temptation to indulge in counterfactual history raised by this proposal is irresistible. Were scores reported only to schools, the admissions process would have been much more mysterious than it has turned out to be. Unable to factor their scores into strategic decisions about an application strategy, students with good college records might have applied more adventurously and aimed higher. Schools might have found it easier to keep from the public the weight given to factors other than scores and grades, and the entire notion of and debate about affirmative action would have been different. If the scores were withheld from the candidates, the schools might have found it possible to withhold information about the scores of candidates they did accept, and the entire modern ranking system might never have developed. The question of taking the test more than once would never have arisen. On the other hand, the less information candidates have, the less accountable are the decision-makers.

For the moment, the important datum is that the law professors gathered in Princeton in November 1947 unanimously voted to report scores to the candidates.<sup>102</sup> The discussion leading to that decision was marked by two important factors. First, several participants disagreed about how anxious candidates were to see their scores, and, second, there was an undercurrent of indifference to the ultimate solution of the question. Henry Chauncey was clearly in favor of disclosure as a means to keep the admissions officers honest.<sup>103</sup> In his view, college admissions officers “wanted to be able to hide behind scores, they want to be able to discriminate and use the scores as an excuse and they do not want to show their hands.”<sup>104</sup> The law professors acknowledged that, in Reese’s words, the score was a “weapon” in the hands of a rejected candidate, yet he believed that “people are not very inquisitive as to what they get on their tests.”<sup>105</sup> Braden disagreed. Applicants to Yale want to know their score on the Yale test—“[t]hey want to know if they have legal aptitude.”<sup>106</sup> He believed that candidates should receive their scores, or at least enough information to allow them to make a decision about applying to another law school. The discussion ended with agreement on giving the scores to the candidates, but a slightly different question opened up a different line of discussion.<sup>107</sup>

The schools represented at the November meeting were literally paying for the creation and administration of the new test. Should other schools be allowed to use the scores in making admission decisions? The decision on that

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101. *Id.*

102. Transcript of Conference, *supra* note 80, at 19.

103. *Id.* at 17.

104. *Id.*

105. *Id.* at 19.

106. *Id.*

107. Transcript of Conference, *supra* note 80, at 19.

question—any school can ask for the scores and use them, but only those who contribute to the expenses of the testing program may have a hand in setting policy—was less important than the accompanying discussion about the rankings of colleges used by some of the law schools to interpret undergraduate grades. Chauncey proposed the “pay to participate” solution and then suggested that part of the testing program involve the ranking of colleges.<sup>108</sup> Livingston Hall was adamant. He stated, “We [Harvard Law School] do not feel that we should make generally available to colleges the relative standing of other colleges as shown by our own records.”<sup>109</sup> Braden and Reese admitted that only their admissions personnel understand the Yale and Columbia ranking systems anyway.<sup>110</sup> The discussion ended with agreement that the testing professionals would consider correlating scores and college grades but there would be no publicity for the law schools’ ranking systems.<sup>111</sup> The last subject of extended discussion was the calendar for administration of the test. The discussion was dominated by attempts to accommodate each school’s particular admission policies. Eventually, dates at the end of February and early May were selected.<sup>112</sup>

Work continued after that November meeting. Willard Pedrick continued to put forward his view that the test should not be advertised as an aptitude test. In September 1947, he had written Sullivan suggesting that the announcement of the test be modified by striking the word “mental” from the phrase “to measure the mental abilities that are important” for law study.<sup>113</sup> Sullivan and the testing professionals eventually agreed. He wrote to Pedrick, “[S]everal of us worried around with the wording descriptive of what the test is designed to measure and finally had to settle upon the phrase in your draft copy as the most appropriate.”<sup>114</sup>

The content of the test was further discussed at a meeting at Princeton on January 30, 1948. Many of the participants in the November meeting attended, along with a large complement of ETS personnel.<sup>115</sup> Once again, the point was

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108. *Id.* at 20.

109. *Id.*

110. *Id.* at 21.

111. *Id.*

112. Transcript of Conference, *supra* note 80, at 26.

113. Letter from Willard Pedrick, Northwestern University Law School, to Richard H. Sullivan, College Entrance Examination Board (Dec. 5, 1947), *microformed on* ETS Archives, *supra* note 40, at Series 1, Box 1, Folder 1.

114. Letter from Richard H. Sullivan, College Entrance Examination Board, to Willard Pedrick, Northwestern University Law School (Dec. 8, 1947), *microformed on* ETS Archives, *supra* note 40, at Series 1, Box 1, Folder 1.

115. Those representing the law schools included Paul Andrews from Syracuse, George Braden from Yale, Paul Bruton from Pennsylvania, Lon Fuller from Harvard, Willard Pedrick from Northwestern, Willis Reese from Columbia, and Louis Tyree from Rutgers. Those representing ETS included Henry Chauncey, Richard H. Sullivan, William W. Turnbull, John

made that the test was to measure the qualities important for success in law school rather than whatever was needed to be a successful practicing lawyer, and that it was to be a test of aptitude (though that word would not be used in public).<sup>116</sup> According to the memorandum of the meeting in the ETS files, the participants agreed that the qualities for which the candidates should be tested fell into four categories. First were those satisfactorily measured by the existing batteries of questions: precision in analysis and logical thinking, feeling for relevance, clarity, perception of analogy, vocabulary and verbal comprehension, command of language, clarity and precision in writing, ability to organize argument, ability to get the essence from reading matter, persistence and industry, concentration, executive ability, and capacity to work under pressure.<sup>117</sup> Further experimentation was required to develop questions to test memory, rapidity of reaction, practical judgment, meticulousness, ingenuity, and imagination.<sup>118</sup>

Questions might be developed to test the ability to apply principles to specific cases, to see the uses and possibilities of an argument, to move from abstract to concrete and vice versa, to recognize the adequacy of data, and something described as “semantic insight.”<sup>119</sup> Finally, questions should be developed to test for analytical versus emotional thinking, suspicion of generalities, willingness to question premises, creativity and the ability to synthesize, ability to recreate a situation, drive to get behind premises, intellectual curiosity, patterns of interest, intellectual achievement, emotional balance, character and dependability, qualities of leadership, force, and drive.<sup>120</sup>

Behind the lengthy list recorded in the memorandum is an important part of the story. When asked to recall the events of 1947 and 1948 decades later, some of the law professors remembered that they did not have much of a role in deciding the content of the test. Willard Pedrick recalled:

[I]n those early days [the professors who attended the November 1947 meeting] believed that somebody who is pretty good at almost any kind of intellectual endeavor would be a good prospect for law school. So we started,

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French, Miss Mann, Mr. Schultz, and Miss Huddleston. The schools all had been represented at the November meeting, and Lon Fuller and Louis Tyree replaced Livingston Hall and Dean George Harris for the January meeting. See Memorandum, *Meeting to Plan Law School Admission Test* (Jan. 30, 1948), microformed on ETS Archives, *supra* note 40, at Series 3, Box 8, Folder 2.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Memorandum, *Meeting to Plan Law School Admission Test*, *supra* note 115.

I think, with the notion that a test that had some relationship to an IQ test would be appropriate.<sup>121</sup>

Constructing that test was another matter, however. Pedrick believed that Reese had some input on the content of the test, but noted, “I think the rest of us were willing to look at ETS as the technicians and let them have a go at it and then come back later and see how it was working.”<sup>122</sup> Reese himself, when asked whether the professors showed any interest in the technical side of writing the test, answered: “There was not any.”<sup>123</sup> The same conclusion was drawn on the ETS side. French noted in late 1948 that “there seemed to be little inclination on the part of the law professors to do any work on test construction.”<sup>124</sup> For their part, the testing professionals often found the law professors to be less than ideal students. John Winterbottom of ETS, who began a long association with the test in the mid-1950s, felt that few of the legal academics “really understood what was going on, and I’m not sure that many of them really understood validity studies and all that sort of thing we sent out to them.”<sup>125</sup> Ben Schrader, also from ETS, disagreed with Winterbottom.<sup>126</sup> On the other hand, Louis Toepfer found Schrader “totally and utterly incomprehensible,” and Emerson Spies agreed that Schrader “failed to understand how little we understood.”<sup>127</sup>

The law professors might not have believed themselves competent to write the test they wanted, but they certainly knew what that test was supposed to do. From the first stirrings of interest in a “legal capacity” test, the goal was to create a predictive tool tied to success in law school, as defined by first-year grades. That was also the goal of the pre-war admission tests, although none of those tests were consulted by the ETS personnel writing the first LSAT.<sup>128</sup> The law professors did not want to get involved in some sort of testing of personality, no matter how enthusiastically some ETS members lobbied for it.

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121. Oral History Transcript of Willard Pedrick, *supra* note 85.

122. *Id.*

123. Oral History Transcript of Willis Reese, *supra* note 79.

124. Handwritten Note by John N. French on Memorandum from Richard H. Sullivan, to William W. Turnbull & John French, (Oct. 26, 1948) (on file with LSAC Archives at Record Group 1, Series Group 1).

125. Oral History Transcript of John A. Winterbottom, *in* ORAL HISTORY PROJECT, *supra* note 63.

126. *Id.*

127. Oral History Transcript of Emerson Spies, *supra* note 63.

128. John Winterbottom stated:

I have never seen any evidence in the ETS records that any of them [admissions tests already in use] was [sic] used in any sense as a model for the LSAT, or even consulted to see what was in them. They seem to have been out there, and we knew about them, but as far as I can tell, there was no effort to mine them or to go to the authors of them or find out what experience there had been with these things.

Oral History Transcript of John A. Winterbottom, *supra* note 125.

Chauncey, in particular, believed in the ability of testing to sort American society both efficiently and accurately, not only for intellectual ability, but for personality traits as well.<sup>129</sup> The law professors, however, would have no part of it, at least in the early days of the LSAT. They were concerned only with one narrow measure of “success”—performance in the first year of legal study. As Ben Schrader remarked decades later, by the time he came to work on the LSAT in 1950, the idea that the test was designed only to predict first-year grades was “carved in stone.”<sup>130</sup> In 1955, Winterbottom wrote a memorandum summarizing the policies behind the test and declared that, before the first administration of the LSAT in February 1948, it had been decided “that the main purpose of the test would be to predict scholastic achievement in law school.”<sup>131</sup> And the law professors decided to accomplish that end, as Schrader noted, by having an aptitude test.

Of course, the word aptitude did not appear in the name of the test, thanks at least in part to Willard Pedrick’s consistent advocacy. Yet there is little doubt that the test was intended to be a test of capacity rather than knowledge. In his 1955 memorandum, Winterbottom summarized the decisions made in 1948:

[S]ince it seemed desirable not to do anything which would tend to limit law school entrants to those students having a particular kind of subject-matter background, it was further decided that the test should be as free as possible of questions based on specific information available only to those who had taken certain courses or who had some familiarity with the law.<sup>132</sup>

Looking back on the contemporary record and later recollections, then, it is clear that the law professors involved in the creation of the LSAT in the winter of 1947–1948 knew what they wanted. The professors wanted a test that could predict success as measured in terms of first-year grades by measuring capacity or aptitude rather than knowledge, but were reluctant to describe the test in those terms and had very little idea of how to construct a test to measure those qualities.<sup>133</sup> The testing professionals at ETS did have that knowledge, and they put together the first LSAT from questions in the item files, according to

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129. See Nicholas Lemann, *The Great Sorting*, ATLANTIC MONTHLY, Sept. 1995, at 88.

130. Oral History Transcript of William B. Schrader, *supra* note 99.

131. Memorandum from John A. Winterbottom, *The Policy Committee of the Law School Admission Test—Its Origin and Activities* (Jan. 14, 1955), microformed on ETS Archives, *supra* note 40, at Series 3, Box 8, Folder 11 [hereinafter Memorandum from John A. Winterbottom].

132. *Id.*

133. According to Pedrick, the professors were sure of one thing—they did not want questions involving geometric figures and arithmetic. Their first reaction was that they themselves could not cope with such questions, but the argument that impressed ETS was the assurance that candidates would rebel because such questions did not seem to have anything to do with law. Oral History Transcript of Willard Pedrick, *supra* note 85.

Chauncey.<sup>134</sup> Those items were of the following types: contrary and irrelevant statements, debate, figure classification, paragraphs, reading comprehension, reasoning, sentence completion, verbal analogies, and word classification.<sup>135</sup> And to everyone's great pleasure, the test worked. The experimental tests given to law school students in the fall of 1947 correlated well with their grades.<sup>136</sup>

After the first administrations on February 28 and May 8, 1948, it was also clear that the program was a financial success. More than fifty-six hundred applicants took the test on those dates, generating so much revenue that ETS found itself holding a surplus of \$23,200 attributable to the new testing program.<sup>137</sup> It was clear that the contributions from the schools would be repaid by the end of 1948.<sup>138</sup> More importantly, the validity studies that had been carried out indicated that the test was a useful predictor of success in law school, at least within the limits of what could be considered statistically significant and practically useful.<sup>139</sup> Financially and practically successful then, the LSAT began its life under the best of auspices. During the next ten years or so, two important lines of development played themselves out. First, the debate about the content of the test called into question the meaning of the aptitude test. Second, the question of the governance of the LSAT became more and more important as revenues increased.

#### IV. THE MEANING AND GOVERNANCE OF THE LSAT

The LSAT was designed to be an aptitude test, but at the very beginning, suggestions were made that there be an effort to gauge the general culture or general background of the candidates. The discussion and controversy that culminated in the decision in 1957 to introduce a test of general background took place in a world in which "cultural bias" did not mean what it would mean ten, let alone forty, years after the decision was made. Both the content of the discussion and the way the decision was made provide an important perspective on the later and continuing controversy.

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134. See Letter from Henry Chauncey, *supra* note 56.

135. LYNDIA M. REESE & RUTH ANNE COTTER, A COMPENDIUM OF LSAT AND LSAC-SPONSORED ITEM TYPES, 1948-1994, at 3-5, Table 1 (1994).

136. See W.B. Schrader & Marjorie Olsen, *The Law School Admission Test as a Predictor of Law School Grades* (1950) (LSAC-50-1), in REPORTS OF LSAC SPONSORED RESEARCH: VOLUME I, 1949-1969, *microformed on* ETS Archives, *supra* note 40.

137. Memorandum, *Meeting with Law School Representatives*, (May 25, 1948), *microformed on* ETS Archives, *supra* note 40, at Series 3, Box 8, Folder 2.

138. See *id.*

139. Memorandum from A. Pemberton Johnson, LSAT Project Manager, ETS, to Members of the Law School Admission Test Policy Committee (Feb. 13, 1951), *microformed on* ETS Archives, *supra* note 40, at Series 1, Box 1, Folder 3.

Before considering the parameters of the debate, however, it is important to state as strongly as possible what the LSAT was not designed to do. The creators of the LSAT did not intend the test to be the sole criterion for admission to law school. The entire rationale for the test was the need to supplement the information supplied by the undergraduate record. The original understanding, Winterbottom wrote in 1955, was that “[s]cores on the test were to be used *along with pre-law grades, recommendations and other information as an aid in admissions.*”<sup>140</sup> In addition, while some schools might have been in the position to be highly selective in admissions, Schrader remembered that in the “early days,” the mean score of those admitted to law school was not much higher than the mean score of all applicants.<sup>141</sup> Years later, Emerson Spies put it simply: “There was not a great growth in those initial years. That’s because there wasn’t a great need for the test in those early years, let’s face it.”<sup>142</sup> A single vignette, however, says it all. In March 1950, a law school representative wrote A. Pemberton Johnson, Winterbottom’s predecessor as project manager for the LSAT, explaining, at his admission committee’s request, why they admitted a candidate whose LSAT was fifty points lower than that of the next lowest admitted candidate. The candidate was a college and medical graduate and “had just returned after a long period of war service in the Army Medical Corps” and, therefore, was “out of touch with the ordinary collegiate academic materials and

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140. Memorandum from John A. Winterbottom, *supra* note 131.

141. Oral History Transcript of William B. Schrader, *supra* note 99. On the other hand, the Dean at Stanford, Carl B. Spaeth, reported to Richard H. Sullivan that Stanford received approximately one thousand applications for the 1947–1948 academic year and admitted two hundred and twenty five students. Letter from Carl B. Spaeth, Dean, Stanford School of Law, to Richard H. Sullivan, College Entrance Examination Board (Dec. 22, 1947), *microformed on ETS Archives*, *supra* note 40, at Series 1, Box 1, Folder 1. In 1953, Dean Henry Brandis, Jr., of the University of North Carolina told A. Pemberton Johnson that applicants with the required three years of college and an average of “middle C” were admitted “regardless of test score,” but applicants with averages barely above the minimum and low test scores were advised that they “probably will have scholastic trouble in Law School.” Letter from Henry Brandis, Jr., Dean, University of North Carolina School of Law, to A. Pemberton Johnson, LSAT Project Manager, ETS (May 5, 1953), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 8, Folder 1. In 1955, Johnson reported to Dean John T. Fey of George Washington University that several schools on the West Coast had set 400 as the minimum score for admission because so many with scores below that failed in the first year. A school in the Mid-Atlantic states set a “practical minimum” score of 475. He suggested that George Washington University set a minimum of score of 450 and adjust it based on experience. Letter from A. Pemberton Johnson, LSAT Project Manager, ETS, to John T. Fey, Dean, George Washington University Law School (June 9, 1955), *microformed on ETS Archives*, *supra* note 40, at Series 1, Box 1, Folder 4.

142. Oral History Transcript of Emerson Spies, *supra* note 63.



procedures.”<sup>143</sup> He did a respectable job in his first-year studies.<sup>144</sup> Johnson replied, “We firmly believe that the general findings of the validity of the LSAT combined with pre-law college grades are no substitute in certain individual cases like this for the exercise of sound judgment based on experience.”<sup>145</sup> From the beginning, the LSAT was meant to be a tool, and from the beginning, the magic of the “objective” numerical score exercised its power over the legal mind.

Questioning the LSAT’s emphasis on the measurement of aptitude did not take long to start. In 1954, ETS was asked to work on questions to test understanding of human institutions and values, an undertaking suggested by the Association of American Law School’s committee on pre-legal education.<sup>146</sup> The 1954 meeting of the Policy Committee voted against cooperation in a study of ways to measure understanding of values. First, the testing of values requires a judgment about the “excellence of values reflected in the test materials.”<sup>147</sup> Second, because the LSAT was an aptitude test, “[i]t was not evident that the proposed kind of test would be useful in this respect.”<sup>148</sup>

There the matter sat until Louis Toepfer of Harvard was elected to lead the Policy Committee in 1956. Years later, Toepfer candidly admitted, “I had that problem of everybody having high scores.”<sup>149</sup> This led him to try to find ways to discriminate among those high scores.<sup>150</sup> With Toepfer as the chair, the Policy Committee discussed the use of the Graduate Record Examination Area Tests (the Area Tests) to find the applicants with “narrow” backgrounds “who have majored in rather technical fields like business and who, in many cases, have expended their electives on trivialities.”<sup>151</sup> The 1957 meeting of the Policy Committee referred the question to a subcommittee that asked ETS to report the scores on the Area Tests of students now in law school.<sup>152</sup>

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143. Letter from George J. Thompson, Law School Representative, to A. Pemberton Johnson, LSAT Project Manager, ETS (Mar. 1, 1950), *microformed on ETS Archives, supra* note 40, at Series 1, Box 1, Folder 2.

144. *Id.*

145. Letter from A. Pemberton Johnson, LSAT Project Manager, ETS, to George J. Thompson, Law School Representative (Mar. 9, 1950), *microformed on ETS Archives, supra* note 40, at Series 1, Box 1, Folder 2.

146. Memorandum from A. Pemberton Johnson, to LSAT Policy Committee (July 30, 1954), *microformed on ETS Archives, supra* note 40, at Series 3, Box 8, Folder 10.

147. *Id.*

148. *Id.*

149. Oral History Transcript of Louis A. Toepfer, in ORAL HISTORY PROJECT, *supra* note 63.

150. *Id.*

151. Memorandum from John A. Winterbottom, *Comments on Agenda* (n.d.), *microformed on ETS Archives, supra* note 40, at Series 3, Box 8, Folder 14 [hereinafter *Comments on Agenda*].

152. See Minutes of the Policy Committee (June 7, 1957), *microformed on ETS Archives, supra* note 40, at Series 3, Box 8, Folder 14; Memorandum from John A. Winterbottom, *Meeting*

Unfortunately, ETS identified only three students now in law school who had attended colleges where they were required to take the Area Tests and could find scores for only one of them.<sup>153</sup> Thought next turned to a new one- or two-hour test of “general culture.” Toepfer continued to believe that the importance of a broad and liberal education to a lawyer made measuring what candidates have learned in college worthwhile.<sup>154</sup> His colleague on the subcommittee, John Bainbridge from Columbia, told Toepfer that the proposed addition to the LSAT would give “something of substantial value to those of us concerned with our culture and the traditional concepts of our profession.”<sup>155</sup>

Those attending the June 1958 meeting of the Policy Committee gave the matter a thorough discussion. The minutes summarized the arguments of those in favor as making two points. The new cultural material might increase the validity of the test and its very inclusion “would help to show that law schools are seriously interested in encouraging their applicants to acquire a broad background during their undergraduate training.”<sup>156</sup> The opposition pointed out the difficulty of finding material, “particularly in the area of philosophy, on which there would be general agreement regarding its suitability;” that the material might be “coachable;” and that the addition of the material would diminish “the unique contribution of the LSAT” as a measure of aptitude.<sup>157</sup> The information on general background is available in the undergraduate record in any event.<sup>158</sup> A motion to cease experimentation with testing of general culture was defeated and the committee voted to proceed with an experimental test to be administered in the fall of 1958 and validated against first-year grades.<sup>159</sup>

The new test was not universally popular with those responsible for guiding the LSAT. At a December 1959 meeting of the committee charged with furthering the development of the test, opinion on the usefulness of the test of general background was deeply divided. A majority of the committee recommended adopting the test as part of the LSAT in November 1961, even though the studies carried out after the experimental administrations showed

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*of Sub-Committee of Area Tests and Writing Samples* (Nov. 22, 1957), *microformed on ETS Archives, supra* note 40, at Series 3, Box 8, Folder 15.

153. Letter from Robert S. Pasley, to Louis A. Toepfer, Chairman, LSAT Policy Committee (Feb. 13, 1958), *microformed on ETS Archives, supra* note 40, at Series 3, Box 8, Folder 15.

154. Memorandum from Louis A. Toepfer, to LSAT Policy Committee (May 22, 1958), *microformed on ETS Archives, supra* note 40, at Series 3, Box 8, Folder 16.

155. Letter from John Bainbridge, LSAT Policy Committee, to Louis A. Toepfer, Chairman, LSAT Policy Committee (Mar. 21, 1958), *microformed on ETS Archives, supra* note 40, at Series 3, Box 8, Folder 15.

156. Minutes of the LSAT Policy Committee 4 (June 5, 1958), *microformed on ETS Archives, supra* note 40, at Series 3, Box 8, Folder 16.

157. *Id.*

158. *Id.*

159. *Id.*

that the test was useless as a predictor of law school grades.<sup>160</sup> The majority position was that the new test “might be a more efficient measure of achievement and reveal abilities not apparent from the college record.”<sup>161</sup> It also identified those who had acquired “the liberal education so strongly recommended by all law schools, recommended not because men so educated would necessarily enjoy any greater academic success but because they would probably become more effective members of the profession.”<sup>162</sup> The minority raised two points. The first was the impropriety of designing a test to do anything other than measure legal aptitude, “the only appropriate activity of the Law School Admission Test Board.”<sup>163</sup> The second was the possible effect on an undergraduate’s choice of courses.<sup>164</sup>

The new test, along with questions designed to test writing ability, became part of an afternoon testing session in 1961.<sup>165</sup> The first discussion of the new test took place at a meeting of the test development committee in February 1963.<sup>166</sup> Several legal educators wrote to Toepfer beforehand, presumably to give information they would not be present to recount in person. At least three of these letters belittled the test of general background. One correspondent assured Toepfer that he could learn all he needed to know about the breadth of education from the candidate’s transcript. “Who cares,” William Shane wrote, “if he doesn’t recognize a picture of Michelangelo’s Moses?”<sup>167</sup> Norman Penney told Toepfer that his school did not use the afternoon scores in the admissions process, except to the extent that “possibly a few students get some help . . . when they are on the borderline. I doubt that any school really uses them more than this.”<sup>168</sup> Yet another writer was more sympathetic to the general background test because they might identify those who do not do well on the rest of the LSAT, but who “nevertheless may do successful law school

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160. Report of the Test Development Committee (Dec. 1959), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 9, Folder 20.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Minutes of the Policy Committee Meeting (June 3, 1960), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 9, Folder 20.

166. Memorandum from Paul Miller, to Members of the LSAT Test Development & Research Committee (Mar. 12, 1963), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 9, Folder 39.

167. Letter from William R. Shane, Assistant Dean, University of Pennsylvania Law School, to Louis A. Toepfer, Chairman, LSAT Policy Committee (Feb. 14, 1963), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 9, Folder 39.

168. Letter from Norman Penney, Associate Dean, Cornell Law School, to Louis A. Toepfer, Chairman, LSAT Policy Committee (Feb. 11, 1963), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 9, Folder 39.

work.”<sup>169</sup> But unless the test of general background can identify those persons, it is not worth it.<sup>170</sup>

The last comment was the most telling. What impressed Winterbottom the most at the meeting on February 22, 1963 “was the way in which considerations of statistical validity dominated the discussion.”<sup>171</sup> In his view, the general background test was not designed to rise or fall on its ability to predict grades.<sup>172</sup> He thought it had been adopted originally for its “backwash effect [in influencing undergraduate study] and in order to provide information which may help law schools to select students for qualities which have no very close relationship with grades.”<sup>173</sup> Toepfer agreed with Winterbottom’s assessment of the tone of the meeting, but was far from happy with it. In his view, the fascination with statistical validity illustrates the “fundamental weakness” of the committee members.<sup>174</sup> He complained that “[n]one of them know beans about admissions and apparently have closed their minds to learning.”<sup>175</sup> For Toepfer, “[t]he only good way to assess a test is to examine it and then ask yourself whether you would rather have a man who stood high on this measure than one who stood low.”<sup>176</sup>

This controversy about the test of general background is clearly important for understanding the development and role of the LSAT in law school admissions, but how we should interpret it more than forty years after the event is far from self-evident. At first blush, the subject of the test is clearly “cultural,” an ideal means of creating and perpetuating cultural bias, and would be conclusive evidence for some that the LSAT’s very roots are sunk deep into the earth of racism and invidious discrimination.<sup>177</sup> But the historical record reveals a far more complex situation. There certainly is no evidence that anyone intended the general background test to exclude any particular group. Louis Toepfer, perhaps its strongest advocate, saw it as a way to answer his own peculiar problem as the person responsible for admissions to Harvard Law

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169. Letter from A. Kenneth Pye, Associate Dean, Georgetown University Law Center, to Louis A. Toepfer, Chairman, LSAT Policy Committee (Feb. 20, 1963), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 9, Folder 39.

170. *Id.*

171. Letter from John A. Winterbottom, Program Director, ETS, to Louis A. Toepfer, Chairman, LSAT Policy Committee (Mar. 12, 1963), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 9, Folder 39.

172. *Id.*

173. *Id.*

174. Letter from Louis A. Toepfer, Chairman, LSAT Policy Committee, to John A. Winterbottom, Program Director, ETS (Mar. 19, 1963), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 9, Folder 39.

175. *Id.*

176. *Id.*

177. A recent example of this school of thought can be found in Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1475-94 (1997).

School. All his applicants had “high scores,” and he believed that the general background test would give him some basis on which to sort his own applicant pool.<sup>178</sup> In fact, recalling the controversy about the general background test, Toepfer asserted that “the only thing” that sorted people the way the rest of the test did not “was really the knowledge of current events.”<sup>179</sup>

People do have differing opportunities to acquaint themselves with current events and differing views about what events are sufficiently important to warrant attention. Asserting that the goal of the general background test was to sort out candidates who were interested in the world around them does not absolve the test of bias in construction or result. On the other hand, the opposition to and eventual abandonment of the general background test reveal one of the most important consequences of the use of standardized testing in law school admissions. As Winterbottom noted and Toepfer lamented, by the early 1960s, discussion of the value of testing was firmly rooted in the belief that the testing was appropriate only to the degree that it could predict law school performance. The most damning thing that could be said about the general information test was that it did not predict.

The emphasis on prediction was not new, of course. The pre-war admission tests had also been subject to validation studies based on correlations between test scores and performance in law school. The LSAT, however, was more widely used and subjected to ongoing supervision. Year in and year out, the legal educators who sat on the Policy Committee and its various subcommittees, especially those devoted to development of and research on testing, heard ETS personnel subject every suggestion for modification of the test to one criterion: how well did a new question-type predict performance? Those outside the LSAT organization read literature that told them that the test was designed to predict success in law school—specifically, first-year grades. Beginning in 1960, conferences for admission personnel of law schools spread the gospel of prediction even more widely.

#### V. THE ROLE OF PREDICTION

One meaning of the story of the general background test is that prediction became the rationale for objective testing. Tests that did not aid prediction—general background and the contemporary tests of writing ability—were discarded. The emphasis on prediction had another, and perhaps unexpected, effect. What the LSAT could not do became as important as what the test could do. The test did say something about ability to do law school work as measured by first-year grades, but its very limitation helped to focus attention on other factors in admission decisions.

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178. *See supra* notes 149-150 and accompanying text.

179. Oral History Transcript of Louis A. Toepfer, *supra* note 149.

One of the factors investigated was “personality,” a term meaning all the aspects of a person that lead him or her to work hard at a task.<sup>180</sup> By investigating personality, the legal educators and ETS personnel thought they might find a way to identify the under- and over-achiever, or, in cruder terms, to identify both the lazy and those who would have to struggle to keep up. Even though members of both groups might do well on the LSAT, they might not be the best risks for admission. In the fall of 1956, experimental personality tests were administered at ten different law schools to about thirteen hundred students.<sup>181</sup> Three different types of tests were given. Two were designed to measure “flexibility” and “aspiration,” and the third was an “omnibus” test intended to measure a broad range of personality traits.<sup>182</sup> The tests were to be evaluated against grades, and one hope was to identify those who might drop out, especially for reasons other than poor academic performance.<sup>183</sup> The goal was to find an objective test of the qualities Henry Witham identified in 1930 as necessary components of success in law school. A memorandum prepared in preparation for the testing gives further indication of the sort of thinking behind the new project. One test would involve sentence completion because “[t]here is good evidence to support the idea that *variability* in response to the same sentence completion stems, over several occasions, is a good measure of an important quality that might be called ‘Tolerance of Ambiguity,’ ‘Tolerance of Complexity,’ or, in a particular sense, ‘Flexibility.’”<sup>184</sup> The results of such a test would be useful because of the “reputed fact” that some students fail because they cannot cope with the discovery that law is not certain and rigorously logical.<sup>185</sup>

In retrospect, the assumptions behind this psychological testing might seem a bit naive, but the effort was a serious one. The Policy Committee spent a considerable sum, more than \$25,000, in the effort.<sup>186</sup> The actual

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180. See Report of the Research Committee (Dec. 19, 1960), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 9, Folder 21.

181. *Comments on Agenda*, *supra* note 151.

182. *Id.*

183. *Id.* The schools were Columbia, Harvard, Michigan, Northwestern, Pennsylvania, Rutgers, Southern California, Stanford, the University of Washington and Washington University in St. Louis. *Id.*

184. Memorandum from D.R. Saunders, *Proposal for Use of Law School Groups for the Study of Experimental Personality Tests* (May 17, 1956), *microformed on ETS Archives*, *supra* note 40, at Series 2, Box 4, Folder 28.

185. *Id.*

186. Twenty-five thousand dollars was appropriated for research in personality, motivation, and interests during the period from mid-1954 to mid-1957. Minutes of the Policy Committee Meeting (June 9, 1954), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 8, Folder 10. Another \$30,000 was appropriated in 1957 for research during the remainder of 1957 and for 1958. Minutes of the Policy Committee Meeting (June 7, 1957), *microformed on ETS Archives*, *supra* note 40, at Series 3, Box 8, Folder 14.

implementation of the study was handed over to John R. Hills, director of the office of testing and guidance of the Regents of the University System of Georgia. In April of 1959, he reported to Winterbottom that the entire project had turned up little useful information. "Most of the leads we followed," he wrote, "have petered out, as far as prediction of grades in law school goes."<sup>187</sup> Winterbottom replied that no one was expecting the study to have "immediate application" to admissions decisions, and it was sufficient to have increased knowledge about personality.<sup>188</sup> Winterbottom added, "I think that we should look on this study as the close of a chapter so far as the LSAT Policy Committee is concerned."<sup>189</sup>

The failure of the mid-1950s study did not, however, mark the end of concern with the personality of applicants. In 1960, the LSAT Research Committee (Research Committee) was talking about investigating motivation and attitudes.<sup>190</sup> In 1961, the entire Policy Committee heard the Research Committee's report that discussed "at length" the possibility of using "such sensitive information as religious affiliation, family income, parent's education, and the like."<sup>191</sup> The committee believed that gathering such information was not necessary because "[t]he applicant's social and cultural background, it is believed, is determinative only to the extent that it produces certain attitudes, drives, and characteristics."<sup>192</sup> There should be no objection to using some device to measure these attitudes directly, "without regard to the background that produced them."<sup>193</sup> At that same meeting, the Policy Committee voted to appropriate \$3,000 to hire experts to assist in the design of research on the role of "non-intellectual factors" in law school success.<sup>194</sup> Louis Toepfer summed up the goal of this research when he answered a British legal academic's questions about the use of the LSAT at Harvard. The test, he wrote, provided a useful common basis for comparing students of diverse backgrounds, and it "assists greatly in arriving at a decision about admission"

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187. Letter from John R. Hills, Director of the Office of Testing and Guidance, The Regents of the University System of Georgia, to John A. Winterbottom, Program Director, ETS (Apr. 12, 1959), *microformed on ETS Archives, supra* note 40, at Series 3, Box 8, Folder 18.

188. Letter from John A. Winterbottom, Program Director, ETS, to John R. Hills, Director of the Office of Testing and Guidance, The Regents of the University System of Georgia (Apr. 17, 1959), *microformed on ETS Archives, supra* note 40, at Series 3, Box 8, Folder 18.

189. *Id.*

190. *See* Report of the Research Committee, *supra* note 180.

191. Minutes of the LSAT Policy Committee Meeting E-3 (June 2-3, 1961), *microformed on ETS Archives, supra* note 40, at Series 3, Box 9, Folder 27.

192. *Id.*

193. *Id.*

194. *Id.* at E-2.

of candidates “whose other attainments leave us doubtful or often openminded.”<sup>195</sup> Just as important, however, is what the test does not do:

You will see when you examine this test that it measures largely qualities in the general area of verbal reasoning. It does not include measures of likes and dislikes, ambition, motivation and other personal qualities which are closely related to successful performance. For this reason, it is not very useful by itself but taken with undergraduate records and other appraisals it becomes a very helpful tool.<sup>196</sup>

As Toepfer acknowledged, however, the test could not be the only tool. Indeed, the need for additional tools would almost certainly become acute. The legal academics and ETS personnel knew the demographic facts. The “population boom” was approaching law-school age, and the number of applicants was likely to increase.<sup>197</sup> One view was that the increase would put even greater demands on the LSAT to predict not only success, but also superior performance as the number of competent applicants increased and the competition for scholarships increased.<sup>198</sup> At the same time, as H.B. Reese told the Research Committee, “many of us in admissions administration are using standards of selection other than success in law school.”<sup>199</sup> The additional criteria might include trying to predict what sort of practitioners graduates would be. “Another possible criterion might emerge,” he believed, “from judgments about the kind of student body we want, apart from their capacities.”<sup>200</sup>

As the 1960s began and the baby boom came into the sights of law school admissions officers, the LSAT had contributed to the creation of a culture in which prediction of success in law school was an important part of the admission decision, but was clearly understood by those most familiar with the test and its development to be not the only part. The quest continued for better ways to determine which candidates would have a more difficult time because of their “personality,” especially as expressed in motivation for study. At the same time, the ability to predict that the LSAT provided made it clear that other factors entered into the admission decision.

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195. Letter from Louis A. Toepfer, Chairman, LSAT Policy Committee, to A.W.B. Simpson, Lincoln College (Jan. 24, 1962), *microformed on ETS Archives, supra* note 40, at Series 3, Box 10, Folder 40.

196. *Id.*

197. See Minutes of the Test Development and Research Committee Meeting (Oct. 27, 1961), *microformed on ETS Archives, supra* note 40, at Series 3, Box 9, Folder 32; Memorandum from H.B. Reese, to the Research Committee (n.d.), *microformed on ETS Archives, supra* note 40, at Series 3, Box 9, Folder 22 [hereinafter Memorandum from H.B. Reese].

198. Minutes of the Test Development and Research Committee Meeting, *supra* note 197.

199. Memorandum from H.B. Reese, *supra* note 197.

200. *Id.*



## VI. THE ROLE OF THE LSAT TODAY

Somehow, in spite of the consistent message that the LSAT was merely one factor in law school admissions, the test score has assumed an overwhelming importance. The position of the plaintiff in *Grutter v. Bollinger*<sup>201</sup> can be understood at the most general level as expressing the idea that a candidate with a higher score should always be admitted in preference to a candidate with a lower score, although perhaps it is more accurate to say that the argument is that a preference based on race cannot offset a lower score.<sup>202</sup> The current “ratings” of law schools, which mirror the median LSAT of their students, are often blamed for the overemphasis on test scores and certainly could contribute to the idea of test score as entitlement. When a candidate can see that he or she has an LSAT score above a school’s median, rejection begins to look suspicious.

Not so long ago, however, it was the test score itself that was suspicious. The “truth-in-testing” movement of the 1970s was predicated on the belief that the tests were unfair and had too great an influence in the lives of those who had no option but to surrender their futures to a standardized test. ETS, the creator of most of these tests (though not the LSAT, which was produced after the creation of the independent Law School Admissions Council), was seen as “powerful, unaccountable, and secretive.”<sup>203</sup> The result of the movement for greater accountability on the part of ETS was the enactment of a “truth-in-testing” law in New York State in 1979.<sup>204</sup> The result for ETS was a decision to treat the New York statute as if it had nationwide effect and to release copies of all tests when they were given.<sup>205</sup> The same provisions, of course, applied to the LSAC and the LSAT.

The result for the test-preparation business was increased opportunity and respectability. The release of the tests gave the review companies raw material with which to work and a much greater ability to claim success by measuring their students’ improvement by comparing “before-and-after” results on examinations that were the real thing. To put it crudely, aptitude could be bought.<sup>206</sup> As Nicholas Lemann notes in his study of the standardized test in America, the market was large and vigorous, powered by the understandable

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201. 123 S. Ct. 2325 (2003).

202. *Id.* at 2332-33.

203. NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 220 (1999).

204. *Id.* at 224-27.

205. *Id.* at 227.

206. The effects of “truth-in-testing” on the review business are described in LEMANN, *supra* note 203.

desire of baby-boom-generation parents to ensure their children's future and prevent the disaster of downward mobility.<sup>207</sup>

If the rewards of a high test score become an entitlement, then any interference with that entitlement will be resisted, and there seems little doubt that affirmative action based on race is widely seen as just such interference. The secretive and elitist testing agency has been replaced as an object both of fear and scorn by an interfering government and by secretive and elitist educational institutions.<sup>208</sup> The situation is complicated, of course, by electoral politics and votes presumably to be gained by opposing racially-based affirmative action.

The world of legal education itself has also contributed to the transformation of the role of the LSAT. In the first place, the American Bar Association's (ABA) accreditation standards require that a law school require applicants to take a "valid and reliable admission test to assist the school in assessing the applicant's capability of satisfactorily completing the school's educational program," and the presumption is that the LSAT is the test to take.<sup>209</sup> As part of maintaining accreditation, the ABA requires law schools to

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207. *Id.* at 228-29. For a review of the Lemann book, see William P. LaPiana, *Testing, Class, and Material Success, or How We Got to Be Professors*, H-Net Reviews in the Humanities and Social Sciences (2000), at <http://www.h-net.msu.edu/reviews/showrev.cgi?path=16647966265537> (2000) (reviewing LEMANN, *supra* note 203).

208. Lemann describes in detail an important facet of the controversy, the enactment in California of Proposition 209 banning affirmative action based on race. LEMANN, *supra* note 203, at 225-336.

209. The relevant standard and its interpretations are as follows:

Standard 503. ADMISSION TEST.

A law school shall require each applicant to take a valid and reliable admission test to assist the school in assessing the applicant's capability of satisfactorily completing the school's educational program.

*Interpretation 503-1:*

A law school that uses an admission test other than the Law School Admission Test sponsored by the Law School Admission Council shall establish that such other test is a valid and reliable test to assist the school in assessing an applicant's capability to satisfactorily complete the school's educational program

*Interpretation 503-2:*

This Standard does not prescribe the particular weight that a law school should give to an applicant's admission test score in deciding whether to admit or deny admission to the applicant. Other relevant factors that may be taken into account include undergraduate course of study and grade point average, extracurricular activities, work experience, performance in other graduate or professional programs, relevant demonstrated skills, and obstacles overcome.

*Interpretation 503-3:*

A pre-admission program of coursework taught by members of the law school's full-time faculty and culminating in an examination or examinations, offered to some or all applicants prior to a decision to admit to the J.D. program, also may be useful in assessing

submit an annual questionnaire, which, among much other required information, requires the schools to report the LSAT scores of matriculating students. The scores are then reported in the ABA Law School Guide.<sup>210</sup> While such information is certainly valuable to an applicant who is trying to decide on an application strategy, there is no way to limit its use. The LSAT scores of a school's students have become important in commercial rankings, especially those by *U.S. News and World Report*. A statistical analysis of those rankings commissioned by Association of American Law Schools (AALS) found that "virtually all of the differences in the overall ranks among schools could be explained by the combination of two of the *U.S. News* factors. These factors are student selectivity (which is driven by the school's median LSAT score) and academic reputation."<sup>211</sup>

The need to stand out in these rankings, of course, becomes a powerful impetus to report the most impressive scores possible. The LSAC itself has recognized that the LSAT is subject to what it does not call, but surely can be described as, abuse. In 1999, as part of a comprehensive series of recommendations on the proper use of test scores in admissions, the anonymous authors of the study noted:

It is generally acknowledged that too few resources are dedicated to the increasingly complex law school admission process. There was a time when the number of faculty and staff allocated to this function was adequate to the demand, but that was before recruiting, marketing, counseling, customer service, computer expertise, research, e-mail, data management, continuing education, and many other functions became a part of the admission operation. Law schools with staff that are too small, with too little power to effect change, may have contributed to expedient uses of standard predictors and the resulting thin records of other criteria used to make decisions.<sup>212</sup>

To some degree the law schools themselves have contributed to the overwhelming importance of the LSAT score, although it must be noted that the deans of law schools have severely criticized the commercial rankings that have contributed to the outsized importance of the LSAT.<sup>213</sup>

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the capability of an applicant to satisfactorily complete the school's educational program, to be admitted to the bar, and to become a competent professional.

American Bar Association, *Standards for Legal Education*, at <http://www.abanet.org/legaled/standards/chapter5.html> (2003).

210. American Bar Association, *2003 Annual Questionnaire Part 2*, at <http://www.abanet.org/legaled/questionnaire/questionnairefiles/enrollment.doc> (2003).

211. STEPHEN P. KLEIN & LAURA HAMILTON, *THE VALIDITY OF THE U.S. NEWS AND WORLD REPORT RANKING OF ABA LAW SCHOOLS*, at <http://www.aals.org/validity.html> (1998).

212. LAW SCHOOL ADMISSION COUNCIL, *NEW MODELS TO ASSURE DIVERSITY, FAIRNESS, AND APPROPRIATE TEST USE IN LAW SCHOOL ADMISSIONS* 7 (1999).

213. Law School Admission Council, *Deans Speak Out*, at <http://www.lsac.org/LSAC.asp?url=lsac/deans-speak-out-rankings.asp> (2003).

The prominence of the LSAT score in these despised, but clearly influential rankings, has helped to transform a test that was designed to provide guidance to applicants and, as this article argues, to increase the diversity of the profession by helping to show that many people had the ability to do law school work. In addition, the test was never meant to have anything to do with any sort of prediction of whether a candidate would be a successful lawyer, whatever that term means. Today, however, the LSAT—that is, the mean and median test scores of the student body—has become the most important factor distinguishing one law school from another.

## VII. CONCLUSION

The homogenization of American legal education in the period after the second World War eliminated the variety noted in Alfred Reed's reports authored for the Carnegie Foundation.<sup>214</sup> The three-year course of study for full-time students became the norm, the college degree the universal prerequisite, and the casebook, rather than the treatise, the basis of classroom instruction. Many different factors helped to bring about change, including the ambitions of law school faculties, the ability of the ABA to convince state authorities that only graduates of ABA-approved schools would be allowed to sit for the bar examination, and the resulting power of the ABA accreditation requirements and, to a lesser degree, the requirements for AALS membership.<sup>215</sup>

Reed's studies, however, were more than descriptive. His great insight was that the wide variety of legal practice in the United States meant that not all lawyers needed to be trained in the same way and that all law schools need not look alike. He was particularly concerned that men (at least) from all classes be able to aspire to the bar:

Humanitarian and political considerations unite in leading us to approve of efforts to widen the circle of those who are able to study law. The organization of educational machinery especially designed to abolish economic handicaps—intended to place the poor boy, so far as possible, on an equal footing with the rich—constitutes one of America's fundamental ideals. It is particularly important that the opportunity to exercise an essentially governmental function should be open to the mass of our citizens.<sup>216</sup>

Reed was not concerned with race or with gender, but his concern for a representative legal profession led him to envision a system of legal education

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214. REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA, *supra* note 32, at 169.

215. The story of the transformation of one law school and the important role of the ABA and AALS is told in DAVID J. LANGUM & HOWARD P. WALTHALL, FROM MAVERICK TO MAINSTREAM: CUMBERLAND SCHOOL OF LAW, 1847–1997, at 118–42, 168–226 (1997).

216. Reed, *supra* note 32, at 398.

that maximized diversity in the American legal profession. The LSAT was created to further that aim. Whether it can continue to do so is the challenge of law school admissions in the Twenty-first Century.