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The Impact of Anti-Affirmative Action Lawsuits: A Case Study of The University of Texas School of Law from 1996 to 2003

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The Impact of Anti-Affirmative Action Lawsuits: A Case Study of The University of Texas School of Law from 1996 to 2003

by

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Dedication

This dissertation is dedicated to Alberta Harris Riley, my mother, and the one who inspired me to continue my higher education.

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The Impact of Anti-Affirmative Action Lawsuits: A Case Study of The University of Texas School of Law from 1996 to 2003

by

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This study analyzes the effects race-neutral admissions policies have on a large predominantly white law school through the lens of its administrators and alumni. Previously, this law school relied on race conscious admissions policies to help it increase and maintain diversity. Utilizing historical documents and relevant stakeholder interviews from prominent former students and staff, in addition to current faculty and staff, I hope to provide a blueprint for other law schools to follow during a race-neutral admissions environment. This is especially relevant with affirmative action policies threatened by state voter referendums, executive orders, and legislation.

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CHAPTER 1: INTRODUCTION AND BACKGROUND

Introduction

In recent years, affirmative action admissions policies in higher education have been systematically attacked in the courts, and in the voting booths. Currently, eight states have banned affirmative action admissions: six by voter referendum (Washington, California, Arizona, Oklahoma, Nebraska, and Michigan); one by legislation (New Hampshire); and one by state executive order (Florida). In 2012, the United States Supreme Court heard oral arguments in a case against the University of Texas at Austin (UT) involving its use of race in its freshman admissions policy (*Fisher v. Texas*). In June of 2013, the Supreme Court did not rule on the case, but decided to remand the case back to the Fifth Circuit of Appeals Court to review the case again, which it later ruled in favor of the university. In April of 2014, the Supreme Court did rule in another anti-affirmative action case, *Schuette v. Coalition to Defend Affirmative Action*, stating that states have the right to ban racial preferences in university admissions. It appears as though affirmative action policies will be left up to the states and regions to decide, and could be in jeopardy of being lost.

The issue of race in education is not new to the United States. Because the U.S. Constitution does not speak to the government role in educating, it is left to the states which are set with regulating this function of society. Due to this regulation of the states, we have seen varying degrees of systematic inequalities within the education systems. The NAACP Legal Defense Fund attacked the most egregious violations at the higher education level before attacking the K-12 school systems in the early twentieth century, up until the landmark *Brown v. Board of Topeka* case, which ended racial segregation in

the U.S. Details of those cases will be presented in chapter 2. Based on the Supreme Court's reluctance to decide in the Fisher case, and remand it back to the federal court within the state of Texas, it is evident that the controversy surrounding the use of race in admissions leads to a difficult decision to make.

This project explores the impact of a race-neutral admissions policy (*Hopwood* decision) on the Law School's admissions practices. The *Hopwood* decision affected colleges in Texas, Louisiana, and Mississippi, all of which had to discontinue utilizing race in the admissions process. Based on recent developments, colleges whose leadership values diversity need to determine how to modify their recruitment practices and admissions policies without the use of race as a factor.

The Controversy's Evolution

The *Fisher* case would be the third admissions case against UT in sixty years. Thus, UT is not unfamiliar with race-based legal claims. The first two lawsuits involved the admissions practices of the University of Texas School of Law (Law School). In 1946, Heman Sweatt, a Black man, sued the Law School claiming that his Fourteenth Amendment rights as an equal citizen were violated. The second case against UT and the Law School was brought by a White woman. In 1992, Cheryl Hopwood, sued the Law School claiming that it admitted "less qualified" minorities before admitting her and other more qualified White applicants. In the current case, a White female, Abigail Fisher, sued UT in 2008 claiming that her Fourteenth Amendment rights were violated. Fisher claims that UT's freshman admissions policy, which utilized race as a factor in the admission of an unspecified number of students, allowed the university to admit "less qualified" minorities before admitting her.

Although, there are obvious differences between the two cases, the similar issue of the suits was the claim of racist discrimination, under the protection of the Fourteenth Amendment. Law schools will need to develop new approaches to recruit and admit a diverse student body without the use of race in the admissions process.

In 1946, Heman Sweatt sued the Law School because at that time it was legal to not admit Blacks as long as states provided a separate but equal institution for their education. This was the law in the U.S. for the Supreme Court had ruled it so in the *Plessy v. Ferguson* decision of 1896. In 1950, UT's student population was over 13,000 (The University of Texas at Austin, 2004). Due to legal segregationist policies at that time, none of those students were Black. However, not only did Texas fail to provide a separate and equal professional school for Sweatt, as dictated by the *Plessy* decision, it did not provide one at all. This made it a prime target for the NAACP, and then general counsel, Thurgood Marshall to sue. In 1950, the Law School lost its first race-based admissions case on appeal at the U.S. Supreme Court. The court ruled in favor of Mr. Sweatt and the Law School had to admit him.

In 1954, the *Brown v. Board of Education* decision legally abolished the segregationist policies made legal by the *Plessy v. Ferguson* decision in 1896. Unfortunately, it would not end discriminatory practices in admissions, nor would it end discriminatory hiring practices throughout the U.S. In response to the continued discriminatory practices against Blacks, the Civil Rights Movement grew throughout the late 1950's and early 1960's.

Due to the pressures from the Civil Rights Movement, many colleges ended their discriminatory admissions practices. Several prestigious universities made the conscious

decision to recruit and admit more minorities, especially Black students. This rally to admit more minorities ultimately led to Whites feeling discriminated against. This led to lawsuits by White students. The most notable case, *Bakke v. Regents of the University of California*, is a cornerstone case in race-based admissions policies and centerpiece to the modern day controversy. In that 1978 case, *Bakke*, a White medical school applicant sued, claiming reverse discrimination after he was rejected for admission. The Court narrowly upheld that race in the admissions process was needed in order to promote diversity. The Court stated:

> The atmosphere of "speculation, experiment and creation" —so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian,* it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples. (*Regents of the University of California v. Bakke*, 1978, p. 313)

The court essentially held that diversity was needed in the higher education environment because the United States was diverse as well. Thus, the *Bakke* decision gave admissions offices the authority to increase their diversity.

Although there were nearly two decades between the *Bakke* decision and the next major anti-affirmative action suit, *Hopwood v. Texas* in 1992, the controversy never went away. It appears that the controversy became more heated, for not only was there the *Hopwood* decision in 1996, but that same year, Californians voted and approved a law, Proposition 209, that banned the use of race in its higher education admissions decisions. Just seven years later, in 2003, however, the U.S. Supreme Court would rule in favor of race-based admissions decisions as it did in the *Bakk*e decision. In 2013, the U.S. Supreme Court made a controversial decision not to hear the *Fisher* case, and to remand it to the Fifth Circuit.

It appears as though the controversy is building as opposed to diminishing, as the time span between cases is getting shorter. Nonetheless, the arguments remain the same.

The University of Texas Law School

The University of Texas School of Law was founded in 1883. The Law School is one of the top law schools in the United States according to U.S. News and World Report. It ranked as the fourth best public law school according to the same publication. According to the Law School's website, the Law School has over 23,000 living alumni, most of whom are distinguished in "careers in government, public-service organizations, corporations, and law firms throughout Texas, the nation, and the world" (The University of Texas School of Law, n.d.).

Prior to the *Hopwood* Decision

In 1901, twelve years after its founding, the Law School, known then as the Department of Law, appointed John C. Townes its first dean. At that time, the Law School was located in the basement of the main building. In 1908, it was moved into its own building. The Law School became the School of Law in 1920. In 1923, the Law School was one of the first law schools to be accredited by the American Bar Association, along with Yale, Harvard, and Stanford. By 1935, the Law School had become one of the largest in the United States.

Prior to the Civil Rights movement the Law School only admitted White students. This was the case for many public law schools in the United States. As other segregationist policies of that era were challenged in the courts, the law school's admissions policies were challenged as well in *Sweatt v. Painter*, the landmark case filed by the legal arm of National Association for the Advancement of Colored People

(NAACP). The case was filed on behalf of Heman Sweatt, a postal worker from Houston, Texas who applied to the Law School and was denied admission. Painter, was the president of the University of Texas at Austin at that time.

The *Sweatt v. Painter* case was decided in 1950 by the U.S. Supreme Court. Mr. Sweatt was represented by Thurgood Marshall who successfully showed how it was impossible for Blacks to obtain an equal education to Whites. Marshall showed how the physical aspects (e.g., the library) of the newly created Black law school at Texas Southern University in Houston, Texas, were insufficient. Mr. Marshall also showed how the opportunities to interact with the number of alumni and professors, who possessed a multitude of experience and expert advice, were detrimental as well. The details of this case will be discussed in more detail in chapter 2.

In the years following the *Sweatt* decision, the Law School was slow to admit more Black and Hispanic students, even with pressure from the Civil Rights Movement in the 1960's. For instance, in 1975, there were 34 Black law students enrolled at the Law School (Statistical Handbook, 1975, p. 36), which accounted for only two percent of the 1,691 total law students at the Law School. The Hispanic law students, (labeled "Spanish Surname"), totaled 88, and represented only five percent of the total population.

Although the *Bakke* decision opened the door for many colleges and universities to openly admit more minorities, the Law School remained slow to admit Black and Hispanic law students. In 1982, to comply with a federal desegregation order, the State of Texas committed to affirmative action in professional school admissions and to goals for minority enrollment (Laycock, 2001). After complying, the Law School was successful in recruiting and graduating many minority students. As an example, in 1982, there 109

Black law students enrolled at the Law School, and they accounted for seven percent of the 1,615 total law student population (Statistical Handbook, 1982, p. 23). The Hispanic law students totaled 189 which represented twelve percent of the total population. The Black enrollment increased by five percent from 1975, and the Hispanic enrollment increased by seven percent. The provisions set in place played a major role, for in 1983, the incoming class had its highest percentage of Blacks, which was 9.3 percent.

The numbers dwindled in 1984 to 6.2 percent and averaged 5 percent from 1985 to 1995. In the same time frame, Blacks made up 11 percent of the state's population. Hispanics had a similar pattern. In the same period, the Law School's Hispanic enrollment was between 8 to 14 percent for first year law students (see Table 1.1). During the same time period, Hispanics made up 31 percent of the state's population.

In the years that the Law School was guided by the *Bakke* decision, the admissions office was relatively successful at recruiting, admitting and enrolling minority students. This is based on the numbers in Table 1.1. However, during that time, the Law School would face its first challenge to its affirmative action admissions policy.

The University of Texas School of Law Fall Enrollment
With Affirmative Action

Year	Blacks	Mexican-Americans
1983	9.30%	10.00%
1984	6.20%	14.30%
1985	4.60%	11.20%
1986	4.40%	13.10%
1987	3.20%	10.20%
1988	7.00%	10.70%
1989	6.00%	11.40%
1990	7.10%	11.60%
1991	6.90%	10.60%
1992	8.00%	10.70%
1993	5.90%	10.00%
1994	6.70%	9.70%
1995	7.40%	12.50%

Table 1.1

In 1992, a White applicant, Cheryl Hopwood, would be one of three White applicants to file an anti-affirmative action lawsuit against the Law School. *Hopwood v. Texas* would be the first anti-affirmative action case and the second landmark case against the Law School since the *Sweatt* decision.

The *Hopwood* Case

Cheryl Hopwood and two other White plaintiffs applied for admission to the Law School in 1992 and all three applicants had high grades and test scores. However, each of them was denied admission. They alleged that they would have been admitted but for the Law School's preference for minority applicants. The applicants sued the State of Texas and sought a declaratory judgment that the Law School's admissions policy was unconstitutional. In addition, they sought an injunction against further use of that policy, and money damages for having been denied admission (Laycock, 2001).

The Law School admitted that it had preferred minority applicants, but it insisted that it had done so for compelling reasons—to achieve and maintain desegregation of legal education in Texas, to remedy past discrimination in public education, and to ensure diversity in its classrooms. The plaintiffs argued that if some minority applicants were preferentially admitted on the basis of race, an equal number of White applicants were denied admission on the basis of race. That was a mathematical fact, which the Law School did not dispute. The Law School acknowledged that affirmative action had costs, but insisted that those costs were justified by the compelling reasons for the program and it argued that the costs were thinly spread over a substantial part of the applicant pool. In addition, the Law School argued that a properly run affirmative action plan had only a minuscule effect on any particular White applicant's chances for admission (Laycock, 2001).

In 1992, the Law School had created a separate committee to review minority applications. This two-committee system became the subject of much criticism later, but neither side thought the dispute was about the administrative details of the program, and neither did the Fifth Circuit Court of Appeals. The Law School's Admissions Committee thought that two committees would lead to a fairer and more accurate process. Consolidating consideration of minority files made it easier to identify the strongest minority applicants, and easier to enforce uniform limits on the magnitude of racial preferences (Laycock, 2001). The court ruled in favor of the Law School in the initial case on all counts.

On appeal, the plaintiffs successfully pursued their argument that any consideration of race would be unconstitutional. Surprisingly, the Court of Appeals held

that *Bakke* was no longer the law—and perhaps had never been the law, because the opinions in the case had been so divided (*Hopwood*, 1996). The Court of Appeals held that the Law School could consider the race of applicants only if that were necessary to remedy discrimination by the Law School. However, the Court ruled that the Law School was not the "appropriate governmental unit for measuring a constitutional remedy" and thus could not use race (p. 951). In essence, the Court of Appeals believed that the University System was responsible for remedying the past discrimination, not the Law School. Therefore, the Law School did not have the authority to use race as a factor. In addition, the Court of Appeals dismissed as irrelevant the state's continued obligation to fully desegregate its institutions of higher education. Surprisingly again, it ruled against a higher authority and dismissed the desegregation plan negotiated with the Office of Civil Rights in 1982 as both irrelevant and unconstitutional.

After the *Hopwood* Decision

Unlike the *Bakke* decision, where all public universities in the United States were impacted by the Supreme Court decision, the *Hopwood* decision ended race in the admissions process for all public higher education institutions only in the states of Texas, Mississippi, and Louisiana. All three of these states had undeniable segregationist histories. The landmark U.S. Supreme Court decision that legalized segregation, *Plessy v. Ferguson*, was initiated in the state of Louisiana. Speaking about the state of Texas, the Law School's dean at the time, Mark Yudof stated, "this state (Texas) had segregation (by law), UT had a history of discrimination" (Brooks, 1992, p. A1).

In the year after the *Hopwood* decision, Black and Hispanic enrollments in the first year class at the Law School dropped by 90 percent and 60 percent, respectively. In

real numbers, the number of first-year Black law students went from thirty-eight to four, and the number of Hispanic students dropped from sixty-four to twenty-six (see Table 1.2).

Chapa and Lazaro (1998) looked at four law schools in Texas and compared minority acceptances for 1995 and 1996. They found that the effect of *Hopwood* on the Law School was somewhat unique. They found that the Law School suffered considerable losses of minority students, while other law schools in the state (e.g., Texas Tech, University of Houston, and Texas Southern) were not affected to the same extent. While Hispanic acceptances at the Law School dropped, they actually increased at the three other public law schools. Additionally, Black acceptances plummeted at the Law School, while The University of Houston saw an increase, and the other two schools suffered a relatively small decline (Chapa & Lazaro, 1998). This gives rise to the question, what was the difference? Why did the Law School's experience differ from the other public law schools?

The University of Texas School of Law First Year Enrollment

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003
Total	510	500	464	489	519	518	526	581	552
White	364	371	376	336	361	346	367	404	329
Hispanic	68	46	31	37	41	51	50	51	92
Black	36	29	4	9	9	17	16	22	32

Table 1.2

Chapa and Lazaro (1998) offer two explanations as to why the Law School was hit harder by *Hopwood* than the other law schools. One, the Law School was at the center of the *Hopwood* case, and thus, all of the publicity could have caused a decrease in

applications from minority students due to negative reputation. The other explanation is that a limit on affirmative action could have caused minority students to be redistributed into less selective schools.

According to Laycock (2001b):

> Even with affirmative action, minority enrollment at the law school had never approached minority proportions in the state's population—Texas is more than 11% Black and more than 30% Mexican-American. Without affirmative action, minority enrollment at the law school is a small fraction of the state's minority population.

In other words, before the *Hopwood* decision, with an affirmative action admission policy, the Law School was not able to graduate a population of Black nor Hispanic attorneys to match the percentages those two ethnicities represent in the state of Texas' population.

Between 1983 and 1995, the Law School was seemingly successful in having a substantial number of Hispanic students in the incoming class (see Table 1). The same holds true for Black students. The only exceptions are in the years 1985 to 1987 where the Black percentage of the class was below 5 percent. In the year the *Hopwood* decision was rendered, 1996, the admissions process was near completion and there was little effect on the minority enrollment (see Table 1.3).

The University of Texas School of Law Fall Enrollment With Part Affirmative Action Policy

Year	Blacks	Mexican-Americans
1996	6.40%	8.60%

Table 1.3

However, there was a substantial decrease in the number of Black and Hispanic students after the *Hopwood* decision from 1997 to 2002 (see Tables 1.4).

The University of Texas School of Law Fall Enrollment
Without Affirmative Action

Year	Blacks	Mexican-Americans
1997	0.90%	5.60%
1998	1.70%	6.40%
1999	1.40%	6.60%
2000	3.80%	7.10%
2001	3.00%	7.00%
2002	4.00%	8.00%

Table 1.4

The Law School, as most law schools of its size, divides each incoming class into four sections for classes. In 1997 there would be four sections of 116 each. In addition, each section is typically divided equally by ethnicity, gender, LSAT score and GPA, so no section has an advantage over another. This would mean that since there were only four Black students in the incoming class in 1997, each section of 116 had only one Black student. In contrast, in 1996, there were 29 Black students in the class of 500. Thus, there were approximately seven Black students in each section. For those four students in 1997, what impact would this have on the acculturation of the non-minority students in each section? What impact would this have on the individual Black student in each section? Although research did not seek the answer to these two questions directly, it did seek to understand the impact the *Hopwood* decision had on the Law School as a whole. For, it is obvious from the quantitative data above that the *Hopwood* decision had a major impact on the enrollment of Blacks and Hispanics (see Table 1.3).

Statement of the Problem

Following the *Hopwood* decision, many social scientists produced research and data that showed the positive benefits of diversity in the higher education setting. This was not done with as much vigor prior to the *Hopwood* decision. There was little to none

of this type of research at that time. Although the research was post *Hopwood*, in hindsight, perhaps it would have been valuable to the Law School in its defense of its affirmative action program. That same research is what can be partly attributed to the success of the University of Michigan's defense of its affirmative action program in 2003, (e.g., the *Grutter* decision).

Michigan's successful defense before the U.S. Supreme Court ended the race-neutral policy in Texas, Louisiana, and Mississippi, that the *Hopwood* decision implemented. The *Grutter* decision stands in favor of Justice Powell's assertion, written in the majority's opinion, that diversity is crucial in the higher education of this nations' youth. From that research, which will be presented in chapter 2, social scientists have concluded that Justice Powell was correct in his assertion that diversity is a strong rationale for colleges and universities to utilize race in their admissions policies.

Although the scholarly research exists and the Supreme Court has ruled in favor of, both in 1978 and 2003, the controversy over how the diversity is attained is still debatable and controversial, hence, the recent *Fisher v. Texas* case. The problem that exists is the threat of losing affirmative action admissions policies again as it happened in 1996, and in recent years. If this does occur, it is important to understand the impact of going from a race-conscious to a race-neutral admissions process. It is valuable to know what to expect and how to deal with the circumstances in law school admissions in a race-neutral admissions environment, both immediately and long-term.

Purpose of the Study

The primary purpose of this research is to tell the Law School's, yet untold story. Although the *Hopwood* decision involved a case against the university's Law School's

affirmative action admissions policy, the majority of the news worthy stories and research surrounding the effects of the *Hopwood* decision focused on the undergraduate population at UT (e.g., Top 10% Plan). The secondary purpose of this research is to identify and document the issues encountered, if any, and the strategies developed and utilized by the Law School administration. In addition, were those strategies successful? If not, what could have been done better?

Finally, the threat of race-neutral admissions policies lingers even though *Fisher* was a victory for affirmative action supporters. It is important for law school admissions officers and deans to understand how to continue to recruit and admit a diverse student body without the aid of race in the admissions process. No studies, to the researcher's knowledge, have examined nor documented how law schools, in particular, have been impacted by the effects of a race-neutral admissions process. This research hopes to provide insight into how law schools can admit diverse student bodies in a race-neutral environment.

By researching what took place at the Law School after the *Hopwood* decision, the story of the Law School's administration and relevant stakeholders (e.g., alumni) can be told. In addition, the information obtained that aided the Law School in developing a race-neutral admissions environment, can assist other law schools, colleges and universities in the future.

Design of the Study

A qualitative case study method was chosen as the design of this study. Yin (2003) states that this method is well suited for researching problems that examine patterns over time especially those that are based on historic incidents. He goes on to say

that qualitative historical design is often used when the objective is to discover previously unknown patterns and variables. The story of what took place at the Law School after the *Hopwood* decision has not been recorded. This study explored the experiences of administrators and relevant stakeholders of the Law School after the *Hopwood* decision from 1996 to 2003.

The following questions guided the research for this case study:

1. What are the best methods in recruiting diverse students under race-neutral admissions policies?
2. How can law school admissions professionals recruit diverse students under race-neutral admissions policies?
3. How can law school admissions professionals overcome the effects of anti-affirmative action lawsuits?

I hypothesized that the environment of a law school that is forced to go from a race-conscious admissions policy to a race-neutral admissions policy, experiences a very stressful and chaotic transition. I believed this would be especially true at law schools in states that historically had deplorable race relations (e.g., Texas, Louisiana, and Mississippi).

The *Hopwood* decision assumed that race was no longer an issue in the United States and thus, the Law School would not have any issues. This change had an enormous impact on the Law School, its administration, and its relevant stakeholders.

Definitions of Terms

This section provides definitions of some relevant terms that will be useful for the reader. While there may be some debate about the specific definitions of some of these terms, I have framed my study in the context of the definitions presented below.

1. Affirmative action – In the United States, this refers to equal opportunity employment measures that are intended to prevent discrimination against employees or applicants for employment on the basis of color, religion, sex, or national origin. The drive toward affirmative action is to help rectify the disadvantages associated with overt historical discrimination. Further, drive for affirmative action is a desire to ensure that such public institutions, as universities, hospitals, and police forces, are more representative of the populations they serve.
2. Race-conscious – In practice, race-conscious is the opposite of race-neutral. These operations use racial data or profiling and make classifications, categorizations, or distinctions based upon race. An example of this would be a college processing admissions with regard to or knowledge of the racial characteristics of applicants.
3. Race-neutral – Race-neutral operations use no racial data or profiling and make no classifications, categorizations, or distinctions based upon race. An example of this would be a college processing admissions without regard to or knowledge of the racial characteristics of applicants. Race-neutral policies are the same as color blind.
4. Reverse discrimination – This is discrimination against members of a dominant or majority group, or in favor of members of a minority or historically disadvantaged group. Groups may be defined in terms of race, gender, ethnicity, or other factors. This type of discrimination can be defined as the unequal treatment of members of the majority groups resulting from

preferential policies, as in college admissions or employment, intended to remedy earlier discrimination against minorities. The idea of reverse discrimination became popular in the early-mid-1970s, the time period that focused on underrepresentation and affirmative action intended to remedy the effects of past discrimination.

Summary

Affirmative action and the use of race in admissions have been controversial topics since the *Bakke* decision made their use legal in the United States. The evolution of this controversy is evident by the number and frequency of lawsuits and voter referendums against its use in the past thirty years. Ample research shows that the presence of minorities in the classroom helps to acculturate White law students to diverse populations (Gurin, Dey, Hurtado, and Gurin, 2002; Bowen and Bok (1998); Orfield and Kurlaender (2001); and Chang et al. (2003)). Other supportive research highlights the benefit of affirmative action, but the argument as to how colleges and universities admit a diverse student body still persists.

Statistically, it is clear that the legal profession is lagging in the representative numbers based on ethnicity (LSAC, 2014). In light of that, it is possible that more cases like *Hopwood* and *Fisher* could potentially remove race from the admissions process for all public law schools in the United States. Thus, it is imperative to understand what the impact of the *Hopwood* decision had and how law schools can adjust to continue to recruit, admit and enroll diverse classes of students.

In the next chapter, the review of the literature, I will provide the scholarly research for and against the use of race-based admissions policies. In addition I will

provide a history of the race issue in the United States by first reviewing the legal decisions involved in establishing and testing both the "separate but equal" and affirmative action doctrines. Chapter 3 will describe the theoretical frameworks and methodology, the rationale for selecting a qualitative approach to this study. Chapter 3 also provides a description of the design of this research which includes a description of the participants, data collection, and the data analysis. Chapter 4 presents the results of the study. Chapter 5 presents an analysis of the emergent themes and interpretations. Chapter 6 presents the areas of further research, limitations to this study, and the conclusion.

CHAPTER 2: REVIEW OF LITERATURE

This review of the literature is divided into two sections that provide the following: 1) the scholarly research for and against the use of race-based admissions policies; and 2) a historical overview of the legal decisions that have shaped the controversial issue of race in higher education admissions.

Scholarly Research

In the *Bakke* decision, the U.S. Supreme Court focused on the diversity efforts that affirmative action programs provided to college campuses, and the benefits they brought. Colleges and universities had utilized affirmative action to counteract the effects of past racial discrimination by providing greater educational opportunities to racial and ethnic minorities (*Grutter*, 2003). After *Bakke*, the Law School and other colleges would struggle to admit diverse incoming classes under affirmative action. The *Hopwood* decision in 1996 would deal affirmative action admissions programs a devastating blow.

The uproar over the controversial *Hopwood* decision provoked social scientists to research the benefits of diversity to counteract the negativity regarding affirmative action. This research and supporting arguments from entities such as major corporations (e.g., 3M and General Motors) and the U.S. military, showing the benefits of diversity and affirmative action, swayed the U.S. Supreme court in the the *Grutter* decision in 2003.

The following section will highlight the scholarly research produced during the *Hopwood* era, the *Grutter* era, and the current *Fisher* era.

The *Hopwood* Era

The Fifth Circuit Court's *Hopwood* decision, which judicially banned the use of race in admissions decisions in all public postsecondary institutions in Texas was felt

immediately, especially at the two most selective public institutions, the University of Texas at Austin and Texas A&M University at College Station. Minority enrollee numbers dropped tremendously. The Law School numbers reflect this as well (see Tables 2 and 3). The precursor to the most recent scholar research would be the seminal research by Bowen and Bok published soon after the *Hopwood* decision in 1998.

Researchers Bowen and Bok (1998) produced a longitudinal study of students graduating from selective colleges and universities that had utilized affirmative action admissions practices. Drawing from records of more than 80,000 students who matriculated at twenty-eight selective colleges and universities in 1951, 1976, and 1989, the study found that the 1976 cohort participated in civic activities in very large numbers.

In addition, this research provided evidence that a diverse student body has a positive impact on the development of students in the area of civic engagement and leadership values. From their work, Bowen and Bok concluded that race-based admissions policies "have led to striking gains in the representation of minorities in the most lucrative and influential occupations" (p.10). Bowen and Bok also stated that race-neutral policies are inadequate. They stated that "of 42,287 Whites accepted by accredited schools in 1990-91, 6,321 would have been excluded if admissions officers had looked only at grades and test scores" (p. 25).

Bowen and Bok also set out to discredit the assumption made by those opposing affirmative action who argue that Black students with lower SAT scores would be better off at second-tier institutions. They conclude that "even those black students in the lowest SAT band graduated at higher rates the more selective the school they attended" (p. 61).

In other words, Black students are more likely to graduate at highly selective colleges than Black students at less selective institutions.

Bowen and Bok also found that merit alone without race is detrimental to admission of minority students. They argued that higher education has an obligation to enrich the education of all students through the diversification of student bodies. This is also a sentiment of Justice Powell in the *Bakke* decision. Bowen and Bok's data show that 74 percent of Black students and 42 percent of White students believe it is important to be able to work effectively and "get along with people from different races and cultures" (p. 220). Bowen and Bok state that meeting the goals of many colleges' and universities' missions would not be possible with just merit based admissions practices.

Another book published during this time opposed affirmative action, and in turn supported class-based admissions. Kahlenberg (1996) wrote that class should be the basis for admissions, not race. He states that affirmative action fails because it is not today's only impediment to opportunity. He claims racial preferences "do a poor job of advancing" the goal of equality of opportunity (p. 209).

The *Grutter* Era

In 1997, one year after the *Hopwood* decision, a White applicant, Barbara Grutter, applied for admission to the University of Michigan Law School and was denied. In March 2001, U.S. District Court Judge Bernard A. Friedman ruled that the admissions policies were unconstitutional because they "clearly consider" race and are "practically indistinguishable from a quota system." In May 2002, the Sixth Circuit Court of Appeals reversed the decision, citing the *Bakke* decision and allowing the use of race to further the "compelling interest" of diversity.

After appealing to the U.S. Supreme Court, affirmative action was upheld by another close five to four decision, similar to the *Bakke* decision. In the Court's opinion, Justice O'Connor summarized that "the Equal Protection Clause does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body" (*Grutter*, 2003, Section IV).

In reaching the court's opinion in *Grutter*, Justice O'Connor referenced "numerous studies show that student body diversity promotes learning outcomes" (*Grutter*, 2003, Section III A). The following section reviews those studies that focus on the effects of diversity in the classroom, the student's values and civic engagement, and in the workforce after higher education.

The effects of diversity in the classroom

The classroom experience is educationally relevant because many topics, such as social inequity, are likely raised in the classroom at some point during a student's undergraduate education. Chang, Seltzer, and Kim (2002) drew on a national sample of nearly 290,000 freshmen at 572 colleges and universities and examined whether campuses with higher proportions of underrepresented racial minority students (African Americans, Latinos, and Native Americans) have a broader collection of student viewpoints. They found that increased proportions of underrepresented minorities led to a greater variety of opinions, with the effect seen across both public and private institutions and in controlling for factors such as school selectivity and size. Chang et al. found that their findings "support Justice Powell's contention that increasing racial diversity leads to

a broader collection of thoughts, ideas and opinions held by the student body" (p. 31). Chang et al. state:

> Maximizing the goal of opinion diversity, however, will require more than enrolling a few students of color or establishing "token" representation. Because these effects are a function of differences regarding group averages rather than stereotypes about individual student's opinions, only by enrolling a sufficient number or "critical mass" of underrepresented students can we expect an effect on the overall spread of opinions. (p. 32)

In order to gain a sufficient positive impact from a diverse group of students, there cannot be a small number of minority students but a sufficiently large number admitted into incoming classes (e.g., critical mass).

Orfield and Whitla (2001) conducted a law school study in which the Gallup Organization surveyed 1,820 law students to determine the effects of student body diversity on learning and other educational outcomes determine the effects of student body diversity on learning and other educational outcomes. When asked how diversity had affected the way in which they reflected upon problems and solutions in class, 68 percent of the Harvard students and 73 percent of the University of Michigan students responded that diversity had affected discussions positively. Sixty-three percent of the Harvard students and 66 percent of the Michigan students reported that racial diversity enhanced the manner in which topics were discussed in the majority of their classes.

When the law students were asked to compare their homogeneous classes to their diverse classes in three categories: (1) the range of discussion, (2) the level of intellectual challenge, and (3) the seriousness with which alternative views were considered—42 percent of the students found the diverse classes to be superior in all three respects while only 3 percent believed the homogeneous classes were superior (Orfield & Whitla, 2001). In their conclusion, Orfield and Whitla (2001) stated:

> It is clear from this survey, however, that large majorities have experienced powerful educational experiences from interaction with students of other races. White students appear to have a particularly enriching experience, since they are by far the most likely to have grown up with little interracial contact. The values affirmed by Justice Powell and by the Harvard admissions officials cited in the *Bakke* decision appear to be operating in the lives of law students today. (p. 172)

Their results show that student body diversity has strong positive effects on the classroom environment, with no statistically significant differences across racial groups.

Maruyama and Moreno (2000) surveyed a representative national sample of college and university faculty in the social sciences, humanities, education, and business at Carnegie Research-I institutions. The surveys indicate that greater student body diversity leads to improved classroom learning. Maruyama and Moreno (2000) found that

> The vast majority of faculty members indicate that neither the quality of students nor the intellectual substance of class discussion suffers from diversity, and from one-third to one-half of faculty members cited positive benefits of diversity in the classroom. (p. 14)

A substantial number of respondents agreed that classroom diversity broadened the range of perspectives shared in classes, exposed students to different perspectives, and encouraged students to confront a range of stereotypes (e.g. racial, ethnic, social, political, and personal experience). More specifically, more than 66 percent of respondents indicated that students benefit from learning in a racially and ethnically diverse environment with respect to exposure to new perspectives and willingness to examine their own personal perspectives (Maruyama & Moreno 2000).

Gudeman (2001) surveyed 132 faculty members at Macalester College, a liberal arts college in St. Paul, Minnesota. Eighty-one faculty members responded. The pool represented a cross-section of faculty members including diversity across key dimensions such as gender, race, discipline, tenure, and political orientation. The results show that 91

percent of the faculty agreed that "racial ethnic diversity in the classroom 'allows for a broader variety of experiences to be shared'" (Gudeman, 2001, p. 259). Eighty percent of the faculty felt that minority students typically raise issues not normally raised by non-minority students, and 75 percent of faculty agreed that racial and ethnic issues are discussed more substantively in diverse classroom environments. The findings from Gudeman's research show that the faculty believes that diversity in the classroom is important to the college's mission, the educational outcomes of students are positively affected and they themselves view diversity more positively as a result of the classroom experiences.

As the previous studies show, whether undergraduate, faculty, or graduate students, diversity among student peers has a positive effect on classroom discussions and experiences in higher education.

The effects of diversity on democratic values

Gurin et al. (2002) studied the effects of diverse interactions among college students on the democratic development and learning outcomes of college students. The study utilized the Michigan Student Survey (MSS) database and the Cooperative Institutional Research Program (CIRP). Gurin examined the survey results of 1,129 White students, 187 African American students, and 266 Asian American students from the MSS database and 11, 383 students from 184 institutions from the CIRP database.

From the CIRP data, Gurin et al. (2002) found that informal interactional diversity (e.g. interaction at events or dialogues) was especially influential in accounting for higher levels of intellectual engagement and self-assessed academic skills White, African American, Latino/a, and Asian students. Their results show that the impact of classroom

diversity was also statistically significant and positive for White students and for Latinos/as. The results from the MSS data analysis showed that "classroom diversity at the University of Michigan nearly always involves the presence of diverse students as well as exposure to curriculum content addressing diversity" (Gurin et al., 2002, p. 357). In sum, Gurin et al. (2002) found that "a diverse student body is clearly a resource and a necessary condition for engagement with diverse peers that permits higher education to achieve its educational goals" (p. 360). Their research proves diversity enables students to understand the differences between and within groups of people different from other groups and why diversity is needed in the classroom.

Hurtado (2001) examined the impact of diversity on students' self-perceived improvement in the abilities needed to contribute to a pluralistic democracy. The data for the survey came from the 1989-1990 Faculty Survey administered at the University of California at Los Angeles Higher Educational Research Institute. The survey consisted of over 16,000 faculty members at 159 predominantly White institutions from across the U.S. The results support previous research (Bowen & Bok, 1998) proving that opportunities for interactions with diverse peers foster civic engagement among college students (Hurtado, 2001). The results of this study "strongly suggests that such diversity may contribute significantly to students' improvement on key learning outcomes that are associated with both academic development and critical abilities needed to work in diverse settings" (p. 200). Thus, diversity is proven to contribute to students' development and help their ability to work in multiple settings.

Research also indicates that when confronted with new ideas and perspectives in diverse learning environments, students' views and values can be altered. Orfield and

Whitla (2001) stated “in diverse settings, students are likely to encounter views very different from their own” (p. 163). Orfield and Whitla (2001) asked law students whether conflicts due to racial differences challenged them to rethink their values, most students responded affirmatively. Sixty-eight percent of the Harvard law students and 75 percent of the University of Michigan law students answered that such conflicts either enhanced or moderately enhanced a rethinking of their values. In addition, 52 percent of the Harvard students and 60 percent of the Michigan students reported that conflicts due to racial differences eventually became positive learning experiences. A survey by Whitla et al. (2003) yielded similar findings. Seventy-seven percent of medical students found that they felt challenged to rethink their values when racial conflicts occurred, and 68 percent thought such occurrences were learning experiences. In sum, Whitla et al. found that “students gave high ratings for a diverse student body supports the hypothesis that students regularly educate each other on important issues, such as differences among the cultures and how to best respond to those differences” (p. 465).

The effects of diversity in preparation for the workforce

In Bowen and Bok’s (1998) study, students were asked what difference their college experience made in developing their ability to work with, and get along with, people of different races and cultures (Bowen & Bok, 1998). Forty-six percent of the White respondents in the 1976 cohort believed that their undergraduate experience was of considerable value and 18 percent assigned the highest rating, saying it helped a great deal. Fifty-seven percent of Black respondents in the 1976 cohort gave college credit for helping them develop these “getting along” skills. Respondents in the 1989 cohort reported even larger positive effects: 63 percent of Whites and 70 percent of Blacks

attributed their ability to work with and get along with people of different races and cultures to their college experiences.

Students in the Orfield and Whitla (2001) law school study reported that diversity had affected their “ability to work more effectively and/or get along better with members of other races.” Sixty-eight percent of the Harvard law students responded that diversity either “clearly enhanced” or produced a “moderate enhancement” in their ability to work and get along with members of other races. Forty-eight percent of the Michigan law students perceived a clear, positive impact on their ability to work and get along with members of diverse backgrounds. Seventy-six percent of students in the Whitla et al. (2003) medical school survey felt that a diverse student body helped them work more effectively with those of diverse racial backgrounds, and 77 percent indicated that a greater understanding of medical conditions and treatments was more likely when a student body was diverse.

The *Fisher* Era

In 2008, five years after the Grutter decision, Abigail Fisher and Rachel Michalewicz applied to the University of Texas at Austin and were denied admission. The two women, both White, filed suit, alleging that the University had discriminated against them on the basis of their race in violation of the Equal Protection Clause of the Fourteenth Amendment. In 2009, United States District Court judge Sam Sparks upheld the University’s policy, finding that it meets the standards laid out in the *Grutter* decision. That decision was affirmed by a Fifth Circuit Court of Appeals panel. Judge Higginbotham, in his ruling, wrote that the “ever-increasing number of minorities gaining admission under this Top 10 Percent Law casts a shadow on the horizon to the otherwise-

plain legality of the Grutter-like admissions program, the Law's own legal footing aside" (*Fisher*, 2011, p. 217). A request for a full-court en banc hearing was denied by a 9 to 7 vote by circuit judges. This appears ironic, for this Fifth Circuit Court in the *Fisher* case ruled the opposite of what the Fifth Circuit Court ruled in the *Hopwood* case. The current court did not go against the current U.S. Supreme Court precedent set in the *Grutter* decision. The Fifth Circuit Court in 1997 did go against the precedent set in the *Bakke* decision.

On February 21, 2012, the court granted certiorari and heard the oral arguments in October, 2012. In June of 2013, the U.S. Supreme Court ruled that the Fisher case be remanded back to the Fifth Circuit Court of Appeals so that the court can "assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity (Fisher, 2013, Section II). In July 2014, a federal appeals court upheld the University of Texas at Austin's consideration of race in admissions.

The positive effects of affirmative action

Harris and Tienda (2012) analyzed institutional administrative data from the University of Texas at Austin and Texas A&M University that includes the admission and enrollment status of all applicants. Using an array of data that measures senior class size, which institutions use to compute class rank, and other indicators, they merged these school attributes to records of individual applicants.

Harris and Tienda (2012) found that at both universities, the Hispanic students' relative share of enrollment was highest under affirmative action. In addition, they found that "the share of Hispanics in the admittee and enrollee pools was highest during the

affirmative action period at both flagships, and their admission prospects were lower than those of Whites under both post affirmative action admission regimes. (p. 63)

In summary, Harris and Tienda found that:

> The shift from affirmative action to the no policy period resulted in declines in the admission rates to both flagships for Hispanics relative to whites, even when comparisons are made among students with similar levels of achievement and from high schools with similar characteristics (p. 65)

Cortes (2010) analyzed data from the administrative component of the Texas Higher Education Opportunity Project (THEOP) which included six higher education institutions. The six institutions included the University of Texas at Austin, Texas A&M University at College Station, Texas Tech University, Texas A&M University at Kingsville, the University of Texas at San Antonio, and the University of Texas at Pan American.

Cortes (2010) found that under affirmative action from 1990–1996, 42 percent of minorities and 67 percent of non-minorities enrolled in public universities in Texas graduated within 6 years. Under the Top 10 Percent Plan from 1998–1999, the graduation rates were 39 percent and 69 percent for minorities and non-minorities, respectively. Cortes' results suggest that most of this increase in the graduation gap between minorities and non-minorities in Texas, a staggering 90 percent, was driven by the change in admissions policy from affirmative action to the Top 10 Percent Plan. Cortes' results suggest "that elimination of racial preference in college admissions in Texas did not help non-minorities as much as it harmed the retention and graduation of minority students" (p. 1122).

Garces (2012) studied the impact of race-neutral admissions policies (e.g., the *Hopwood* decision) on graduate level admissions. Garces analyzed data aggregated from

the Council of Graduate Schools (CGS) and Graduate Record Examinations Board (GRE) Survey of Graduate Enrollment and Degrees, a national survey co-sponsored by the Council of Graduate Schools (CGS) and Graduate Record Examinations Board. The CGS/GRE Survey includes responses from graduate-level institutions that are representative of all the graduate programs in our nation, outside the professional fields of medicine or law.

Garces (2012) found that "bans on affirmative action led to declines in the proportion of students of color enrolled across all graduate degree programs" (p. 117). Garces' results suggest that "affirmative action bans have also reduced the enrollment of these students of color by about 12.2 percent across graduate programs" (p. 122). In other words, under affirmative action, graduate programs were more successful in the recruitment of minorities than under a race-neutral admissions program.

The negative effects affirmative action

There are those who oppose affirmative action and have produced literature that attempts to show why affirmative action should not exist. One of the primary opponents of affirmative action admissions in law schools is Richard Sander.

Sander (2005) believes that affirmative is an experiment that has not worked. He states that:

> The principal "cost" I focus on is the lower actual performance that usually results from preferential admissions. A student who gains special admission to a more elite school on partly nonacademic grounds is likely to struggle more, whether that student is a beneficiary of a racial preference, an athlete, or a "legacy" admit (p. 370).

Although Sander believes that African American students benefit from affirmative action because they can attend more elite schools, and because more African

Americans have been admitted than who would not have been admitted, he believes that there negatives outweigh their positives. He argues that: 1) African American students as a whole are at a substantial academic disadvantage when they attend schools that used preferences to admit them; 2) the clustering of African American students near the bottom of the grade distribution produces substantially higher attrition rates; 3) generally low grades among blacks have even larger effects on bar performance; 4) when African Americans pass the bar and enter the job market, they encounter a generally positive climate; 5) in 2001, about 86 percent of all African American students who attended accredited American law schools would have been eligible for admission at one or more law schools in the total absence of racial preferences; and 6) when one takes into account the corrosive effects of racial preferences on the chances of all African American law students to graduate and pass the bar, these preferences probably tend, system-wide, to shrink rather than expand the total number of new black lawyers each year (p. 479).

Sander states that schools felt pressure to admit African American students. He states the pressures came from faculty and staff and that the schools had to succumb to the “fears of appearing racist” (p. 480).

In addition, Sander (2012) states that African American students usually get much lower grades, rank toward the bottom of the class, and far more often drop out than their white counterparts. Sander labels this phenomenon as the mismatch effect. Sander believes that African American law school applicants are at a disadvantage when it comes to the admissions process. He states:

> The admission preferences extended to Blacks are very large and do not successfully identify students who will perform better than one would predict based on their academic indices. Consequently, most Black law applicants end up

> at schools where they will struggle academically and fail at higher rates than they would in the absence of preferences (Sander, 2005, pg. 371).

Sander (2005) recommends that the only way to change away from affirmative action at this point is for schools to just stop using race in the admissions process. He also states that "the battle for racial inclusion has been fought and largely won" (p. 485).

Historical Legal Decisions

Current debates around affirmative action are best understood in light of both current circumstances and the nation's racist history, out of which these circumstances have arisen.

Establishing "Separate But Equal"

After the end of slavery in the U.S., in 1865, many states, especially southern states, legally separated Blacks from Whites in public areas. Those laws were coined Jim Crow laws. The name Jim Crow became a negative name for Blacks in the 1830s. Blacks and their supporters fought against the Jim Crow laws in local courts. However, very few court battles were won. Riegel (1984) states that "the federal courts from the Reconstruction onward consistently and frequently decreed Jim Crow segregation to be constitutional and consistent with the laws of the land" (p. 20). The legitimacy of the "separate but equal" laws under the Fourteenth Amendment of the U.S. Constitution was upheld by the U.S. Supreme Court in the historic 1896 case of *Plessy v. Ferguson.*

Plessy v. Ferguson

In the landmark case of *Plessy v. Ferguson* (1896) the United States Supreme Court sanctioned and set the precedent for "separate but equal" doctrine in the interpretation of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution (Kauper, 1954). Mr. Plessy's argument was different than previous cases in

other states demanding equal treatment of accommodations in that it “challenged the statute’s constitutionality and explicitly demanded the right to racially integrated train accommodations” (Riegel, 1984, p 37). In an eight to one vote the court rejected Mr. Plessy’s arguments based on the Fourteenth Amendment, seeing no way in which the Louisiana statute violated it.

In the majority opinion written by Justice Henry Brown from Michigan it was stated simply “that equal rights cannot be secured to the negro except by the enforced commingling of the two races” (*Plessy*, 1896, p. 537). The Court’s opinion stated “if one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane” (*Plessy*, 1896, p. 552). In essence, the Court spoke for the entire nation and believed that Blacks were inferior to Whites. In addition, the two races should not intermingle. With such a lopsided vote, the Court obviously believed that “separate but equal” facilities had the approval of the full citizenry of the United States.

Although the Supreme Court’s decision firmly established “separate but equal” as the supreme law of the land (Riegel, 1984), there was a glimmer of hope for equal justice in the dissent of Justice John Marshall Harlan. Justice Harlan believed that upholding the “separate but equal” doctrine “…can have no other result than to render permanent peace impossible and to keep alive a conflict of races…” (*Plessy*, 1896, pp. 560-561).

Despite *Plessy*, Blacks would continue to challenge the constitutionality of “separate but equal” facilities (e.g. seating in rail cars, restaurants). A major challenge to “separate but equal” in the realm of education was being developed by the National Association for the Advancement of Colored People (NAACP) in the early nineteenth century. The NAACP devised a plan to systematically attack the “separate but equal”

doctrine by challenging the constitutionality of separate facilities for Blacks and Whites. The first strategy was to test whether higher education institutions were fulfilling their obligations under the law of providing separate, yet equal facilities for Blacks.

Testing "Separate But Equal"

At the turn of the century, Blacks took heart when a new progressive president, Theodore Roosevelt, took office. He would be in office from 1901 until 1909. President Roosevelt not only invited Booker T. Washington, then the most respected Black leader of this time, to the White House, but he would appoint Blacks to official posts. However, "nothing that could be called a Negro policy was ever formulated by Roosevelt's administration" (Kluger, 2004, p. 89). In contrast, the next president, Woodrow Wilson did have a race agenda upon which he acted. Wilson was a sympathizer to the South and a proponent of segregation. Blacks protested Wilson's policies but to no avail. After Booker T. Washington's soft-spoken policies were met with racist actions throughout America, other black voices would begin to speak with a louder and more insistent tone. One of those voices was that of W.E.B. Du Bois.

By the time Du Bois was in his early thirties, he was recognized as the intellectual leader of his race. Du Bois' values and methods challenged those of Booker T. Washington. Du Bois called for a meeting of Black men who were "for organized determination and aggressive action on the part of men who believe in Negro freedom and growth" (Kluger, 2004, p. 95). The meeting was held in Canada near Niagara Falls and incorporated as "The Niagara Movement." From this meeting, the first National Negro Conference was set in 1909. Most the conference involved presentations on

research that contradicted the belief that the Negro was inferior to Whites. By the end of the two day conference the civil rights organization, the NAACP had been born.

In 1915, the NAACP had hired its first attorney to initially overturn residential segregation laws. Four years later, a young Black Amherst graduate, Charles Hamilton Houston would leave for his first year of law school at Harvard. After graduating, Houston would be hired to reform the law school curriculum at Howard Law School. Howard University's president, Mordecai W. Johnson, wanted a law school of the first class, who better to establish than an African American with a Harvard law degree. Just two years after Houston's arrival at Howard Law, the law school was accredited by the American Bar Association. In 1922, a young Harvard graduate, Charles Garland, gave $800,000 of his inheritance to help liberal and radical causes. Of that, $100,000 was given to the NAACP to carry out a legal campaign to liberate Blacks, especially in the area of education.

In January 1935, the former Dean of the Howard University Law School, Houston, joined the staff of the NAACP as an attorney. His "principle assignment was to design and carry out a legal campaign against discrimination in education and transportation" (Jones, 1983, p. 518). Houston would test the *Plessy v. Ferguson* "separate but equal" precedent in higher education along with one of his former students at Howard University Law School, Thurgood Marshall. Levergne stated:

> It was believed by the leadership of the NAACP that professional schools would be a better place to begin desegregation lawsuits because you're dealing with adults and not children…and professional schools are a lot easier to show inequality than a place like an elementary or secondary school. (Boswell, 2013)

Together with the brave students who would step forward as plaintiffs, the NAACP chipped away at "separate but equal" in a series of lawsuits. The lawsuits showed the enormity and absurdity of keeping the doctrine alive.

Pearson v. Murray

In the NAACP's first case in 1935, Donald Murray, a Black applicant, applied to the University of Maryland's law school. He was denied. Marshall argued that by denying Murray admission to its law school, the University of Maryland was in violation of his Fourteenth Amendment right to an equal education as Whites are allowed. The state and University of Maryland did not have a separate law school for Blacks as the Morrill Act of 1890 required if the original state school did not admit Black students.

In the original case, the judge presiding over the case did not need to deliberate and ruled, "The University's law school must admit Murray that fall" (Rath, 2007). On appeal to the Court of Appeals of Maryland, Chief Judge Bond wrote:

> The case, as we find it, then, is that the state has undertaken the function of education in the law, but has omitted students of one race from the only adequate provision made for it, and omitted them solely because of their color. If those students are to be offered equal treatment in the performance of the function, they must, at present, be admitted to the one school provided. (*Pearson v. Murray*, 1936)

In essence, the court did not allow the University of Maryland to escape its duty of providing either admittance to its law school at the University of Maryland or an equal facility in the state of Maryland that Mr. Murray could attend.

Missouri ex rel. Gaines v. Canada

Consistent with Houston's strategy, other cases were selected to discredit the "separate but equal" doctrine. In their next case, the courts in Missouri would not be so easily persuaded as the courts in Maryland. Marshall and the NAACP would have to

appeal to the U.S. Supreme Court in its case. In *Missouri ex rel. Gaines v. Canada* (1938) the U.S. Supreme Court reversed a Missouri court in a six to two decision, with the opinion authored by Chief Justice Charles Evans Hughes (Jones, 1983).

The opinion of Chief Justice Hughes stated:

> The question here is not of a duty of the State to supply legal training or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. . . . That is a denial of the equality of legal right to the enjoyment of the privilege which the state has set up and the provision for the payment of tuition fees in another State does not remove the discrimination. (*Missouri ex rel. Gaines v. Canada*, 1938, pp. 349-350)

Chief Justice Hughes' statement reiterates what the Court of Appeals of Maryland held in the Murray case, that the state has a duty to uphold by the law and that is to supply an equal education for all of its citizens, regardless of race or ethnicity.

Sipuel v. Board of Regents of University of Oklahoma

In the third case in which Marshall and Hamilton continued to test "separate but equal," Ada Lois Sipuel applied to the all-White law school of the University of Oklahoma in 1946. She was denied admission. She then petitioned the District Court of Cleveland County, Oklahoma. Her writ of mandamus was refused. The Oklahoma Supreme Court upheld the decision of the lower district court. Marshall then appealed to the United States Supreme Court. The Court ruled unanimously in favor for Ms. Sipuel. The Court stated:

> The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. (*Sipuel v. Board of Regents of University of Oklahoma,* 1948)

The Court ruled just as it had in the *Missouri ex rel. Gaines* case ten years earlier since the facts of the cases were identical. The plan was working, for many states did not have a separate law school for Blacks. The next case in Texas would be more dramatic, for the leaders in Texas saw what took place in Maryland, Missouri and then Oklahoma. Thus, they would stall and ultimately come up with ways of circumventing their situation and the law.

Sweatt v. Painter

The fourth lawsuit would be a daunting task for Marshall. The initial hurdle was finding a suitable plaintiff for the case. After reviewing five candidates to be plaintiffs, they were all rejected. Not until a desperate cry by Lulu White, a civil rights activist, in her speech in a church in Houston, did Heman Sweatt stand and volunteer. Thus, in February 1946, Sweatt and a group of supporters went to the Registrar's Office at the University of Texas at Austin to apply. Sweatt stated that "he did not want to leave Texas and he was a citizen of Texas, and he wanted the same education as everybody else" (Boswell, 2013). The president of UT at that time, Theophilus Painter told Sweatt that he would give an answer to his application. Painter then wrote a letter to the state's attorney general, Grover Sellers, stating that Sweatt was qualified to be a law student, except that he was Black. Sellers responded that Sweatt could not enroll, and Sweatt was denied admission. This was what Marshall and the NAACP needed to argue that this issue was one of discrimination.

After reviewing the outcomes of other lawsuits in other states, and in response to persistent pressure from Marshall, the leadership in Texas prolonged the case for six months which allowed the state time to create a law school only for Black students. After

the new hearing, the court ruled in favor of the University of Texas stating that the a new school created for Black students offered Sweat "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to White students at the University of Texas" (*Sweatt v. Painter,* 1950 p. 632). The Court of Civil Appeals affirmed this decision, as did the Texas Supreme Court. After these defeats Marshall next went to the federal courts, and the case ultimately reached the U.S. Supreme Court.

Marshall and the NAACP ultimately decided to change the strategy of going after an equal educational opportunity or law school, to one in which he argued that segregation, was wrong. Marshall's key arguments before the U.S. Supreme Court were based on two major premises: 1) segregation "perverts and distorts the healthy development of human personality," and 2) the Fourteenth Amendment equal protection clause calls for identical, and not separate, rights. During the case Marshall showed how the newly created law school for Blacks in Houston was dramatically inadequate and dramatically unequal to the Law School. The first was the physical inequalities of the two schools.

The Supreme Court considered those issues set forth by Marshall, and ultimately ruled in favor of Sweatt and the NAACP in a unanimous decision. The Supreme Court found that the faculty, courses, size of the student body, library, and availability of a law review made the Law School "superior" (*Sweatt v. Painter,* 1950 p. 634). More importantly were the social capital advantages that White students had at the Law School that the Black students did not have at their school. The Court's opinion stated:

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but

> which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close. (*Sweatt v. Painter,* 1950, p. 634)

In other words, the court stated the Law School had a superior faculty, administration, and alumni base and thus a larger advantage.

Justice Vinson (*Sweatt v. Painter*, 1950) also stated that "few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned" (*Sweatt v. Painter,* 1950, p. 634). Black law students, once lawyers, would be dealing with mostly White lawyers, witnesses, jurors, judges, and other officials in their everyday lives and jobs as lawyers. Thus, students should learn together, not separately, in order to share ideas from each other's' cultures and experiences.

McLaurin v. Oklahoma State Regents

Heman Sweatt's case was paired with the case of George McLaurin, who was admitted as a PhD student to the University of Oklahoma, but was forced to sit in the hallway because of his race. In *McLaurin v. Oklahoma State Regents* (1950), the U.S. Supreme Court stated "we are faced with the question whether a state may, after admitting a student to graduate instruction in its state university, afford him different treatment from other students solely because of his race" (p.638). Decided at the same time as *Sweatt v. Painter* and challenging the same issue, this case dealt with the fact that separate was not equal.

In the opinion, the Court stated:

> These restrictions were obviously imposed in order to comply, as nearly as could be, with the statutory requirements of Oklahoma. But they signify that the State,

> in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession. (*McClaurin v. Oklahoma State Regents for Higher Education et al.*, 1950, p. 639)

This statement affirmed the importance of allowing students from different races to interact and the benefits from those interactions. Both this case and *Sweatt v. Painter* provided the foundation Marshall and the NAACP legal team needed to tackle segregation and inequality in K-12 education. Marshall would challenge K-12 and the ill effects of segregated education left on Black children in *Brown v. Board of Education* in 1954.

Brown v. Board of Education

Although the decisions in *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents* outlawed "separate but equal" in higher education, Blacks were still subjected to schooling conditions inferior to those of Whites in K-12 education. This too would be overturned in by a unanimous U.S. Supreme Court decision in *Brown v. Board of Education*.

In addressing the issue in comparison to the *Sweatt v. Painter*, the Court opinion stated:

> In the instant cases, that question is directly presented. Here, unlike *Sweatt* v. *Painter,* there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education (*Brown v. Board of Education*, 1954, p. 492).

In essence, the court would not cover the inequality of the facilities in this case but the inequalities of the effects of segregation. This was profound for the belief that by providing equal facilities, educations would be equal. In turn, separating the races is acceptable as well. The Court said no to this. Specifically, the Court's opinion stated:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. (*Brown v. Board of Education*, 1954, p. 493)

The unanimous decision in *Brown v. Board of Education* was the crushing blow to "separate but equal." Although it would take further court intervention to force states to end it, the doctrine itself had ended. In 1955, the United States Supreme Court ordered the states to comply and desegregate "with all deliberate speed" (*Brown v. Board of Education*, 1955, p. 301). The ambiguity of the Court's directive regarding all deliberate speed allowed schools to delay the desegregation process.

Establishing Affirmative Action

Although African Americans had won court cases ending segregation legally, African Americans were still discriminated against in more subversive ways. In 1965, an executive order was given to set an example that discriminatory practices must stop. Thus, the origins of the term affirmative action can be found in that executive order, originated by President John F. Kennedy, issued by Lyndon Johnson requiring that "all Government contracting agencies…take *affirmative action* to ensure that applicants are employed…without regard to their race, creed, color or national origin" (Tierney, 1997, p. 167). Ironically, those in favor of ending affirmative action, use the words of President Kennedy "without regard to their race" to mean that African Americans and other

minorities should not be hired or admitted based on their race. They believe that race should not matter and thus should not be a factor in the admissions process. This twisting of words is what makes affirmative action even more of a complicated issue. McPherson (1983) states that although affirmative action was created to end and prevent discriminatory behavior, establishing it as a legitimate policy has been one of the most difficult and divisive issues in our nation.

In the years following the Executive Order of 1965, law schools throughout America saw a boom in applications, as more students chose to pursue a legal education (Sindler, 1978). This rise in interest outpaced the law schools' ability to expand, resulting in serious increases in the competitiveness of admissions. The admissions process fundamentally changed by the surge in applications, and law schools soon turned to more objective measures to evaluate candidates. The objective measures included formulas that were based on an applicant's undergraduate grade point average and their scores on the recently-developed LSAT (Law School Aptitude Test). In order to not discriminate against African Americans and other minorities and accomodate the surge in applicants, many institutions of higher education developed preferential admissions programs that specifically benefited African American applicants. The purpose of these admissions programs were to: (1) address the issue of past discrimination; (2) guarantee racial balance; and (3) remedy the underrepresentation of minorities in higher education (Flores & Slocum, 1997). Many higher education officials and supporters of these admissions programs feared the challenges that would emerge. They argued that their systems were designed to offer African Americans an equal chance at higher education that would not be available if their race was not taken into account in the application process. The first

challenge came in 1973 by a White student, Marco DeFunis, that applied to the University of Washington Law School in 1971 and was denied admission.

DeFunis v. Odegaard

DeFunis's argument was that he was not admitted to law school, but lesser qualified African American students were accepted. His argument was that he was discriminated against because he was White and not a minority. The U.S. Supreme Court decided not to hear the case because it was moot to decide because by the time the case arrived there, DeFunis had been admitted to the law school and would soon graduate. However, in the Court's dissent, written by Justice Brennan, Justice Douglas, Justice White, and Justice Marshall, Justice Brennan stated:

> Moreover, in endeavoring to dispose of this case as moot, the Court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of twenty-six *amicus curiae* briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this Court. (*DeFunis v. Odegaard*, 1974, p. 350)

This statement shows how important this issue was at that time and how it was a growing controversy. One of the important takeaways from this statement was that Justice Brennan stated that the question would not disappear. His words were prescient, as four years later affirmative action would be challenged yet again in a reverse discrimination cased filed by Allan Bakke.

Regents of the University of California v. Bakke

Allan Bakke, a White applicant, had applied to the University of California, Davis School of Medicine in 1973 and 1974. He was denied admission both times. In *Regents of the University of California v. Bakke* (1978), Bakke's argument was the same as

DeFunis's, which was that he was discriminated against because he was White and not a minority. The Supreme Court of California applied strict scrutiny and decided that, although the admissions program had a justifiable goal of "integrating the medical profession and increasing the number of physicians willing to serve members of minority groups" as a compelling interest, it was not the best or least intrusive means to do so (*Regents of the University of California v. Bakke*, 1978, p. 279). The court also ordered the University to admit Mr. Bakke since he would have been admitted if not for the special program to admit minority students.

The United States Supreme Court granted certiorari and considered the case upon appeal by the board of regents. In making the decision for this case, the justices' voting shows how complicated the issue of race in admissions can be. The justices were split four and four with the deciding vote in the hands of Justice Powell, a conservative Virginian. Justices Brennan, White, Marshall and Blackmun concluded in one plurality opinion that race could be used as a factor when it was for the purpose of remedying substantial chronic underrepresentation of certain minorities in the medical profession. Chief Justice Burger, Justice Stewart, and Justice Rehnquist joined Justice Stevens' view that whether race could ever be a factor was not at issue in the case, but that the special admissions program under consideration violated Title VII because it excluded from consideration an applicant on the basis of race. Ultimately, in the deciding vote, Justice Powell concluded that though race could not be the basis for excluding a candidate, race may be one of many factors in admissions considerations.

The justices agreed that the "special" admissions program at Davis' medical school was unconstitutional and violated Bakke's constitutional right to equal treatment

under the Equal Protection Clause of the Fourteenth Amendment. Although the Court's opinion stated the use of "quotas" was unconstitutional, more importantly, it asserted that the use of race in creating a diverse student body was a "plus" factor. The Court reiterated the importance of diversity by recalling *Sweatt v. Painter* and stating that "even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial" (*Regents of the University of California v. Bakke*, 1978, p. 313). Orfield and Whitla (2001) state "Powell's decisive opinion recognized only one justification for continuing the policy—the pursuit of diversity" (p. 145). Thus, the Court realized the importance of race in admissions and the diversity rationale was constitutionally sound.

In addition, the Court stated:

> In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. (*Regents of the University of California v. Bakke*, 1978, p. 317)

This was in reference to Harvard's admission program as an example of how to utilize race as one of many factors in achieving diversity which the Court stated is "valued by the First Amendment" (*Regents of the University of California v. Bakke*, 1978, p. 316). Again, the Court's reasoning was that race in the admissions process was constitutionally viable.

In the Court's opinion Justice Powell stated:

> The atmosphere of "speculation, experiment and creation" —so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian,* it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples. (*Regents of the University of California v. Bakke*, 1978, p. 313)

In essence, the Supreme Court ruled, although narrowly, that the use of race in the admissions process is okay and this would be precedent. In addition, the use of race was important to promote diversity which was important for the nation's future. Thus, the Court reversed the Supreme Court of California's decision on utilizing race in the admissions process. Race in admissions processes would be utilized by colleges and universities for years after the *Bakke* decision to promote diversity.

The *Bakke* decision in itself was controversial for it produced six separate opinions in which neither commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice" (*Grutter v. Bolinger*, 2003, p. 322). The ruling upheld the use of race in admissions and established affirmative action admissions policies for colleges and universities to use to promote diversity. However, as Justice Brennan had stated in the *DeFunis* dissent, the debate would continue, and did not go way. Affirmative action and race in the admissions process would not be truly tested again until fourteen years later. The next challenge came when a White Law School applicant, Cheryl Hopwood, would be denied admission to the University of Texas School of Law in 1992. This would be the second lawsuit against the University of Texas Law School that involved race, and the first major anti-affirmative action case since the *Bakke* decision.

Testing Affirmative Action

Nearly fifteen years had passed after the *Bakke* decision before another major university would have its affirmative action admission policy tested by a lawsuit. The

Law School would be the next defendant, just forty-two years after it lost its segregation case in *Sweatt v. Painter*.

Hopwood v. Texas

There are several glaring differences between Heman Sweatt and Cheryl Hopwood. Sweatt was an older, married, Black man. Hopwood was a younger, single, White woman. The differences between their cases are just as substantial. Besides forty six years between their applications to the Law School: 1) in the *Sweatt* case, it was argued that race was used in admissions to keep qualified Blacks out, which was the law of the land under *Plessy*; 2) in the *Hopwood* case, it was argued that race was used to keep qualified White applicants out.

In the initial *Hopwood* decision, the plaintiffs argued that *Bakke* had been implicitly overruled and that any consideration of race was unconstitutional. When this was not accepted by Judge Sam Sparks, the plaintiffs argued that the two-committee system of the Law School admissions office utilized, one for minority applicants, and one for non-minority applicants, was unconstitutional. Judge Sparks held it constitutionally permissible for the Law School to use race in its admissions process and held it constitutionally permissible for the Law School to prefer minority applicants. In addition, he held that plaintiffs had not shown they would have been admitted to the Law School under a one-committee system with racial preferences (*Hopwood v. State of Texas*, 1994).

On appeal however, the plaintiffs successfully pursued their argument that any consideration of race would be unconstitutional. The Fifth Circuit Court of Appeals ruled in their favor and held that *Bakke* was no longer the law and perhaps had never been the law because the Supreme Court opinions in the case had been so divided. The Court of

Appeals believed that "Justice Powell's view in *Bakke* was not binding precedent. The court stated that while Justice Powell "announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale" (*Hopwood v. State of Texas*, 1996, p. 944). The court stated that since the Bakke decision was not a majority view the decision was "questionable as binding precedent" (p. 944). This gave the Court of Appeals an opportunity to say that the Supreme Court was wrong on setting diversity as a rationale for using race in admissions.

The Court of Appeals did recognize that race of applicants could be considered in order to remedy discrimination from the past. However, in the court's opinion it stated:

> Any racial tension at the law school is most certainly the result of present societal discrimination and, if anything, is contributed to, rather than alleviated by, the overt and prevalent consideration of race in admissions. (*Hopwood v. State of Texas*, 1996, p. 953)

However, the Law School could not use race, for it was not the entity that created the tension, if it existed.

The Law School would appeal to the U.S. Supreme Court but to no avail. The Court did not grant certiorari. Justice Souter and Justice Ginsburg in their opinion explained that the Supreme Court refused to review the case for the Court "reviews judgments, not opinions," and viewed the law school's petition as a challenge not to any judgment of a lower court, but only to the rationale of the Court of Appeals. University of Texas School of Law professors Forbath and Torres (1999) stated, "The Fifth Circuit's decision was electrifying" (p. 186). Indeed, the fact that the Fifth Circuit Court of Appeals decision would be the law of the land in only three states was a bombshell decision for its time. In addition, affirmative action in admissions would go away in three states that had a history of deplorable discrimination histories against minorities (Texas,

Louisiana, and Mississippi). Removing affirmative action in higher education admission practices, many feared, would be a step back towards the days of segregation.

The legal precedent regarding race in higher education has evolved. The evolution from the belief that African Americans were not social equals to Whites and the legalization of the doctrine "separate but equal," to its demise by the NAACP challenges starting in the 1930s and ending with the *Brown* decision in 1954. The lack of true integration following *Brown* would lead to more challenges in the 1960s. Primarily, these challenges were in the form of protests during the Civil Rights movement. Affirmative action policy would soon follow to force businesses and schools unwilling to accept African Americans and systematically fleeing integration. However, not long after affirmative action admissions programs were in place, challenges based on reverse discrimination would arise in the 1970s.

Thus far, in chapter 1 I have reviewed the history of the Law School prior to the *Hopwood* decision, provided an overview of the *Hopwood* case, and reviewed the effects the decision had on the Law School. In this chapter I reviewed the relevant literature surrounding the use of race in admissions. In chapter 3, I will review and set up the conceptual frameworks in which this research study will follow and the methodology in which this study will be conducted.

CHAPTER 3: THEORETICAL FRAMEWORKS AND METHODOLOGY

Theoretical Frameworks

Two theories set the framework for this study. Critical Race Theory (CRT) provides an effective tool to analyze legal decisions and their effects on underserved minority populations. The *Hopwood* decision assumed that race was no longer an issue in the United States. One of the main tenets of CRT is that race is central to the logic and functioning of the U.S. The second theory, University Adaptation Theory (UAT), is a theory that shows several critical factors that colleges and universities must utilize in order to adapt in a time of crisis. I will utilize this theory to test the hypothesis that the Law School administration was under tremendous pressure to change from an affirmative action admissions program to a race-neutral program.

Critical Race Theory

Brown (2007) states that Critical Race Theory (CRT) "examines the role that race plays in the judicial decision making process" (p. 1). Bell (1987) described CRT as a concept that incorporates scholarly perspectives and intellectual traditions from law, sociology, history, ethnic studies, and women's studies to advance and give voice to the ongoing quest for racial justice. Both agree with Justice Thurgood Marshall (1987) who stated that "Negroes…were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law" (p. 5). CRT posits that given the centrality of race in the development of the nation and its laws, no thorough, comprehensive legal analysis is complete without a consideration of the role of race.

Solórzano (1998) notes "a critical race theory in education challenges ahistoricism and the unidisciplinary focus of most analyses, and insists on analyzing race and racism in education by placing them in both a historical and contemporary context using interdisciplinary methods" (p. 123). In other words, race and racism have to be viewed using history as a context and from many disciplines (e.g., legal studies and social science). Ladson-Billings (1998) states that CRT "becomes an important intellectual and social tool for deconstruction, reconstruction, and construction: deconstruction of oppressive structures and discourses, reconstruction of human agency, and construction of equitable and socially just relations of power" (p. 9).

History of CRT

Critical Race Theory began as a movement by a number of lawyers, scholars, and activists who in the 1970s saw that the work of the Civil Rights movement had stalled. Many of them were frustrated by the slow pace of racial reform in the United States after the Civil Rights movement of the 1950s and 1960s. Delgado (1995) states that the traditional approaches of filing amicus briefs, protests, and marches of the Civil Rights era produced smaller gains than in previous times. Two scholars in particular are credited with starting the CRT movement: Derrick Bell (African American) and Alan Freeman (White).

In 1989, CRT scholars held their first conference in Madison, WI (Delgado, 2001). In 1995, researchers Gloria Ladson-Billings and William Tate proposed that CRT could be employed to examine the role of race and racism in education.

Tenets of CRT

Since the 1970s a substantial body of legal scholarly research has created a vocabulary for Critical Race Theory that names race-related structures of oppression in law and society (Dixon and Rousseau, 2006). According to Matsuda et al. (1993), there are six unifying themes that define the movement:

- Critical race theory recognizes that racism is endemic to American life.
- Critical race theory expresses skepticism toward dominant legal claims of neutrality, objectivity, colorblindness and meritocracy.
- Critical race theory challenges ahistoricism and insists on a contextual/historical analysis of the law…Critical race theorists…adopt a stance that presumes that racism has contributed to all contemporary manifestations of group advantage and disadvantage.
- Critical race theory insists on recognition of the experiential knowledge of people of color and our communities of origin in analyzing law and society.
- Critical race theory is interdisciplinary.
- Critical race theory works toward the end of eliminating racial oppression as part of the broader goal of ending all forms of oppression. (p. 6)

Although no official definition of CRT exists, many scholars agree that these are the base principles for critical race theory.

Since 1993, the six tenets above have been expanded to seven. Harper, Patton, and Wooden (2009) expanded the six tenets to the following:

- Racism is a normal part of American life
- CRT rejects the notion of a colorblind society
- CRT gives voice to the unique perspectives of people of color
- CRT recognizes interest-convergence
- Revisionist history is another tenet of CRT
- CRT also relies on racial realists
- CRT continuously critiques claims of meritocracy that sustain white supremacy

The following section will explore these seven areas of CRT and how they relate to higher education; specifically law school admissions processes.

Racism is normal

Ladson-Billings and Tate (1995) state that the source of racism can be found in the idea that African Americans, based on the color of their skin, were inferior to Whites. This idea has its roots in slavery and then the end of slavery after the Civil War. Due to enslavement and the construction of Africans as property, White privilege has been inextricably linked to African American subordination and serves as a foundation for White superiority in an oppressive educational system. In addition, the fact that many Whites wanted and approved of separate facilities to prevent the intermingling of the races is a key example of Whites belief in their superiority and their belief of African Americans' inferiority.

Post integration and Civil Rights Act, racism has taken on different forms. Racism has not disappeared but has become more subversive, taking forms such as racial micro-aggressions. Racial micro-aggressions are "subtle insults (verbal, nonverbal, and/or visual) directed toward people of color, often automatically or unconsciously" (Solórzano, Ceja, & Yosso, 2000, p. 60) that replace more overt demonstrations of racism in most settings. Harper et al. (2009) state "a CRT lens unveils the various forms in which racism continually manifests itself, despite espoused institutional values regarding equity and social justice" (p. 390).

A colorblind society does not exist

Harper et al. (2009) state "CRT rejects the notion of a 'colorblind' society" (p. 390). They continue that "instead of tackling the realities of race, it is much easier to ignore them by embracing colorblind ideologies…it creates a lens through which the existence of race can be denied and the privileges of Whiteness can be maintained without any personal accountability" (p. 3). Critical race theorists critique institutional

claims of liberalism, neutrality, objectivity, color blindness, and meritocracy (Crenshaw, 1997). These ideas camouflage the socially constructed meanings of race and present it as an individualistic and abstract idea instead of addressing how racial advantage propels the self-interests, power, and privileges of the dominant group (Solórzano, 1998).

As an example, the *Hopwood* decision refused universities their ability to 'consider' race in their admission policies. By this decision, the court was attempting to establish a 'race-neutral' approach to college admissions. However, CRT scholars argue that the appeal to color-blindness is far from racially neutral and in the best interests of persons of color, but, instead, supports the operation of White privilege (Crenshaw *et al.*, 1995).

Gives a voice to people of color

Matsuda (1995) states "those who have experienced discrimination speak with a special voice to which we should listen" (p. 63). Delgado (1995) states that CRT uses storytelling to "analyze the myths, presuppositions, and received wisdoms that make up the common culture about race and that invariably render blacks and other minorities one-down" or at a disadvantage (p. xiv). An example is the story of White individuals who have encountered racism (e.g., White parents who adopt Black children).

In acknowledging the validity of the lived experiences among persons of color (or others), CRT scholars can place racism in a realistic context and actively work to eliminate it. CRT scholars utilize narratives and stories as a way to highlight discrimination, offer racially different interpretations of policy, and challenge the universality of assumptions made about people of color. Ladson-Billings (1998) states "for the critical race theorist, social reality is constructed by the formulation and the

exchange of stories about individual situations" (p. 13). By recording and writing about these stories, CRT scholars can help contribute to a better, fairer world.

Interest convergence

In this proposition, CRT scholars contend that White people have been the main beneficiaries of civil rights legislation (Ladson-Billings, 2000). In 1979, Derrick Bell first proposed that "Blacks progress only when the white majority perceives that progress is a clear benefit to whites, or at least not a serious threat" (p. 16). He went on to state that for Blacks to advance, they must find policies that have oppressed some Whites as well as Blacks. Or, find a way to show that by changing the policy, Whites will be benefited by the change as well. An example of this is when the state of Arizona refused to recognize the Martin Luther King, Jr. holiday. When the National Basketball Association and National Football League suggested boycotting the state for failure to recognize the King Holiday, the decision in Arizona was reversed.

Harper, Patton, and Wooden (2009) provide another example of interest convergence in the creation of separate schools under the Morrill Act provision of 1890. Since Blacks were deemed unworthy and unwelcome at White institutions, the establishment of Historically Black Colleges and Universities (HBCUs) under the Morrill Act ensured there would be no need for Blacks to attend the same institutions as the sons and daughters of Whites.

Delgado and Stefancic (2001) contend that efforts to eradicate racism have produced minimal results due to the insufficient convergence of interests by both White elites and African Americans. Thus, racism continues to persist. Bell (2000) believes we should not ignore but, learn from the situations when there is a convergence of interests.

Revisionist history

This tenet suggests that American history be closely scrutinized and reinterpreted as opposed to being accepted at face value as truth. Harper et al. (2009) state "it requires a more nuanced understanding as well as taking a critical perspective toward examining historical events" (p. 392). They state that American history should not just be taken at face value, but rather scrutinized and viewed from a different angle. An example of this is Bell's interest convergence idea as to why *Brown v. Board of Education* was a unanimous decision:

> …given the United States' opposition to communism and its contentious and hostile relationship (to say the least) with communist nations like Cuba, the then Soviet Union and China, the fact that democracy and freedom was not enjoyed by *all* citizens of the US was highly problematic for a government that attempted to position itself against those 'red' nations. (Dixon and Rousseau, 2006, p. 19)

Ladson-Billings (1998) summed it up by saying that "racial decisions by the courts were pivotal in softening the criticism about the contradiction of a free and just nation that maintained a segment of its citizenry in second-class status based on race (p. 17).

Racial realism

Racial realists recognize that there is a hierarchy in America that determines who receives benefits and how those benefits are acquired. Racial realists also come to terms with the fact that racism is a permanent fixture in American society, including on college campuses. In addition, they point to slavery as the inception of prejudice and discrimination. In other words, "there is a coming to terms with the reality that racism is a permanent fixture in society, including on college and university campuses" (Harper et al., 2009, p. 392).

Sharon Lee (1993) suggests that race has been a part of American society since the beginning. She states that "questions of race have been included in all U.S. population censuses since the first one in 1790" (p. 86). Bell (2005) contends that racial realism is a mindset that requires individuals to understand the permanency of racism while still working to create a set of strategic approaches for improving the plight of historically excluded groups.

Meritocracy and white supremacy

Valdes, Culp, and Harris (2002), explain three central beliefs of mainstream culture that must consistently be challenged: (a) blindness to race will eliminate racism; (b) racism is a matter of individuals, not systems; and (c) one can fight racism without paying attention to sexism, homophobia, economic exploitation, and other forms of oppression or injustice. Harper et al. (2009) believe that the previous three beliefs are "maintained in society through legal, educational, and sociopolitical channels, students of color, low-income persons, and other disenfranchised populations are silenced" (p. 392).

Summary

Taylor (1999) purports, "the central tenets of CRT have yet to be extended into analyses of higher education, and their potential to inform strategies for reform has yet to be fully explored" (p. 182). An exception to this is Foster's (2005) study on the racial experiences of black students in a predominantly white university. CRT is particularly useful for examining policies affecting African American students in higher education, as racial subordination is among the critical factors responsible for the continued production of racialized disparities and opportunity gaps.

For this study, I used CRT as a lens through which I viewed the impact of the *Hopwood* decision and how the UT Law administration was impacted by that decision. Viewing the impact of the *Hopwood* decision, its effects, and the reaction by the UT Law administration through the lens of CRT will hopefully produce new and innovative insight into the role of race in the admissions process. That insight will provide and inform strategies for future law school admissions professionals when faced with similar situations as *Hopwood*.

University Adaptation Theory

Sporn (1995) states that higher education institutions are confronted with external and internal challenges. She states that "the future of the university is contingent on how well internal adaptation processes to external changes are implemented" (p. 72). Adaptation to change is very important and how a college or university adapts, depends on how successful it will be after the change. Sporn's research shows that change only occurs at universities that are threatened by crises.

Cameron (1984) states that adaptation can be either an active or proactive reaction by an institution in order to cope with a new situation. Sporn (2001) states:

> One common response is to restructure, aiming at increased flexibility, efficiency and effectiveness. This involves new procedures to manage the relationship with the environment (e.g., fundraising, alumni relations, technology transfer), new authority structures within universities, and new ways of resource allocation (p. 122)

Stated simply, college and universities can adapt to their environment by changing, or adapting the relationships it has with the environment. The Law School's environment consisted of the actions of its alumni, the university, and/or the press. This research focused on the alumni, faculty, and the administration.

History of UAT

From 1992 to 1994, Sporn collected data from six universities that had a variety of changing environments and had a history of adaptation. The following universities were studied: New York University (NYU) as the largest private university in the world successfully adapting after severe financial problems in the 1970s; the University of Michigan (UM) as a large public university challenged by ethnic diversity and racial tensions; the University of California at Berkeley (UCB) confronted with a major financial crisis through the restructuring of the Californian legal and economic system; Universitat St. Gallen (USG) with a history of adapting effectively to regional needs for focused training; Universita Bocconi (UB) as the private university in Italy with strong entrepreneurial and adaptive structures; and Wirtschaftsuniversitat Wien (WW) facing a major organizational reform mandated by the government (Sporn 1999).

From this research, a grounded theory of university adaptation was created that identifies the seven critical factors that higher education institutions need in order to adapt (see Table 2.1).

University Adaptation Theory

Critical Factors	Propositions
Environment	Adaptation at universities is triggered by environmental demands which can be defined as crisis or opportunity by the institution.
Mission, goals	In order to adapt, universities need to develop clear mission statements and goals.
Culture	An entrepreneurial culture enhances the adaptive capacity of universities.
Structure	A differentiated structure enhances adaptation at universities.
Management	Professionalized university management helps adaptation.
Governance	Shared governance is necessary to implement strategies of adaptation.
Leadership	Committed leadership is an essential element for successful adaptation.

Table 3.1

Tenets of UAT

As the table above shows (Table 2.1), there are seven critical factors, or tenets of UAT. The following outlines those factors.

The first critical factor is the external environment. This environment can have different meanings depending on the institutional history and current resource situation. A college or university can respond by defining this as a crisis or an opportunity. But most importantly, either response is necessary in order for the institution to initiate adaptation processes. The second factor is a clear mission. The mission and subsequent goals guide decision-making, planning and orientation of all members of the university community. Actions and behavior, as a consequence of adaptation, enhance integration in a traditionally decentralized and loosely-coupled academic organization.

The third factor is culture. The specific organizational culture dominating a university is essential for adaptation. An entrepreneurial approach that emphasizes individual responsibility and rewards creative new activities helps in dealing with the changing needs of external constituencies. The fourth factor is the structure of a university. A differentiated structure will make it easier for universities to respond to different environmental demands. As an example, a university can create separate schools or colleges which serve different functions (e.g., academic, vocational and continuing education). Thereby, the differentiated units could be relatively autonomous to design and adjust their services, but are accountable for their activities to central leadership.

The fifth critical factor is a professional management team. Adaptation processes require a professionalization of university management. Administration needs full-time managers with a professional background to make adequate decisions and successfully implement strategies. Tools like information technology or fundraising are needed. Through personnel development and new hiring practices professional university management can evolve. The sixth critical factor involves the governance of the institution. Shared governance, defined as democratic participation of interest groups, is necessary to reach consensus about activities responding to environmental demands. The different stakeholders of universities (e.g., students, faculty, and administration) have to be integrated in the process of decision-making in order to make strategies more successful.

The seventh and final critical factor involves the leadership abilities of those overseeing a university. The commitment of leadership demonstrates importance and provides resources in the process of adaptation. Additionally, a vision communicated by

leadership increases motivation and identification with new response strategies. Through this, a shared view on adaptation could develop among university members, which dominates institutional activities.

Summary

The legal precedent in regards to race and its role in the U.S. has transformed over time. As Justice Marshall stated and judicial opinions have shown, race in U.S. history and society has changed with the times. In admissions we have gone from legally separating the races (*Plessy*), to integrating the races (*Sweatt v. Painter* and *Brown v. Board of Education*), to another time where Whites feel discriminated against because of the use of affirmative action plans to increase the number of underrepresented minorities.

In 1896, the U.S. Supreme Court set the precedent for "separate but equal" that stated that African Americans were inferior to Whites socially, that Whites and Blacks should not mingle, and that they should thus have separate public facilities. In the twentieth century the NAACP challenged this notion of inferiority and proved that the burden and absurdity of "separate but equal" was daunting for states to maintain. In fact, *Brown v. Board of Education* successfully argued that separation is detrimental to the mental health of African American children and their self-worth and, thus, ended the legality of "separate but equal."

Affirmative action policies were created to enforce segregationist policies still in effect and removed discriminatory practices against African Americans by employers and higher education institutions. In the 1970s challenges to affirmative action policies were successful for the U.S. Supreme Court considered diversity as a positive reason to maintain the use of race in college admissions. Race was considered a constitutionally

sound way to obtain diversity as long as quota systems were not the means in which it was obtained.

After the success of the *Hopwood* decision in testing race-based admissions programs, research findings showed the benefits of diversity on college campuses by illustrating that it leads to the growth of students as citizens and benefits those going into an already diverse workforce. Research showed that race-neutral admissions policies were not as effective as race-conscious admissions policies in producing a critical mass of diverse college campuses.

Critical race theory sees race-based affirmative action admissions policies as positive forces to help extinguish racism, which it assumes still exists. It also believes that the push towards race-neutral admissions policies, which produce fewer minorities and thus less diverse college campuses, are just another means by which racism continues to exist and continues the advancement of White supremacy.

University adaption theory states that the environment triggers change and adaption in universities in moments of crisis such as the Hopwood decision. It also states that colleges need to have a clear mission, differentiated structure, a professional staff, utilized shared governance and a committed leadership in order to successfully adapt to the crisis.

Methodology

According to Denzin and Lincolm (2000) qualitative research is "a situated activity that locates the observer in the world" (p. 3). They go on to state that qualitative research consists of a set of interpretive, material practices that makes the world visible. These practices turn the world into a series of representations including field notes,

interviews, conversations, photographs, recordings and memos. In other words, qualitative researchers study things in their natural settings and interpret the meanings of the occurrences as they are brought to them by the participants in the study.

Glesne (1999) asserts that the interpretivist paradigm is closely associated with qualitative research because it “portrays a world in which reality is socially constructed, complex, and ever changing” (p. 5). Interpretivists argue that traditional research methods employed in the natural sciences are inappropriate for the social sciences and believe that human beings do not simply respond to external stimuli but actively interpret the world around them. Thus, by utilizing subjective methods as opposed to objective methods, a better understanding of events can be obtained. In addition, social science research permits investigators the flexibility to choose a framework for approaching their research project. For this research, the single case study method was chosen.

Research Questions

The primary focus of this research study was to understand and document the impact the *Hopwood* decision had on the University of Texas Law School administration and its admissions practices through the views of its administrators, faculty, and alumni. The following research questions guided this study:

1. What are the best methods in recruiting diverse students under race-neutral admissions policies?

2. How can law school admissions professionals recruit diverse students under race-neutral admissions policies?

3. How can law school admissions professionals overcome the effects of anti-affirmative action lawsuits?

Research Design

The single case study method and design was chosen for this research and is well-suited to this study because it involves the historical analysis of a single organization or institution. Yin (2003) states “the case study is preferred in examining contemporary events but when the relevant behaviors cannot be manipulated” (p. 7). Yin goes on to state that the strength of the case study approach is in its ability to examine a “full variety of evidence – documents, artifacts, interviews, and observations” (p. 8). Yin defines a case study as an empirical inquiry that investigates a contemporary phenomenon within its real-life context. He believes the boundaries between phenomenon and context are not clearly evident and relies on multiple sources of evidence. This study utilized three primary methods for data collection (e.g., open-ended interviews, oral histories, and historical documents).

Participant Profiles

The participants selected for this study were selected based on particular criteria. The administrators were chosen based on their involvement in the admissions decision process, including the recruitment process, before and after the *Hopwood* decision. Alumni participants were chosen based on three criteria: 1) Black or Hispanic; 2) widely held as successful and/or prominent; and 3) older graduates (e.g., 1960s and 1970s). The participant profiles will be provided in more detail in chapter 4.

Participants were contacted via emails (see Appendix A). The first email explained the study’s purpose and asked for a response as to whether or not they would be able to participate. If the response was affirmative, the subject was asked to complete a short pre-interview survey that was included in the e-mail text as a website link (see

Appendix C). After the short survey was received, a follow-up email (see Appendix B) was sent asking to schedule a one-on-one interview (see Appendix D).

Data Collection

Yin (2003) lists at least six sources of evidence: physical artifacts, archival records, interviews, documentation, direct observation, and participant-observation. Glesne (1999) lists interviews, observation and document collection, and open-ended surveys as sources of evidence. This study utilized three of these sources. Interviews with individual participants were informal with no standard questions. Interviews were conducted face-to-face, recorded with a digital recorder, and then transcribed. Data collected from interviews were stored and backed up on secured hard drive databases.

Data Analysis

Glesne (1999) states that "data analysis involves organizing what you have seen, heard, and read so that you can make sense of what you have learned" (p. 130). Yin (2003) believes the data analysis depends heavily on the investigator's way of thinking about the data along with consideration of alternative interpretations and presentation of evidence. Unlike quantitative data analysis, qualitative data analysis does not provide any fixed formulas for the researcher to analyze data.

Yin (2003) cites four principles that support high quality analysis: 1) attend to all of the evidence, including considering all alternative interpretations and rival hypotheses, thus leaving no loose ends; 2) address all major rival interpretations; 3) focus on the most important issue in the study; and 4) the researcher should use his/her own prior, expert knowledge in the analysis. Glesne (1999) recommends that the investigator keep a reflective field log to begin the analysis process.

Validity of the Study

Creswell (1998) uses verification as a standard for judging the legitimacy of research, in place of quantitative approaches to establish validity. Creswell lists eight verification procedures that may be implemented in qualitative research: 1) extended participation and observation in the field; 2) triangulation, or using multiple sources, methods and theories for corroboration; 3) peer review, where another individual and the researcher meet during debriefing sessions to discuss challenging questions and concerns about the study; 4) negative case analysis, where a hypothesis is reworked when the researcher comes across negative information that disconfirms the hypothesis, or part(s) of it; 5) making researcher bias/assumptions explicit; 6) member checks, where the researcher presents his or her findings to the research subjects in order to establish their opinion on the credibility; 7) thick descriptions provided to the reader; and 8) external audits, where someone with no connection to the study assesses the accuracy of the study (pp. 201-203).

Creswell suggests that any two out of these eight procedures be implemented throughout the research process to help verify the research. Glesne (1999) summarizes Creswell’s eight verification procedures that are often used in qualitative research, following up with the fact that not all of these procedures need to be used in one study, but consideration to as many as apply is necessary to increase the trustworthiness of the study (1999). For this study, at the minimum, triangulation and peer review were utilized for validity purposes.

Yin (2003) recommends following certain “formal procedures to ensure quality control during the data collection process” (p. 106). He described three principles of data

collection that help in this process: 1) multiple sources of evidence, 2) creating a case study database, and 3) maintaining a chain of evidence. The reliability of a study is increased through the process of triangulation, where converging lines of inquiry are developed from the multiple sources of evidence. Additionally, construct validity is addressed as multiple measures of the same phenomenon are provided through multiple sources of evidence (Yin, 2003). Glesne (1999) adds that triangulation is a measure of validity through the "use of multiple data-collection methods, multiple sources, multiple investigators, and/or multiple theoretical perspectives" (p. 32). Triangulation will be achieved through the examination of multiple sources such as interviews, oral histories, and document artifacts.

Summary

The purpose of this study was to explore the impact the *Hopwood* decision had on the University of Texas Law School administration and its admissions practices through the experiences and views of relevant Law School administrators, faculty, and alumni. Explored in more detail in chapter 4, the participants' profiles are briefly introduced in Table 3.1. A qualitative case study approach, utilizing interviews and document analysis, allowed for a descriptive analysis of the impact the *Hopwood* decision had on the Law School. Critical Race Theory and University Adaptation Theory were used as the theoretical frameworks in which to view their perspectives. In addition to uncovering other areas to study, this study helped to answer the research questions which lead the study, and identify the best practices to assist law school admissions professionals in race-neutral circumstances.

Participants

Name	Administrator/Alumnus/Faculty	Gender	Ethnicity
David	Alumnus	Male	Hispanic
Gabriel	Faculty/Administrator	Male	White
John	Faculty/Administrator	Male	White
Mary	Administrator	Female	Black
Michael	Alumnus	Male	Hispanic
Peter	Faculty/Administrator	Male	White
Phillip	Alumnus	Male	Black

Table 3.2

CHAPTER 4: RESULTS

The purpose of the following chapter is to report the data collected for this study. The first section of this chapter provides the results of the seven open-ended interviews. The second section provides an overview of the four relevant oral histories found in the Law School's Tarlton Library. The third and final section of this chapter reviews the data collected from historical documents (e.g., speeches and quantitative data).

Open-Ended Interviews

There were a total of seven open-ended interviews recorded for this case study. Four Law School administrators and three were Law School alumni. A brief history of each participant is included. I assigned each participant pseudonyms.

The four Law School administrators interviewed consisted of two current Law School administrators and two former administrators. Three of the administrators have/had dual roles as faculty as well. One of the former administrators was full time staff only.

The three Law School alumni consisted of two Hispanic alumni and one Black alumnus. All of the alumni were students at the Law School before the *Bakke* decision. An explanation for choosing alumni from this era will be provided later in this chapter.

The Law School Administrators

The administrators were chosen based on those individuals who had influence in the admissions process at the Law School before and after the *Hopwood* decision. All but one interview request was fulfilled. Multiple requests to this former administrator went unanswered. An analysis of why this no response occurred will be provided in chapter 5.

Gabriel

Gabriel has been with the Law School for over twenty years. He has been involved with the admissions process directly, as well a member of the faculty.

Gabriel began his interview by recalling the admissions process at the Law School prior to the *Hopwood* decision. He stated that he said to himself and others that "one day we would be sued on this." Gabriel was referring to the separate committees used to admit regular and minority applicants. Gabriel went on to say that the Law School realized its issue of not having many minorities and "instead of playing shuffle and holistic and all of that stuff" he stated the Law School "decided this problem deserves attention and this is the way to get it."

Gabriel recalled in the late 1960's when the Law School started to recruit Black students, that he went to Prairie View A&M and Texas Southern universities "to get people interested in law school." He went on to say that "back then that is where Blacks came from….they did not go to UT." He stated that "a few went to SMU…to Swarthmore or Oberlin."

Gabriel provided me with a set of speeches that he gave to various parties (e.g., alumni) that provided updates to the admissions process. The speeches, from the early and late 1980's, provide historical context to how the admissions process worked at the Law School prior to the *Hopwood* decision and post *Bakke*. These data will be presented later in this chapter.

John

John is a former faculty and administrator at the Law school and was employed there for over twenty years. John was involved with the admissions process indirectly for most of those years. John became an upper level administrator the year after the

Hopwood decision and became more involved with the admissions process during that time until his departure.

To start the interview, John was asked if he felt the *Hopwood* decision created a crisis at the Law School, he stated that "I think all crises have some opportunity, but it was a bad thing that happened to us and there was a risk of really going off the edge to where we were a non-diversified school." He went on to say that the Law School "spent a lot of effort trying to avoid that from happening." John ultimately said, "Yes, I consider it a real crisis." He went on to say that the Law School decided to fight back and said they made it a high priority.

The second thing he said was very prophetic. He stated that they were aware that "there's no silver bullet solution." He went on to say "it involved about four or five different strategies all of which contributed some." John then laid out the five factors that helped to increase the diversity of the Law School. The first thing he mentioned was scholarship money was needed. He stated:

> So, the first thing we did was get from the Long's and Joe Jamail and then others, but they were the leads. A very large gift to the Texas Exes and we made a goal determination that the Texas Exes could use ethnicity in admissions.

John mentioned that the number of Black students was small, four, so the amount of money spent on scholarships initially was small. An added benefit from the scholarship money was "it also sent a signal to the minority community." The signal was that "UT Law School wants us…UT Law School is not the enemy."

The second factor that John mentioned was the way the Law School used geographic criteria to focus on recruitment. He stated:

> What we did was we set-up one up in Prairie View and then one up in Pan Am. It takes students out of that and they were open regardless of race. But, they were higher minority driven because of their geographical take.

John was referring to the summer programs for students at those schools who are interested in going to law school. He went on to say that "we took historically underserved, but geographically defined schools, and we said we'll admit your students." At this point in the interview, John stated that "those were very successful and the combination of them was very successful." He was referring to the combination of the scholarship offers mentioned above and the geographic recruitment.

The third factor John stated was the hire of a new assistant dean of admissions, Monica Ingram. He stated that the previous director was not willing to recruit students with a "certain grade point average or a certain LSAT score." He stated "you don't respond to a crisis like that if it's important." He stated the new assistant dean was more strategic about coordinating the new scholarship monies and recruitment. He stated that it was "a seemingly simple thing, but made a huge difference."

The fourth and fifth factors John mentioned involved strategic recruitment. John referred to this as "heavy recruiting." This involved having current law students help out with recruitment. John stated that the Law School's student organization named the Student Recruitment and Orientation Committee (SROC) was originally started to help with orientation check-in. However, later they would call admitted students and ask "how's it going?" He stated also that minority students got involved in SROC. He referred to that as "minority students recruiting minority students." The other factor in the strategic recruitment involved earlier recruitment. He stated that "you recruit them in November; you have to double the chance than if you recruit them in March or April."

The final portion of John's interview involved the impact of Professor Graglia's comments and actions during the *Hopwood* case and after the decision. John began by stating that in the 1980s, affirmative action was a controversial subject. He stated it was "controversial even among people of good will." John stated, in reference to Professor Graglia, he admitted that "Lino was a problem." He stated "Lino would say stuff in class that was utterly inappropriate…and this came from students who I had great faith in." However, John stated that the minority students coming in had heard of Professor Graglia, and stated "I'm coming to Texas anyway."

Finally, when asked if there was something that could have been performed better by the Law School, John stated they could have moved quicker. But, he stated, perhaps "the faculty might have pushed back further than they did."

Mary

Mary was with the Law School as an administrator for three years. Mary was not a faculty member and was involved with the admissions process directly.

Due to Mary's limited time at the Law School, her comments regarding the impact of the *Hopwood* decision were brief. However, Mary stated that once she started at the Law School, she "felt like I just got thrown in." In addition, Mary admitted that she "had not been very aware of what had been going on" with the *Hopwood* cases. Mary mentioned that the assistant dean of admissions when the lawsuit was filed was Loquita Hamilton. She also stated that she may be someone of interest to interview.

In regards to the Law School's attitude after the *Hopwood* decision, Mary stated "I just don't think they were very surprised that they lost." However, she also stated that "I think that they thought that they were going to win."

In regards to the U.S. Supreme Court deciding not to hear the Law School's appeal, Mary stated "we were now left with a law school that couldn't consider race anymore." After the decision, Mary stated that she did not feel isolated or alone in regards to "what do we do now?" She stated that there had been a lot of publicity and:

> It's not just, "What are we going to do?" but, how is this going to impact our pool? How is it actually going to impact the number of students who apply to UT?

After this statement, Mary brought up an interesting idea. She stated:

> But it would be interested to see how the African American and Hispanic applicants…not who were admitted or came…but the applicants …how that changed between the class that started in '95 and the class that started in '96 and then the class that started in '97. Because I do think it had an impact on the pool and I think that the pool dropped of applicants dropped.

I did investigate this idea and the results will be shared later in this chapter.

Mary went on to state that in the mid to late 1980s, the Law School had its largest numbers of African Americans (see Table 1.1). She stated that there was a feeling that "among those students there was a feeling that UT did most of its African American recruiting out of state." She went on to say that "most of them didn't stay in the state," however. When asked why they came to Texas, she stated "for the money." She stated that the Law School was "throwing money at people" and since it was the 1980s, "it didn't cost them a lot to get students." The scholarship money that was available to recruit Black students "was one of those obvious things that went away" after the *Hopwood* decision. She went on to say that "there was still a lot of scholarship money, it just wasn't designated."

In regards to the major drop off in the number of Black students in the incoming class, Mary stated that she hated that because she "felt that it somehow validated this idea that the only way kids were getting in was because of the numbers." She stated that it

never made sense to her. Mary went on to say that “all the focus on, well, these minority kids got in with lower scores than me, but there were White kids that got in with lower scores than you, too.” She stated that the big difference the Law School made was saying “until we can come up with a new system, we’re holistic.” This is in reference to how applications were reviewed. Mary stated that every application had to be read in its entirety. That was on average, five-thousand applications. She stated:

> But the ideal was that one person would look at everything that way there was that one way to spot that, you know, diamond in the rough that would not have normally made it up, that could kick it up to there and say, “Hey, this person didn’t have the GPA or etcetera but there’s something else in the file that was so amazing and then kick it back up to the committee for consideration.”

When asked if minority students were distinguishable this way, Mary stated that “I would not say that there are written ways, but yeah, there were things that you could look at.” She stated that personal statements were number one. She also mentioned the permanent address, fraternities and sororities. In summary, Mary stated:

> There were ways. And more often than not they were frankly mentioning it in their personal statement. People became very adept at making sure that kind of information was in front of the admissions committee whether it was a space on the application or not.

Mary stated, twice during the interview, that I should interview her predecessor, Shelli Soto.

Peter

Peter has been with the Law School for over twenty years. He has been involved with the admissions process indirectly as an administrator and a full time faculty member.

At the beginning of Peter’s interview, he was asked if the Law School was prepared for the *Hopwood* decision. Peter stated that “by the time it finally came down from the Fifth Circuit it wasn’t unexpected.” He went on to say however, that people did

believe the Supreme Court would hear the case. He also stated that "I think there was perhaps more of a surprise that the Supreme Court didn't take it."

Peter stated that after the *Hopwood* decision, the Law School was at a "real disadvantage" in competing for minority students. He stated that by the Supreme Court not hearing the appeal was "the worst possible outcome for us in terms of recruiting minority students." He stated that what made the *Hopwood* decision even worse was then Texas Attorney General, Dan Morales, "said that we couldn't offer scholarships on a race-based mechanism either." He went on to say that "that's one place where outside forces came in and helped." He stated that "Joe Jamail, my recollection is, donated a million dollars and helped raise other money" for the Texas Exes Alumni Association specifically for minority scholarships. He went on to explain that "because Texas Exes was not a creature of the state, but a private organization, it could give out race-based scholarship money."

Peter gave more insight to the administration prior to, and after the *Hopwood* decision as well. He stated that "*Hopwood* came down when Mike Sharlot was still dean." In reference to Dean Powers, who became dean after Dean Sharlot, he stated that

> He was active in trying to do some other things to enhance minority recruitment, and we started these weekends for admitted minority students with the help of Rodney Ellis we got some of the airlines to donate plane fare so we could fly some of the minority students in.

Peter stated that the flights were to get people to realize that they wouldn't be alone if they came." He went on to say that "to the extent you could get a whole bunch of people who had been admitted together and they could talk to each other and say 'well, if you come, I'll come' kind of thing." When asked if this recruitment tactic worked Peter stated:

> I think the fly-in weekends really helped. Because I think - quite rightfully - any minority student who was admitted, who didn't have a good reason to come here and had an option would think "Do I want to come here and right being one of two or three or four or five African Americans in the entire class?" I could sure see why they would say no.

When asked if there was any animosity towards the Law School from outside sources, Peter stated that "we got it from both sides." He went on to say that:

> There were a lot of people who thought affirmative action was - and to some extent still is - a very controversial issue. And we had a lot of alumni who thought we were doing too much pre-*Hopwood*. It's hard to remember, but it was a very controversial issue.

In reference to the decision by Dan Morales, Peter stated that he did not know what Morales' motivations were, but "he made things worse for us," and "he didn't have to do that."

In reference to staffing issues after the *Hopwood* decision, Peter stated that:

> My recollection is Shelly Soto being the admissions director for most of the time that we're talking about. And then she left after Powers because dean - maybe in the first year or so of his deanship, maybe a little longer. I know that they clashed a lot.

When asked about the impact of the comments by Professor Graglia, Peter stated that Dean Sharlot "got lots of letters criticizing Graglia, and got lots of letters in support of Graglia." Peter went on to say that:

> There were people would say 'I'm not going to give you a penny if you do anything to Graglia. I'm going to stop my contributions.' And then people would say, 'I'm going to stop contributions as long as Lino Graglia is there.'

Peter stated that "it was a very hot button issue, and you had to tread very carefully.

In reference to the Law School's history in recruiting minority students, he stated that:

> There was a push to increase the minority enrollment before I arrived here, which was in 1977. Now, my guess is different people had different motivations for

> doing that. A lot of people did it because they thought it's something we should do. I don't think many people did it - I'm just projecting here because I wasn't even here - because we were embarrassed because what Harvard was doing.

Peter stated that the quality and caliber (objective criteria) of the minority students that attended the Law School in the late 1970s and the late 1980s were very different. He stated that "you got to remember, in 1977, the whole educated base was so much smaller." He went on to say that "I think you'd be shocked at the kind of people we were admitting then - people you would never look at today."

The Law School Alumni

The alumni chosen were based on those individuals who had attended the Law School prior to the *Bakke* decision and had a historical perspective of how the Law School has changed since then. (e.g., the significance of the Law School's transformations, post *Sweatt* decision, post *Bakke*, and post *Hopwood*). Lastly, the alumni are prominent minorities in their particular legal fields, and well known alumni of the Law School.

David

David, a Hispanic male, graduated from the Law School in the early 1970s. David has been an avid supporter of the Law School, and the legal profession in general, for many years. He has served on multiple committees within and outside of the Law School.

To start David's interview, he preferred to have me ask questions and then answer them. He stated that "as a lawyer and an expert witness, I'm used to being examined, as it were." I then adjusted the format of the interview based on David's request and came up with an opening question.

I began the interview by asking David if he thought the Law School did all it could to defend its use of affirmative action. David responded by saying the he did. He went on to say that "I don't think there was any reason for the university not to." He went on to add that he did not think the Law School was "racist." He stated:

> I think to believe that the University did not defend itself to the fullest you would have to accept the proposition that at the time, the administration of the University was at some level, racist. I don't accept that proposition. I have been familiar with the folks of the administration at the time. I don't think that is one of their problems.

In reference to the Law School's handling of the *Hopwood* case, he said, "I didn't brief it, I didn't argue it, I wasn't there. But as an outside observer, I think they did everything they could have done."

I then asked David what he thought of the criticism that the Law School received about its handling of the *Hopwood* case. He stated "I think you are always going to find within certain quarters, those that are going to be disinfected; those that are going to be complaining." He also said that "if you would have asked me that question about the University, say, about the time that I got there in the mid-60s, I might have given you a different answer." He qualified his answer by stating that the administration, those who "populated the board of regents" in the 1960s took the following position:

> We are no longer affirmatively taking action to Black people of given race or ethnic background of certain people coming here, then that is all we need to do. We don't need to take any action to affirmatively bring people here given racial or ethnic background. That was the attitude of certain board members of the regents at that time.

David did state that it was probably easy for those regents "if you've never been the victim of racial or ethnic prejudice." David went on to state that:

> But if you've ever been subject to some form of racial or ethnic prejudice, your attitude might be a little different and you might think if the university spent about

> 80 years blocking African Americans from coming to law school. That perhaps you might want to reach out and let Black members of the community know they are welcome to the law schools instead of saying there is no barrier and it is up to them to figure it out.

When asked about the recruitment efforts of the Law School, David stated that prior to the *Hopwood* decision, he had been asked "to reach out to see if anyone would be interested in coming to the law school." He stated that after the *Hopwood* decision, he couldn't. He stated that "the one entity that was able to act on behalf of The University to try and counter the negative effects of *Hopwood* was the Alumni association." Which he stated created scholarships for minority students to help recruit them to the university.

When asked about Professor Graglia, David stated that "I've known him for a number of years…he is a nice person." He went on to say however, that "but that doesn't change the fact that his comments were racist." David stated that "he needs to remember that his ethnic group was subject to a lot of racism and a lot of problems when they first came over. And still are in some areas."

David stated, again on the efforts of the Law School in its defense, that "the decision was contrary to what they wanted to do, but yet you had these ethnic/race groups criticizing The University for being racist. You talk about a Catch-22, how do you get out of that?"

David was asked if the Law School were to fall into a post *Hopwood* situation again, what efforts it should take. He stated that "I think the Law School is going to have to partner again with ex-students, and allow ex-students to reach out to minorities across the state and country." In addition, he stated "I think we are going to have to address it by letting people know that is not our decision. That is not where we want to be." Lastly, he concluded the interview by stating that:

> I think they ought to start now, start anticipating what might be the likely outcome of what is coming down and you have a new dean at the law school who might not be totally familiar of the culture around the campus.

Michael

Michael is a Hispanic male who graduated from the Law School in the late 1960s. Michael, like David, has been an avid supporter of the Law School by serving on multiple committees within, and outside of the Law School.

To begin Michael's interview, I asked him if he knew of any pressure that minority alumni put on Dean Sharlot during the Law School's defense of its affirmative action policy. Michael said that he was aware of it. He said "we talked to him about doing outreach to try and increase the number of minorities in the law school, but actually that started back when I was in law school."

Michael went on to say that "in 1965, when I started law school out of fifteen hundred students, there were like seven Hispanics. In all of the law school there was one African American." He stated that the Hispanic students met with then Dean Keeton and "talked to him about what could be done to improve the numbers of Hispanics in the law school." This was in 1967. He mentioned that after he graduated, a professor, Dave Robertson, "went to South Texas to try and promote University of Texas School of Law among the communities throughout South Texas." He stated that the then community college in Brownsville was not very helpful to the professor. He stated that "they gave him a table and chair outside the student union and he sat there and talked to students…I mean, for a day…and talked to students." Michael went on to say:

> And then he went down to Pan America, which was a four-year school at the time, and met with students there. And then he went to Texas A&I in Kingsville and talked to students there as well. And he did that for two years.

Michael said that the Board of Regents soon after this "passed a rule that prohibited the university from going out and recruiting." Michael referred to Professor Robertson as a minority because to do something like recruit at schools like those, "he must have felt alone." He stated it as even amazing for "a faculty who would wanna do that." Michael did say that he did not "know whether he [Professor Robertson] was supported by Dean Keaton," as a result of his and his fellow Hispanic students conversation with him, or if he just did it on his own. He said "I never talked to him about that."

In reference to the more recent recruitment style of the Law School, Michael stated that:

> We started it again talking to Dean Sharlot. And I think he was the first dean that came to The Valley and brought some professors with him and they went to TSC and Brownsville and also to Pan American. And then Powers continued that.

Michael did not know who was first, but he remembered both Dean Sharlot and Dean Powers coming to The Valley to recruit. He stated that "Powers did continue it in a big way and they made a trip and spent one day in The Valley." Michael also mentioned that Dean Powers "came back later to Kingsville/Corpus, and went to Laredo." In addition, he stated that the deans came every year and "at some point they created a space for students in that area."

Michael mentioned that the Law School administration continued to go to South Texas after the *Hopwood* decision. He stated that then they "started getting applications." However, he did mention a problem in the Hispanic community:

> I can't speak for the African American community – but one of the problems we had was a self-imposed "I can't get in, so I'm not going to apply. So I'll go to St. Mary's or I'll go to Houston." And that's why you have so many Hispanics in South Texas that graduated from St. Mary's. Not that they wouldn't have gotten into UT had they applied straight out it's just that they didn't…and I faced that

> when I got out of law school and I talked to students…they were afraid to apply to UT. It wasn't until we started getting the deans down there to talk to the students.

When asked about the pressure that Dean Sharlot encountered from minority alumni to fire Professor Graglia, mentioned in his oral history, Michael stated he had not heard of that pressure. He did say that "it's very possible that some of the alums in the Hispanic alums in the Houston/Austin metro areas may have had a different vision of that than those of us in South Texas."

When asked if anything could have been improved upon as far as recruiting or scholarships during the post *Hopwood* era, Michael stated that scholarships were always an issue. He said that scholarships "have always been an issue among minorities regardless of what kind of minorities they are." He stated that:

> I think that there were ways to get around *Hopwood* without violating *Hopwood*. And that is that they could have done more outreach without specifically targeting minorities. They could've gone to the Rio Grande valley and had more days inviting everybody from the schools to come. They didn't have to go and target particular groups.

He continued to say that:

> UT could've gone down there and had programs all up and down the Rio Grande Valley, all along the border, all the way to El Paso, Laredo and gone to the schools and put on programs without saying we're targeting Hispanics because it would've been for all seniors, regardless of what they were.

Michael mentioned that students in South Texas were afraid. He explained that:

> We have had valedictorians – especially women – who have been offered full rides at the MIT's and the Harvard's and the Yale's and who's fathers will not let them go because they don't need to leave…they've graduated from high school…they can start working. Okay? So, you have that kind of environment. And same way with boys. Fathers say, "Hey, you're 18. You've graduated from high school. You can go get a job. You don't need to go college."

Michael stated that he believes the applicant numbers would have increased earlier if this recruitment was done earlier before Sharlot and Powers. He also mentioned that Dean

Powers, now president of UT Austin, continues to go the Valley. He stated that "he goes down to Brownsville every August or June and has dinner with all of the incoming freshman and their parents." When asked if this was a success, he said "Absolutely!" He went on to say that "I think that had a lot to do with helping to change the attitude of students from south Texas in wanting to come to UT."

Phillip

Phillip is a Black male who graduated from the Law School in the early 1970s. Phillip has been in public service for over twenty years.

As I gave Phillip an introduction to my study at the beginning of his interview, I informed him that Professor Graglia was in the news for saying some racist comments recently. He interrupted me softly and stated "he hasn't changed." He went on to say that "he said those same things when I was in law school." Phillip stated that when he as in law school, one spring, there was a debate about affirmative action. This would have been close in time to the *Bakke* decision. He stated the debate was about "affirmative action really just in general…in the educational setting, undergraduate and law school."

Phillip's interview was unstructured as the other interviews. Phillip began his interview stating that "if you know the history of Texas, there is no way to get around that in Texas there was racist society." He went on to say that it was "a whole lot more like Alabama, Mississippi." Phillip went on to describe San Francisco, where he worked after graduating from the Law School as a civil rights attorney. He said he encountered racism there, but, "it was just a lot more covert."

An interesting statement that Phillip made was that athletics and entertainment "have done more to desegregate America than any other group." Phillip went on to explain:

> I say that because when I went to Tyler Junior College my high school had 600 people in three grades…Tyler Junior College had 5,000 students and the two years I was there and there were about 40-50 Blacks while I was there. The first year I was there was one Black on the football team, the second, there about ten. When I went out there, there was one Black on the basketball team, the second year, there were four, starting (laughter). And when you saw that, pretty soon though, sitting in the stands, were Whites and Blacks…students first then parents.

Phillip stated that he did not know "how" Tyler was until he left Tyler. He stated that not until "I left Tyler and talked to other people about where they were from and their backgrounds did I learn the kind place Tyler really was."

I then asked Phillip if a colorblind society exists now, and he stated that "no, no, it's not even colorblind now; it's just its not as rigidly segregated as it was back then." Phillip then told a story about how he had supported an upper level White politician in his bid for public office. When Phillip then ran for public office, that politician and others did not support him. However, they did support the White female candidate running against Phillip. When asked why, he stated "she was a friend of theirs." Phillip stated that "that didn't bother me." He said that "what bothered me was that the same people I had been out there campaigning for went out of his way to oppose me…where I think he could have stayed neutral."

Phillip went on to talk about affirmative action and the role it played in his higher education. He stated:

> If there was not affirmative action, I would not have been admitted to the UT Law School. I know that. Affirmative action did not get me out. Me and hard work…and to pass the bar. And when I was out there working as a lawyer, that was hard work, dedication etc. Affirmative action had nothing to do with it.

When asked if he thought minority alumni would be good to help recruit more minorities to the Law School, Phillip stated:

> I think whether than trying to get alumni from central Texas to go state wide, have alumni in pockets recruit there. For instance, alumni who are in Dallas, have them recruit there. And I think it does matter if a Black lawyer comes out and gives you the advantages of attending the UT Law School.

Phillip stated that when talking about the Law School to others, he stated that “the argument I used to use was that the Law School is ours.” He also stated that “there are a few challenges, but I was tough enough to do it, and so are you.”

Phillip mentioned that there were only two Black graduates in his class. He stated that in the first year, “which is the toughest,” there were five to six. He stated that he did not feel any racial tension while in Law School. Phillip stated that he hung out with twenty or so other law students, and they all “had pretty much the same mind when it came to how we thought society should look, the law school, and the role that civil rights should play.”

In reference to how Professor Graglia was in the 1970s, Phillip stated that he and his group of law student friends “had written Graglia off.” He stated that “we thought the University of Texas was crazy for retaining him.” Phillip stated another professor, Charles Wright, like professor Graglia, “was very conservative,” however, “he (Wright) would treat you like a human being.”

Oral Histories

The Law School’s Tarlton Library began collecting oral history interviews in 1986. The oral histories are of distinguished alumni, faculty and former deans of the Law School. Searching through the oral histories, I was able to find an alumnus, a dean and a

faculty member who were closely tied to the admissions process. In addition, the oral histories contained information about the Law School's historic path to diversity and specific insight into the *Hopwood* decision.

The oral histories were from: 1) Michael Sharlot, dean of the Law School from 1995 to 2000; 2) Stanley Johanson, current faculty member, who also served on the admissions committee for many years; and 3) Harry Reasoner, Law School alumnus (1962), who was lead counsel in the Law School's defense in the *Hopwood* case.

Dean Michael Sharlot

Michael Sharlot served as dean of the Law School from 1994 to 2000. He was a professor at the Law School since 1969 until his death in 2013. Dean Sharlot's scholarly work was in the areas of criminal law and evidence. A large majority of Dean Sharlot's oral history dealt with the *Hopwood* decision, for the cases and the decision were during Dean Sharlot's tenure as dean.

In his oral history, Dean Sharlot (2009) spoke of other deans and their roles at the Law School. He spoke about Dean Ernest Smith's efforts to integrate the Law School in the mid to late 1970s. He stated that "Ernest has to his credit the initiation of the great efforts to integrate the school, to overcome the history of overt discrimination, the tragedy of Heman Sweat" (p. 18). Regarding his own tenure as dean, he stated that he "did achieve some of the goals" he had set (p. 19). He stated that he increased the annual giving by alumni and "we continued with affirmative action until we were blocked by the *Hopwood* decision" (p. 19). He ended by saying that:

> But, my deanship was dominated, perhaps unduly in terms of my sensibilities, by the *Hopwood* litigation, which we had to address throughout my five years, and it was a time of extreme division among our alumni and our students, although the students in many cases wouldn't admit it. It was an undercurrent with them.

> Obviously, our Anglo students here were enormously reluctant to freely express their views about race preferences. But that wasn't true of our alumni who were very free to castigate me as the representative of the Law School from both sides. (p. 20)

Later in his interview, Dean Sharlot spoke about the history of the Law School and the *Hopwood* decision again. He stated:

> So, the tragedy, one of the many tragedies associated with the *Hopwood* litigation was that Texas provided the bookends of the history of law school discrimination, on being *Sweatt v. Painter* and the other being *Hopwood*, though that was only before the *Hopwood* case went to the Supreme Court and was rejected. (p. 23)

He went on to say that "we were going to fight it and we did fight it" (p.23). He stated that the person who deserves an "overwhelming degree of credit" was Harry Reasoner. Mr. Reasoner is a Law School alumnus who helped defend the Law School during the *Hopwood* case. Mr. Reasoner's oral history will be reviewed later in this chapter.

In reference to the defeat at the Fifth Circuit during the appeal, Dean Sharlot stated "we lost out two to one that it did violate the Constitution, which did prohibit race-consciousness" (p. 25). He went on to say however:

> We never denied that we were engaging in race-consciousness. It was affirmative action. We believed that it was legitimate in the manner in which we were using it. By the way, I don't think many people ever understood what an extraordinary degree of success we had had, beginning with Dean Smith and continuing with my deanship, of being able to attract and graduate Mexican-American and African-American students. (p. 25)

He stated that from 1980 to 1990 "we hadn't just talked the game, we had achieved it."

Dean Sharlot included more history on the Law School's affirmative action efforts during Dean Smith's tenure from the mid to late 1970s. He stated:

> Let us [Law School] find and recruit African-American and Mexican-American students. At that time I was very active on the admissions committee, and we got better and better at identifying and selecting who were most likely to graduate. But, over the years we got better and better at it in terms of the efficacy of our recruitment. We went all over the country to every school that had significant

> Black and Mexican-American student populations and sold them on the -- that they were safe to come to Texas, that they would be welcomed, that they would be assisted in every way (p. 25)

He went on to say that scholarship money was significantly raised to recruit and this led to students with higher credentials and ultimately “greater graduation rates” that were “almost identical to those of Anglo students.” He stated that “there had been enormous progress made” and “we graduated during this decade more of these groups combined than any other school in the country.”

Dean Sharlot went on and spoke about the Law School’s history in relation to the *Hopwood* decision. He stated:

> The history of the law school of overt discrimination hung over us, and or implied that the lawsuit was a put-up job, that we wanted to be sued, that we were not fighting it in good faith. Things that were extremely painful because they were based not on fact -- there no facts to support of it -- but based on the generalized hostility to the school and to the University. (p. 26)

On his efforts during the *Hopwood* decision, he stated that “I wrote constantly to minority alumni, I visited minority alumni all over the state, and I appeared before the legislative committees without end” (p. 26).

Dean Sharlot referenced the issues involved with one professor, Lino Graglia, who is outwardly against affirmative action. He stated:

> We had a faculty member who’s famous, notorious, for his hostility to affirmative action of any form and he became a lightning rod, or rather I was the lightning rod, and the insistence of many of our minority alumni that he be discharged. It was a time of enormous difficulty, and it weighed on me perhaps more than it should have....it weighed on me a great deal. (p. 26)

In reference to the Law School’s efforts to recruit after the *Hopwood* decision, Dean Sharlot stated:

> We continued our efforts to attract more minority students, though of course it became increasingly difficult because we were now prohibited from putting our

> thumb on the scale, and the reluctance of minority students to come to a place that had gained further notoriety because of *Hopwood* added to the notoriety attached to us because of *Sweatt v. Painter*. It became extraordinarily difficult, though we made enormous efforts to do so, and to the credit of the Law School Foundation, a private entity, rather than the Law School, and which was overtly race-conscious, so we did have money to give out and we were able to attract minority students. (p. 27)

He continued by explaining an effort the Law School undertook to assist in increasing the diversity which was inspired by another graduate program. He stated that:

> Another effort we made, and this is one that I am proud of, was an effort to do more to improve the chances of minority students to successfully apply to law schools and to graduate and to pass the bar, and I was inspired in part by the efforts of the engineering profession in this country which had long before us undertaken a very serious program of trying to bring minority high school students in while in high school and to do summer work with engineers and to improve their math skills, math of all sorts and other science subjects, and they had the benefit of being supported very strongly by manufacturers, engineering firms, but manufacturers in particular large American corporations had supported this effort. I thought that it made more sense for law schools, that if we were to try to do something like that that we should do it at the college level because after all high school students go directly into engineering, college students go directly into law school, and I heard about this program at El Paso - that they were devoted, there were two devoted undergraduate teachers at El Paso who were trying to devise a program to prep their students to pass the bar and they didn't have any money. (p. 27)

Dean Sharlot went on to state how he and other minority professors reached out directly:

> I flew out to El Paso, together with my colleague, Gerald Torres, to talk to President Natalicio at the University of Texas at El Paso (UTEP) and meet with these two professors, and to see what could we do to help get this program off the ground, and we were very taken by them. We thought the design was an excellent one, having the students decide in their sophomore year that they wanted to be on this track, and then they would supposedly get to work with law firms. They would take special courses to improve their writing and rhetoric skills and analysis in their junior and senior years, and they would have a full summer at the end of their junior year when they would essentially prep for the Law School Aptitude Test (LSAT). p. 28

Dean Sharlot spoke to how he reached out and collaborated with the other law school deans of the state of Texas as well:

> I raised money by contacting all the other deans at Texas law schools and saying that I anticipated that this was going to increase the number of successful, competitive minority students, so it was in their interest to get it off the ground, and I showed them that we were not creating this program just to feed The University of Texas. There was no suggestion of that, although I had committed myself that we would enroll the top three students graduating from the UTEP program, if they wanted to come to Texas. (p. 28)

He went on to state that "thanks to the contributions of other deans and the money that I was able to take out of my budget, the program got on its way" (p. 29).

Dean Sharlot mentioned that faculty got involved in assisting with those efforts well. He stated that "some of our faculty agreed to participate in attracting El Paso students to participate in the program, and preparing them for what a law school class would be like" (p. 29).

On dealing with the public outcry from the *Hopwood* decision, Dean Sharlot stated:

> We did hold a number of public meetings at the Law School to discuss the case while it was going on, both from the legal point of view and as a matter of social policy, and those tended to be very well attended, and in some cases fairly open, and it was my view to the enormous credit of our minority students that they listen to things that had to get under their skin, anger them deeply, and how lawyer-like their behavior was. (p. 30)

In reaction to how the students behaved during the meetings, Professor Sharlot stated that "in some ways it suggested how effective law school is in teaching people self-control and the intellectual task of addressing arguments you despise" (p. 30).

Dean Sharlot spoke to his outreach to the alumni. He stated that:

> I spoke to minority alumni and minority leaders many times and there was considerable flack. Visiting with Black lawyers in Houston, talking to members of the legislature, there was an unwillingness to believe that we were trying to win; we were trying to maintain our very substantial progress in achieving a diverse student body. (p. 30)

He went on to state that at a meeting in San Antonio, “being surrounded by a group of almost entirely Mexican-American alumni. Here they were graduates of the school they thought were betraying them” (p. 30).

On that encounter, he went on to state that:

> One of the things they were demanding, what they focused on, was that I should fire Professor Graglia who had, as usual said some very painful things about the failure of success of minority students in academe, and they wanted me to fire him and here were lawyers saying this and when I pointed out that we couldn’t possibly win a case where he had been discharged on the basis of exercising free speech on the matter within his competence as a law professor, they said it didn’t matter, better to fire him and lose the case and pay the damages. Those were strong, but not rational, feelings. (p. 30)

Dean Sharlot continued to speak about the publicity that surrounded the university and the Law School. He spoke of Jesse Jackson, who supported affirmative action, coming to campus. He spoke of Ward Connally, who opposed affirmative action, coming to campus. He stated “we had to prepare for problems by having a substantial portion of the University police force in the Law School” (p. 31). Dean Sharlot continued and spoke of the difficulty of the time:

> There is a terrible irony there, that at universities, people whose views are unpopular at the moment are shouted down with impunity- and, well, it was an extremely difficult time. I spent so much time writing letters, making appearances, and working on things like the El Paso program as well as traveling nationally to encourage other schools to continue with affirmative action. (p. 32)

When asked what finally made you decide to resign, near 2000, Professor Sharlot stated “I was getting tired” and that he had some health problems. The interviewer stated that “given that *Hopwood* was…” Dean Sharlot stated “the bane of my existence” (p. 36).

In speaking to the Law School’s practice of affirmative action today, Professor Sharlot stated:

> We can practice it, we do practice it, and, and course, the school is back closer to where it was at our high point in terms of percentage of minority students, and they are ever improving as are our majority students. Overall, the school has been transformed in my time here, not only the quality of the student body, which is indicated by the fact that nobody fails any more, nobody is dropped for academic failure. We lose perhaps five percent of our student body, but it is always their decision, they don't want to do it or it's a psychological problem, something like that. (p. 37)

Professor Lino Graglia

Lino Graglia is currently a professor at the Law School and has been since 1966. Professor Graglia has written extensively on the subjects of judicial review, constitutional interpretation, race discrimination, and affirmative action. In addition, he teaches and writes in the area of antitrust.

Professor Graglia is originally from Brooklyn, New York. Early on in his oral history interview, he spoke of being raised by a single parent, his mother, and only applied to two local colleges. On applying to law school, Graglia (2011) admitted that he was "uninformed and unsophisticated" (p. 2). He chose a local college so he could continue to live at home. He stated that today he thinks he "could have applied to Harvard or Cornell" because he was "good at taking admissions tests and entrance tests."

Professor Graglia stated that his uncles would ask him how much money he would make after law school, and he stated "it's not really the money, it's that I like it." He stated they would laugh and say liking school was very un-Sicilian. He ended by saying that "I must have been left on the doorstep or something" (p. 9).

Professor Graglia stated that he knew the people at the Center for Individual Rights (Ward Connerly) who brought the suit for Cheryl Hopwood. He stated "I talked to them about this lawsuit and I was certainly in favor of it" (p. 56). Professor Graglia went on to state that the *Hopwood* decision was "the right decision on the law as it was then."

He poked fun at the supporters of affirmative action at the Law School by stating “there was nothing but wailing and moaning from then on about what a terrible thing this was…we could no longer discriminate against Whites!”

When asked what it like was for him on the law faculty after the decision, he stated “well, there can hardly be infighting because there’s only one person on the other side” (p. 57). He did mention “there would be a substantial number of faculty members, then and now, who would be opposed to affirmative action.” He went on to say that “they, understandably, don’t want to go public.” He stated that once you stand out and opposed affirmative action as he did, it becomes what you are known for as it did for him. After the decision, he did state that “everybody knew I was pleased” and “some people…were pleased, but they didn’t want to speak about it.”

Professor Graglia went on to state that at a meeting supporting the *Hopwood* decision, he said that “the problem Blacks and Mexican-Americans are not academically competitive with Whites” (p.57). He received national notoriety for that statement. He stated he was interviewed on the national news program the *Today Show* the next two mornings with the host Matt Lauer.

Professor Graglia mentioned a meeting with the president of the university, Peter Flawn, and the chancellor of the UT System, to “discuss what to do” (p. 61). He stated that “Flawn was amazed when I told him that I really wasn’t a racist nor hated Blacks or anything.” He stated that “it never occurred to them that they might take the position that I’m entitled to express my views and that indeed the views are not totally irrational or that the views are defensible.”

When asked about his focus on judicial activism, Professor Graglia stated that:

> As a professional, that's my mission, to push that line, that we should have more faith in democracy and Supreme Court Justices are not to be trusted. I sometimes feel that I do missionary work. I undo what all the rest of the professors are teaching, which is a big responsibility. (p. 63)

Professor Graglia did mention that a regent, Tony Sanchez, and legislators, "were clamoring" because they believed "people shouldn't be allowed to say things" like he said. He went on to say that "affirmative action depends on intimidation. It can't be defended, so it is necessary to suppress the opposition" (p. 63). He stated that Tony Sanchez went to the dean and said "you've got to fire him" and the dean said, "I can't fire him" because of his tenure.

Professor Graglia stated that because of affirmative action "there are groups by race and ethnicity everywhere" (p. 64). He stated that "there was once a time when organizing something on a racial basis was definitely disfavored, thought to not to be proper." He went on to state that because of the racial grouping, that is "one reason I've been opposing this."

Professor Graglia stated that he told the Law School before the *Hopwood* decision that "what we're doing is unconstitutional" (p. 67). He stated in *Bakke*, Powell allowed racial preferences, but under "very restrictive conditions." He stated "none of which were ever observed in the slightest here."

Professor Stanley Johanson

Stanley Johanson is currently a professor at the Law School and has been since 1963. Professor Johanson is an expert in estate planning, and wills and estates. In addition, Professor Johanson has served on the admissions committee for many years. In fact, in his oral history interview, Johanson (2012) stated that he was appointed to the

Admissions Committee his second year as a faculty member, circa 1965, and "I never got off" (p. 47).

Professor Johanson gave a history of law school admissions, stating that the Law School Aptitude Test (LSAT) was first given in 1948. In addition, he stated that he served as a trustee to the Law School Admission Council (LSAC), which administers the LSAT. He stated that as far as law school admission was concerned, he "had been actively involved at a national level" for quite some time (p. 49).

Professor Johanson stated that "massive credit" was to be given to Lou Toepfer, associate dean at Harvard Law, and Frank Walwer, associate dean at Columbia Law, for "bringing Blacks into the legal profession." For, he stated that in the mid 1940s these two men decided to do something about the small, two to three, Black students they each had at their respective law schools.

In speaking about the history of the Law School's *Sweatt v. Painter* case, Professor Johanson spoke about how Dean Page Keeton reaction on the stand during the *Sweatt v. Painter* case in 1950. He stated that:

> Page Keeton was on the stand, and he asked him regarding the school that they sent Heman (Sweatt) and a couple of other guys to in the basement of the capitol, "Do you think that's an equal education?" and Page Keeton said, "No it is not." In no way was Page going to defend what happened. (pg. 50)

He went to state how in the 1960s, he and Dean Ernest Smith, then Professor Smith, served on the Law School Admissions committee. In regards to admitting minority students, he stated:

> We worked hard and the problem, one of our problems is we were frontal and straightforward. Other schools-how to put it, evasive or obfuscating and so on, and no, in terms of having meaningful representation in the law school we have to make extra efforts, so we had a separate admissions committee with respect to minorities, they were not in the same pool. (p. 51)

He went on to say that "we cut corners because we thought there had to be…there had to be a sufficient number so they wouldn't be one person in a class of hundred…critical mass, that's the word I'm looking for" (p. 51).

Professor Johanson mentioned it was difficult to recruit minority students when he had joined the faculty. He stated that:

> When I joined the faculty there, no one in the undergraduate school and the only Blacks that had decent credentials had gone somehow, someway to Harvard or Swarthmore or the University of Michigan. And so we had, we had people, hopefully, from Texas Southern, maybe from Southwest Texas State University and so on and we worked hard at it. (p. 51)

In reference to how the Law School handled admissions after the *Grutter* decision, he stated that:

> Mr. Laycock concluded under Grutter we can't do that because we can't have different people with their own perspectives and biases, we gotta have one, we have to have one sort of consistent yardstick by which we measure everybody, Black, Hispanic, White, whatever. And so the end result was that Bill Powers, then the dean, in effect abolished the Admissions Committee. And I stayed on reading non-resident files until this year. (p. 53)

Alumnus Harry Reasoner

Harry Reasoner is a graduate of the Law School's Class of 1962. He is also managing partner at Vinson & Elkins law firm and named one of Texas Monthly's "Top 100 Super Lawyers." Not only is a Mr. Reasoner a respected attorney and Law School graduate, he also was one of the Law School's lead counselors in its defense in the *Hopwood* case. His oral history was chosen because of that role in the *Hopwood* case.

Mr. Reasoner's reason why he chose to help defend the Law School, Reasoner (2005) stated that he "felt giving minorities fair access to the Law School was vital for

learning, for providing future leadership, and was morally required, given our history of segregation and unequal treatment of minorities" (p. 26). He went on to state that:

> I thought we made a great record in the trial court, but unfortunately when we got to the Fifth Circuit, the panel we drew were good judges, but one could predict how they would be predisposed to vote in a case of this nature.

In reference to the damage done to the Law School (and university) by then Texas Attorney General Dan Morales, Mr. Reasoner stated:

> Morales did a thing that really hurt the University. He refused to let us move for rehearing en banc in the Fifth Circuit. I believe if the entire court of fifteen judges had considered it, if we'd asked them to and they considered it, the result might have been different. (p. 26)

He went on to state that "Morales dealt us another serious blow when…he stood on the courthouse steps and said that he was opposed to affirmative action, that it was morally wrong" (p. 27).

Mr. Reasoner, in reference to how the defense of affirmative action was critical in Texas, he stated:

> I thought it was critical politically for the University of Texas to demonstrate that it had done everything it could to attempt to preserve affirmative action. I don't believe the University of Texas can survive as an academically excellent institution being monolithically Caucasian in a state that will be majority minority in a relatively short time. Nor do I think that would be a proper result. (p. 27)

Mr. Reasoner mentioned that the Top Ten Percent rule in Texas, implemented after the *Hopwood* decision "was that it would be a surrogate for affirmative action by imposing a ten percent rule that then maybe you'd have more Black entrants" (p. 27).

He went on to state that:

> One reason people thought that would work is because we still have segregated schools in Texas. For example, many of the Houston inner city schools are high percentage Black, so presumably you'd have lot of African Americans who would qualify under that program. (p. 27)

Mr. Reasoner then commented on the negative consequences of the then new top ten percent rule. He stated that “it excludes better qualified African American and Hispanic students from other schools who weren’t in the top ten percent of their school, but might be better students” (p. 27).

Mr. Reasoner responded when asked if the university is more diverse, he stated:

> No. As it happened, it’s not working. I suspect a lot of the kids in the top ten percent of some of the inner city schools either don’t have an interest in going to the University of Texas or don’t feel they are equipped to go there or can’t afford to go there. (p. 28)

Mr. Reasoner mentioned that one major source of success was the money donated for scholarships. He stated:’

> Morales also made people feel like you could have minority-based scholarships. The University of Texas Alumni Association offset that to a considerable degree, because the Jamail’s gave two million dollars for scholarships, which I thought was a wonderful and vital gesture. There were others who gave, but I thought it was absolutely critical for the University of Texas to continue to be able to offer minority scholarships. (p. 28)

He went on to state that “it (scholarships) came at a critical time.” He continued that “if we had not been able to offer scholarships, the Law School would have dropped to a very small percentage of African Americans” (p. 28).

Historical Documents

The historical documents reviewed for this study fall into two categories: 1) quantitative records, and 2) historical speeches. The quantitative records were provided, with permission, by Ward Farnsworth, the current dean of the Law School. The historical speeches were provided by the interview subject Gabriel.

Quantitative Records

The Law School Admissions Office provided a table that contains the number of applicants, admitted applicants, and the number of enrolled students by race for each from 1996 to the present year. This study is a case study of the Law School from 1996 to 2003, thus the numbers from those years were reviewed. The results of that analysis follow.

Applicant numbers

In chapter 1, the enrollment numbers were reviewed to show how the number of African American and Hispanic numbers dropped after the *Hopwood* decision. In the open interview with the former Law School admissions administrator Mary, presented earlier in this chapter, she stated that the number of applications and number of applicants admitted who were African American and Hispanic, should be reviewed for any impact after the *Hopwood* decision. We know the number of enrolled African American and Hispanic students dropped significantly (see Table 1.2). However, the impact on the applicants had not been analyzed.

After reviewing the Law School Admissions Office's table, there was a drop in the number of applications for all applicants from 1996 to 1998 (see Table 4.1). However, the drop for Hispanics and African Americans is much more significant compared to that of White applicants (Charts 4.1 and 4.2). This is very similar to the enrollment values presented in chapter 1.

The University of Texas School of Law Applicants
1996-2003

Year	Total	White	Black	Mexican American
1996	3,910	2,693	361	354
1997	3,487	2,515	225	306
1998	3,184	1,936	120	260
1999	3,284	2,012	141	311
2000	3,885	2,311	184	299
2001	4,451	2,876	196	347
2002	5,447	3,449	250	380
2003	6,066	3,574	259	454

Table 4.1

According to the table, there was an increase in the number of total and White applicants from 1998 to 2003. This is also true for African Americans and Hispanics in the same time frame.

The University of Texas School of Law Total and White Applicants 1996-2003

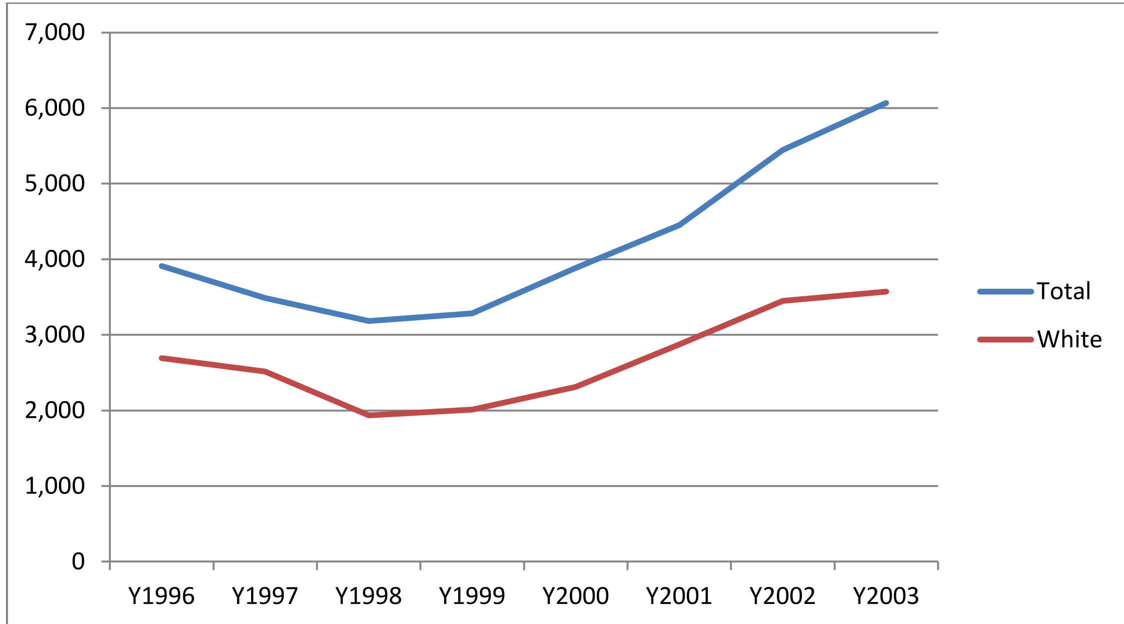

Figure 4.1

The University of Texas School of Law Black and Mexican American Applicants 1996-2003

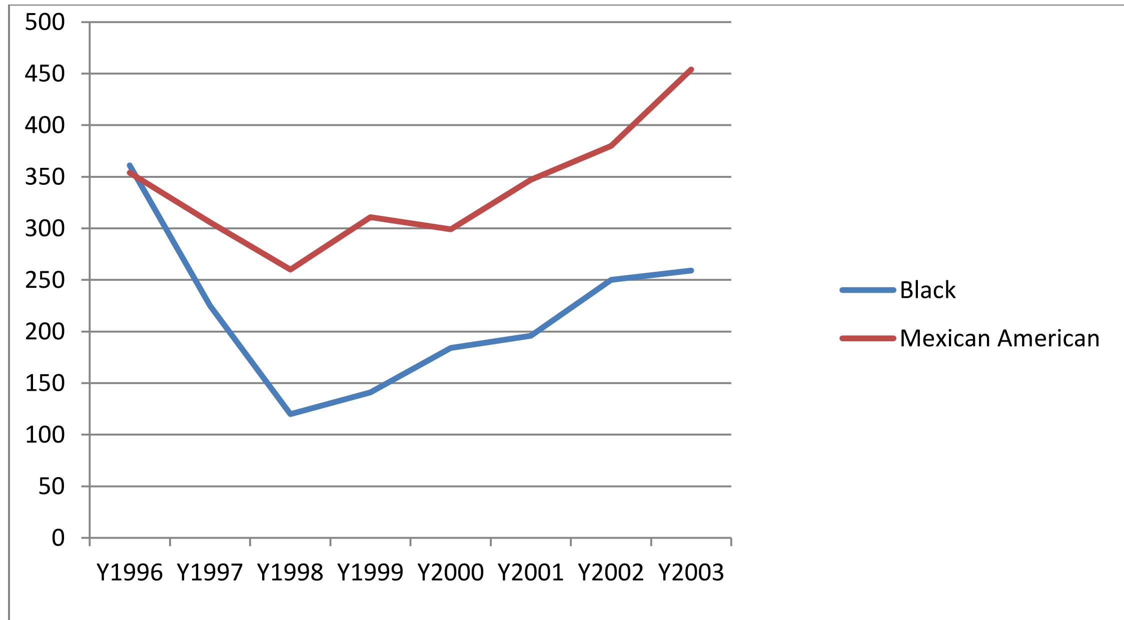

Figure 4.2

Admitted Student Numbers

Utilizing the same table provided by the Admissions Office, the admitted student numbers were analyzed. Unlike the applicant numbers to the Law School, the students admitted were not similar from 1996 to 1998 (see Table 4.2). In the same time period, the number of White applicants admitted went up, and then down. The number of total applicants admitted went down, and then up (see Chart 4.3). From 1996 to 1997, the number African American and Hispanic applicants admitted went down significantly. Those numbers rose sharply from 1997 to 1998 (see Chart 4.4).

The University of Texas School of Law Admitted Students 1996-2003

Year	Total	White	Black	Mexican American
1996	1,105	841	65	70
1997	1,092	907	11	40
1998	1,188	794	25	63
1999	1,088	747	32	60
2000	1,031	684	37	63
2001	1,050	742	40	65
2002	1,129	775	36	67
2003	992	621	45	97

Table 4.2

From 1998 to 2003, the number total and White applicants admitted dropped slightly (see Chart 4.3). Whereas, for the same years, the number of African American and Hispanic applicants admitted rose each year (see Chart 4.4). This is true for all years except for 2002 where the number of African American applicants admitted dropped.

The University of Texas School of Law Total and White Admitted Students 1996-2003

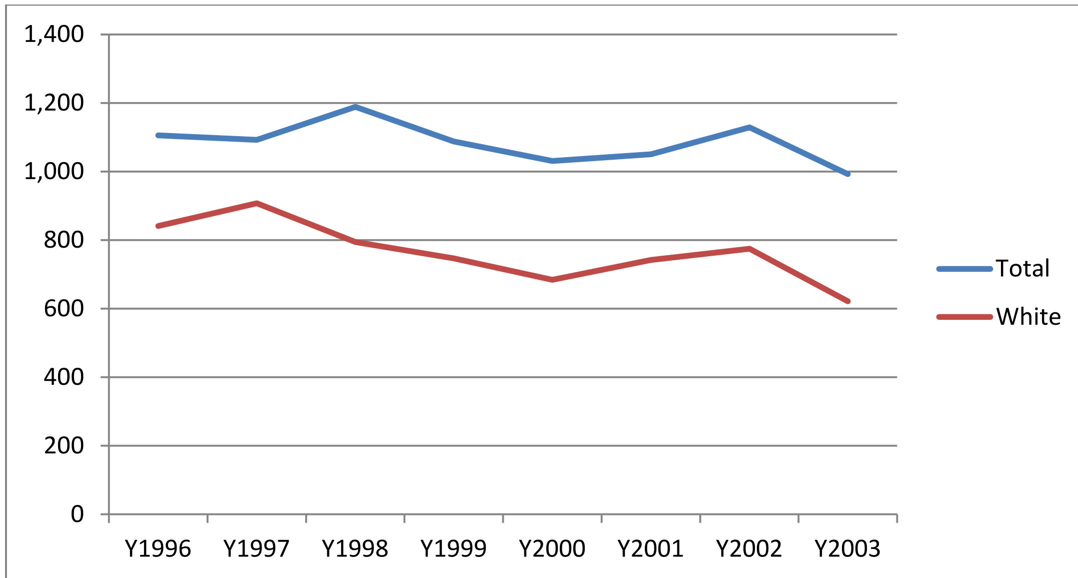

Figure 4.3

The University of Texas School of Law Black and Mexican American Admitted Students 1996-2003

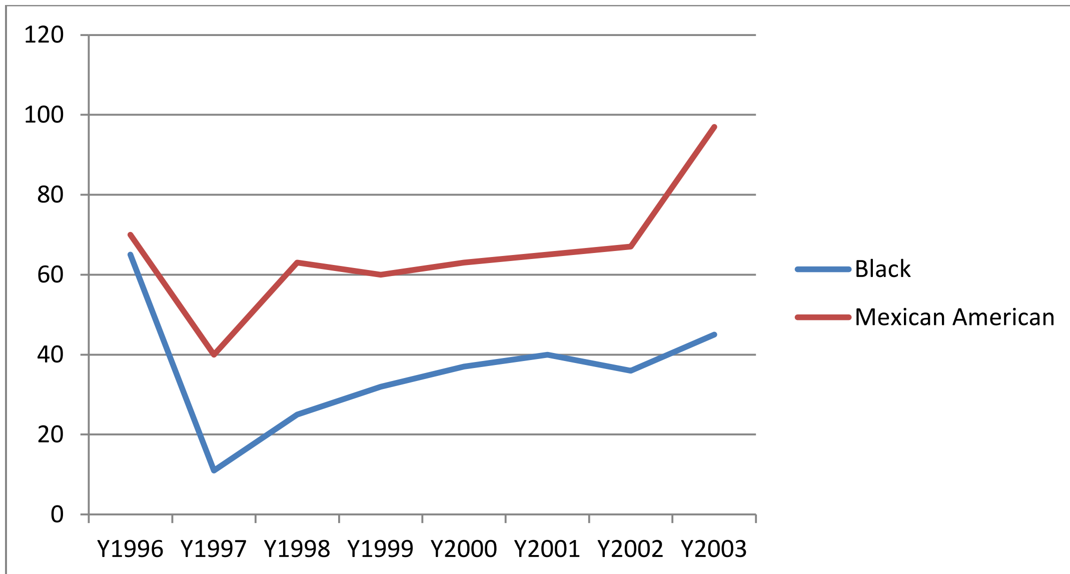

Figure 4.4

Historical Speeches

Historical speeches were provided by Gabriel, the first subject interviewed for this study. The speeches were given by Gabriel to various groups (e.g., Law School Board of Visitors, Alumni Association, and Parents' Day) in 1983, 1986, and 1998. The information in the speeches provides a brief overview of the admissions process for that particular year. It also gives some insight into the number of minority applicants each year as well.

In the speech from 1983, Gabriel stated that "enrollment of qualified minority candidates – continues to bear fruit." He went on to state that the 1983 entering class had 20.7 percent minority enrollment. He referred to this number as "substantial minority representation." He stated that it was the third consecutive year in which the first-year class had 20 percent or more in minority enrollment. He went on to state that the increase was due mainly to the number of Blacks in the class. The number of Blacks was 9.3 percent of the total first year class (see Table 1.1). He continued that the "disconcerting" news is of those 47 Black students, 33 were nonresidents.

In the speech from 1986, Gabriel began the speech with the Law School's decline in the total number of applications. He stated that "from last year (1985) to this year (1986)" the number of applications dropped 20 percent. He went on to state that the number of Texas resident applicants went up, but the nonresident pool went down. Another interesting fact mentioned in the speech was the Law School did not charge an application fee until 1986 ($25). The drop in nonresidents was, according to Gabriel, based on the new application fee and the increase in the nonresident tuition from $1,200 to $4,500 per year.

As far as minority enrollment in the speech from 1986, Gabriel mentioned that "over the past decade (1976-1986), the law school has taken pride in our accomplishment in substantially increasing minority enrollment." He went on to state this was "specifically of the major ethnic groups of this state, Blacks and Mexican-Americans." He attributed the success to "substantial effort in the recruiting process by the Minority Opportunities Committee and others, by added effort in the admissions process itself, and through the selective use of the limited scholarship funds available." He stated that the Law School's drop in minority enrollment was a "nationwide phenomenon." He added that this downward trend (Table 1.1), was a 33 percent decline nationally. As to where the minority applicants went, he attributed it to several factors. The major factor he stated was a change in the career paths to business administration and computer sciences. In addition Gabriel stated that "we have received fewer applications from qualified Mexican-Americans, and substantially fewer applications from Blacks." Gabriel stated that "Blacks have presented a special problem in that, in order to reach what we regard to be desired enrollment levels, we have been forced to go outside of the state to make offers to well-qualified Black applicants."

The final speech, from 1998, was given the second year after the *Hopwood* decision. This speech was shorter than the previous two speeches from 1983 and 1986. It also touted the overall GPA and LSAT credentials of the class. It was not as upbeat in tone, and ended with on a negative tone. Gabriel stated that "the one dilemma we face, and indeed all of our society faces, has to do with the level of minority enrollment at our law school – and indeed, at the University." He went on to state that Texas had "a sizeable African American and Mexican American population, does not portend well if

there is not meaningful representation." He finished by stating that "the law school administration is committed—and the faculty with but few."

Summary

This chapter introduced the seven participants in the open-ended interviews. The experiences of the administrators and alumni after the *Hopwood* decision provide an idea of the impact the decision had on the Law School. The alumni provided a historical perspective showing what is important to them as minority graduates, and thus should be important the Law School. The oral history documents also provided insight into the impact the *Hopwood* decision had on the Law School staff and its alumni. Finally, the historical documents provide more insight into the first year enrollment numbers provided in chapter 1 by providing insight into the impact on the number of applications and admitted students.

In the next chapter, the themes that emerged from the results will be presented and viewed through the lenses Critical Race Theory and University Adaptation Theory. In addition, the answers to the research questions which lead the study will identify the best practices to assist law school admissions professionals deal with the impact of race-neutral circumstances.

CHAPTER 5: DATA ANALYSIS AND INTERPRETATIONS

This chapter identifies and examines the themes that emerged from the open-ended interviews, oral histories, and historical data presented in chapter 4. As mentioned in chapter 3, the primary focus of this research was to understand and document the impact the *Hopwood* decision had on the University of Texas Law School administration and its admissions processes.

Using the research questions as a guide, I examined the data presented in chapter 4 for the best methods for recruiting in a race-neutral environment. The answers to this question also answered the second research question on how law school admissions professionals can recruit diverse students under race-neutral policies. Secondly, I examined the data for themes to identify the effects of an anti-affirmative action lawsuit, and to determine how law school admissions professionals overcome these effects.

The Best Methods for Recruiting in a Race-Neutral Environment

Law school administrators need a pathway to assist them in recruiting diverse students when in a race-neutral environment. As shown in the Table 4.1, the number of African American and Mexican American applicants decreased significantly after the *Hopwood* decision from 1996 to 1998. The same is true for admitted students (Table 4.2). The number of Blacks in the class of 1997 stands out for the Law School divides its incoming class into four sections. Thus, there was only one African American student in each section. This does not represent the critical mass that Justice Powell stated was needed for a “broader collection of thoughts” in the majority’s opinion of the *Bakke* decision in 1978. Chang referred to a small number of minority students such as this, as token representation.

The data does show an increase in the number of African American and Mexican American admitted students and applicants from 1998 to 2003. Although smaller than previous years prior to the *Hopwood* decision, progress was made. How did the Law School do it? From the data, I was able to pinpoint four major factors that emerged as the best practices for recruiting in a race-neutral environment.

Substantial Scholarship Money

The administrators and alumni mentioned the importance that scholarship money played in helping to recruit minority students to the Law School after the *Hopwood* decision. As a reminder, prior to the *Hopwood* decision, some scholarships were awarded specifically to African American and Mexican-American students. This was done because in Texas, African Americans and Mexican-Americans were historically discriminated against because of their race (e.g., *Sweatt v. Painter*). Dan Morales, attorney general of Texas at the time of the decision, interpreted the Fifth Circuit's ruling on admissions stand for the awarding of scholarships and financial aid as well. More on this decision by Morales will be covered later in this chapter.

It appears as scholarship money was an important first step. John stated it was "the first thing" the Law School did. At the undergraduate level at UT Austin, an algorithm was created after the *Hopwood* decision that identified low socioeconomic status high schools that had traditionally sent few applicants to UT. Those high schools were located in inner city schools in Texas which had majority minority enrollments. According to Torres, this and other initiatives helped save UT "from complete resegregation" (p. 98).

The Law School did not utilize an algorithm, but awarded scholarships to top minority college graduates from around the country to entice them to come to the Law School. Top administrator and subject, John stated in his interview that the scholarship money "sent a signal to the minority community" that "UT Law School wants us…UT Law School is not the enemy." Alumnus Mr. Reasoner reiterated the importance of the scholarship monies as well. He stated that they were "critical." Administrators David and Peter backed the importance of the Texas Exes, a private organization, as an important factor in this scholarship process as well. David referred to the Texas Exes as "the one entity that was able to act on behalf of The University to try and counter the negative effects of *Hopwood*." Dean Sharlot also mentioned another outside support group, the Law School Foundation, who were "overtly race-conscious" in giving out scholarship money to recruit minority students.

It appears that the amount of scholarship money needed should be substantial enough to fund large scholarships to attend your law school. UT and the Law School depended on alumni for the majority of its funds. Per Mr. Reasoner, Joe Jamail, Joe and Teresa Long were the major contributors to the fund. According to Guerrero (2013), in the first year, 134 students received over $837,000 from the Texas Exes minority scholarship fund. This was an average of $6,246 per student. It is not clear how much was given to each minority law student, but in 1998 there were nine African American students in the incoming class. If they were given the average above, $6,246, that would nearly equate to a full tuition and fee scholarship. The average tuition for a resident law student in 1998 was $7,234.

Geographic Recruitment

A second factor mentioned by the subjects that helped to recruit minority students to the Law School was a geographic strategy. This strategy had two different forms: 1) prelaw institutes; and 2) personal visits.

Prelaw institutes

Dean Sharlot heard of a program in El Paso where there were some undergraduate professors at the University of El Paso (UTEP), a Hispanic Serving Institution (HIS), who were trying to devise a program to prep their undergraduate students to pass the bar but did not have any money to fund it. Dean Sharlot stated that he and Professor Gerald Torres visited the president and professors at UTEP to assist them monetarily and organize their prelaw institutes. By definition, HSIs are institutions that have at least a 25 percent Hispanic undergraduate full-time-equivalent enrollment.

John stated that two other colleges were added later as well: 1) Prairie View A&M University (PVAMU), a Historically Black College and University (HBCU), and; (2) the University of Texas at Pan Am (UTPA), another Hispanic Serving Institution (HSI). He stated they were “higher minority driven because of their geographical take.” In addition to the PVAMU and UTPA institutes, a fourth program was started at the University of Texas San Antonio (UTSA), also a HSI.

The institutes have had major success. Although the UTEP institute has changed slightly over the years, is still supported by the Law School, and since 1998, 33% of the institutes’ graduates have attended top fifteen law schools and attended law schools in over thirty different states (University of Texas at El Paso, 2014).

Through a CRT lens, the decision to assist the institutes may be interest convergence. Did Dean Sharlot do it to improve the pipeline of minorities to the legal

profession, or did he do it to improve the number of minorities at the Law School and thus improve the reputation of his tenure as dean and the Law School?

Personal visits

Another type of geographic recruitment included the dean of the Law School reaching out to five colleges in the South Texas region of Texas. Michael stated that the Hispanic alumni asked Dean Sharlot about recruiting more Hispanic students. He believes that from those conversations, Dean Sharlot began traveling to particular schools in South Texas and the Valley. The Valley is in the south most region of Texas and comprises four counties. According to the 2008 U.S. Census, two counties are 86% Hispanic, one is over 90% Hispanic, and one is 97% Hispanic.

Michael stated that he thought Dean Sharlot "was the first dean that came to the Valley and brought some professors with him." He stated that the dean visited specific colleges in the Valley; UT Brownsville and UT Pan American. He stated that after Sharlot, Dean Powers continued to take those trips. Michael stated it was successful; the Law School "started getting applications." It was not clear as to when these trips began exactly, but Dean Sharlot was dean from 1995 to 2000. William Powers was dean of the Law School from 2000 to 2005, when he became president of UT.

From my knowledge as director for admissions programs at the Law School, Dean Powers would travel to UT Pan Am, the University of Texas Brownsville, Texas A&M Universities in Laredo, Kingsville, and Corpus Christi. He would take current students from South Texas or graduates of those schools, and admissions representatives from the Law School as well. This tradition of visiting the administrators and students at those undergraduate universities continues today.

Michael stated that he believes the applicant numbers would have increased earlier if this recruitment was done earlier before Sharlot and Powers. He also mentioned that Dean Powers, now president of UT Austin, continues to visit South Texas and the Valley. He stated that "he (President Powers) goes down to Brownsville every August or June and has dinner with all of the incoming freshman and their parents." When asked if this was a success, he said "Absolutely!" He went on to say that "I think that had a lot to do with helping to change the attitude of students from south Texas in wanting to come to UT."

John stated that "we took historically underserved, but geographically defined schools, and we said we'll admit your students." John stated that "those were very successful and the combination of them was very successful." The combination being the scholarship offers mentioned earlier and the geographic recruitment.

Enhanced Student Recruitment

A third factor that emerged from the data was an enhanced strategic recruitment. John referred to this enhanced strategic recruitment as "heavy recruiting." The enhanced student recruitment involved: 1) free trips to visit; 2) minority to minority recruitment and; 3) earlier recruitment.

Free trips to visit

Peter mentioned that Dean Powers "was active in trying to do some other things to enhance minority recruitment." Peter stated that under Dean Powers' leadership, with the help of Rodney Ellis, a Black alumnus of the Law School and state senator from Houston, minority students were flown in to visit the Law School. The visits occurred on the weekends. Peter stated that the flights were to show the minority students that there

were other minority students like them who were interested in attending the Law School as well and they would not be alone. He went on to say that "to the extent you could get a whole bunch of people who had been admitted together and they could talk to each other and say 'well, if you come, I'll come' kind of thing." When asked if this recruitment tactic worked Peter stated:

> I think the fly-in weekends really helped. Because I think - quite rightfully - any minority student who was admitted, who didn't have a good reason to come here and had an option would think "Do I want to come here and right being one of two or three or four or five African Americans in the entire class?" I could sure see why they would say no.

Minority to minority recruitment

Another type of enhanced student recruitment involved having current minority law students and alumni help with recruiting minority students to the Law School. John referred to that as "minority students recruiting minority students." John stated that the Law School's student organization named the Student Recruitment and Orientation Committee (SROC) was originally created to help with orientation check-in. However, later they would call admitted students and ask "how's it going?" He stated also that minority students got involved in SROC and began calling admitted minority students to welcome them to the Law School.

Alumnus David stated that prior to the *Hopwood* decision, he had been asked "to reach out to see if anyone would be interested in coming to the law school." David stated that in fact, that if the Law School were ever put in this race-neutral situation again, "the Law School is going to have to partner again with ex-students, and allow ex-students to reach out to minorities across the state and country." He did state that the alumni did not have to be minority students. He stated that the Law School should "start now, start

anticipating what might be the likely outcome of what is coming down." Alumnus Phillip agrees with David and stated for future purposes, the Law School should "get alumni from central Texas to go state wide." In addition he stated that minority alumni who are in Dallas should recruit there. He stated that he believes that "it does not matter if a Black lawyer comes out and gives you the advantages of attending the UT Law School." Alumnus Michael had a similar idea as well. He stated that he recruiting could have occurred without targeting minority students. He stated that the Law School could have gone to the Rio Grande valley and "had more days inviting everybody from the schools to come." He stated "they didn't have to go and target particular groups."

Earlier recruitment

A type of enhanced student recruitment involved earlier than normal recruitment. John stated that "you recruit them in November." He went on to state that by doing this you "double the chance than if you recruit them in March or April." This type of recruitment is well known today, but may not have been in late 1990s. Most top law schools have an early application deadline in hopes of determining their classes earlier in the process than later. Most of them provide scholarships monies only to those who apply early to entice earlier recruitment.

Super Holistic Application Review

The fourth factor that emerged from the data as a factor in recruiting minority students was a super holistic review process. Mary made the first reference to this application review process in her open interview. She stated that the big difference the Law School made in light of the *Hopwood* case was to come up with a new admissions system. She called it "holistic" file review. This is in reference to how applications were

reviewed. Mary stated that every application had to be read in its entirety. As many mentioned in chapter 4, the Law School receives on average, five-thousand applications per year. When applying, each applicant must submit an application, which, after the *Hopwood* decision did not include their race, a personal statement, a resume, and letters of recommendation. Optional parts of the application include additional statements on overcoming such things as social or economic hardships, poor grades in college, or poor standardized testing.

Mary stated that there were ways to determine if an applicant was Black or Hispanic even without their race visible on the application. She stated that there were not obvious, ways to determine this, but by reading the personal statement, clues may be found. She also mentioned other sources that aided in determining race. Those include the applicant's permanent address (e.g. from the application), fraternities and sororities (e.g., from the resume). There are particular fraternities and sororities that are predominantly Black (e.g., Alpha Phi Alpha, Alpha Kappa Alpha, Delta Sigma Theta). There are also predominantly Hispanic fraternities and sororities as well (e.g., Lambda Theta Phi and Lambda Theta Alpha). Finally, during those years, Mary stated that applicants began "making sure" that this kind of information was in front of the admissions committee by including it on their application.

The Effects of Anti-Affirmative Action Lawsuits

I examined the data for themes to help identify the effects of an anti-affirmative action lawsuit, and answer the third research question, how can law school admissions professionals overcome these effects. From the data I found three themes that emerged

which law school admissions professionals should be aware of in the effect they are faced with an anti-affirmative action lawsuit.

Unanticipated Antagonistic Press

A major problem for the Law School that was mentioned in each open interview and each oral history was the fire storm created and fueled by a law school professor, Lino Graglia. Professor Graglia, who outwardly opposes affirmative action, made racist statements during, and after the *Hopwood* decision. This type of antagonism is referred to as in-house antagonism.

In-house antagonism

The first case of in-house antagonism came from a Law School Professor, Lino Graglia. In his interview, John labeled Professor Graglia as “a problem,” and that he would say things that were “utterly inappropriate.” He stated that he learned of the professor’s classroom outbursts from students. Professor Graglia made other statements as well. Professor Graglia stated that at a meeting supporting the *Hopwood* decision, he said that “the problem Blacks and Mexican-Americans are not academically competitive with Whites.” This was the statement that caused the most stir, because it hit the national press. Professor Graglia stated that “he was interviewed on the national news program the *Today Show* the next two mornings with the host Matt Lauer.” Professor Graglia stated that his mission in life is to “to push that line, that we should have more faith in democracy and Supreme Court Justices are not to be trusted.” This is in reference to the Supreme Court’s decision in *Bakke* and *Grutter*.

Alumnus David stated that he has known Professor Graglia “for a number of years” and referred to him as “a nice person.” He went on to say however, that his

comments were racist. In 1997, Graglia stated that Black and Mexican-American cultures set children up for failure (Jefferson, 2012). In 2012 Graglia was in the news again for stating that Blacks and Latinos can't compete with White students because so many of them are raised in single-parent households (Jefferson, 2012). I mentioned the latter to Alumnus Phillip in his interview and he stated that "he hasn't changed." Phillip graduated in the early 1970s, and Graglia was saying racist statements then, in 1997, and in 2012.

This was another CRT tenet to emerge from the data; racism is normal. Professor Graglia's comments are examples micro-aggressions that Solorzano et al. (2000) label as "subtle insults (verbal, nonverbal, and/or visual) directed toward people of color, often automatically or unconsciously" (p. 60). Dan Morales' move to further According to this tenet, racism has not disappeared but become more subversive as Professor Graglia's and the attorney general's move to restrict the awarding of scholarships and financial aid, although the Fifth Circuit only named admissions in its decision against the Law School. This too is an example of a microaggression. It is difficult to apprehend this move by Morales, because he too is a minority. However, his political affiliation may have trumped this important fact.

Another type of in-house antagonism came from the alumni. Peter supported John's statements and mentioned that Dean Sharlot "got lots of letters criticizing Graglia." However, he also stated that the dean received "lots of letters" in support of Graglia. Peter went on to state that the Law School's potential to raise scholarship monies was in jeopardy. He stated that alumni, typical donors to law schools, would say "I'm not going to give you a penny if you do anything to Graglia." He stated other alumni would say "I'm going to stop contributions as long as Lino Graglia is there." This put the Law

School in a major predicament. Dean Sharlot stated that “we couldn’t possibly win a case where he [Graglia] had been discharged on the basis of exercising free speech.” He went on to state that the feelings of the Law Schools alumni were “strong, but not rational.”

Peter stated that “we had a lot of alumni who thought we were doing too much pre-*Hopwood*.” Dean Sharlot reiterated this by stating that during his deanship of five years, “it was a time of extreme division among our alumni and our students.” Although he stated that the students would not admit it. Students were “reluctant” he stated to voice their opinions, but he stated “that wasn’t true of our alumni who were very free to castigate me as the representative of the Law School from both sides.” Dean Sharlot stated he was even approached by alumni who wanted him to fire Professor Graglia. Dean Sharlot stated that this issue alone from alumni who wanted him to fire Professor Graglia “weighed on me perhaps more than it should have....it weighed on me a great deal.” He stated it was a time of great hardship and “an extremely difficult time.” Dean Sharlot stated that he spent a lot of time writing letters, making appearances, and traveling nationally to “encourage other schools to continue with affirmative action.”

Outside antagonism

Another source of unanticipated antagonism came from the state’s attorney general, Dan Morales. The University of Texas and the Law School were blindsided by the attorney general’s opinion, and his personal interpretation of the *Hopwood* decision. As mentioned earlier in the scholarship section, Dan Morales interpreted the decision of the Fifth Circuit court to not include admissions practices, but scholarship and financial aid awards as well. The Law School, and the main campus had to scramble to come up with alternatives (e.g., Texas Exes scholarships).

I remember when this happened when I was a financial aid counselor. Our director of financial aid called an emergency meeting to inform the entire financial aid staff of Morales' decision. I was affected the most because the scholarship programs I worked with were UT's scholarships for Blacks and Mexican American students (e.g., Texas Achievement Honors Award (TAHA), and Texas Achievement Award (TAA)). This program awarded approximately two million dollars each year to Black and Mexican American undergraduate students at the university. A new program was invented, Presidential Achievement Scholarship, that utilized data from the undergraduate admissions office, the Texas Education Agency, and the Federal Application for Free Student Aid to award the money based on social and economic factors. This along with the Law School's leadership ability to adapt to these environmental changes support the UAT theory.

As mentioned by Mary in chapter 4, the Law School started awarding scholarships to Black students in the 1980s. After the Morales decision, that had to end. To recruit minorities after the *Hopwood* decision, the Law School raised substantial scholarship money and it was awarded by outside sources (e.g., the Texas Exes).

Find Opportunity

John admitted that what happened to the Law School was a "real crisis." He also admitted that "all crises have some opportunity." A somewhat surprising phenomenon found in the data suggests that in a situation like this, there may be opportunity.

John stated that during this crisis, the Law School realized that there was no "silver bullet solution." That it would take a series of steps to maintain or increase the Law School's diversity. He went on to say that the Law School "spent a lot of effort

trying to avoid that from happening." He stated that the Law School decided to fight back and said they made increasing the Law School's diversity a high priority. He did state however, that what happened was very bad, and "there was a risk of really going off the edge to where we were a non-diversified school."

Dean Sharlot found opportunity in the crisis as well. He stated that the Law School held "public meetings" at the Law School "to discuss the case." He stated they were well attended and "fairly open." He stated that the dialogues during those meetings were an opportunity for the students. He stated he was very impressed by the minority students who had to listen to things that "that had to get under their skin, anger them deeply." However, they were very "lawyer-like" in their behavior. Thus, this gave the students a great opportunity to practice lawyer skills. He stated that during the meetings, "it suggested how effective law school is in teaching people self-control" when "addressing arguments you despise." Dean Powers' and Dean Sharlot's leadership abilities in time of crisis and/or opportunity are key critical factors according to UAT.

History Is Relevant

Another phenomenon revealed by the data is it is important for law school administrators to know their respective college's, state's and region's history. Above all, it is important for administrators to know their college's mission and history.

Phillip began his interview with an interesting factoid about the history of Texas. He stated that "if you know the history of Texas, there is no way to get around that in Texas there was a racist society." He went on to say that it was "a whole lot more like Alabama, Mississippi." Texas is has a poor history of race relations with its minority populations. Dean Sharlot stated that "one of the many tragedies associated with the

Hopwood litigation was that Texas provided the bookends of the history of law school discrimination, on being *Sweatt v. Painter* and the other being *Hopwood*." As noted earlier in chapters 1 and 2, the Law School was sued by the NAACP Legal Defense team in 1946.

During the 1960s and 1970s, Gabriel stated that the Law School realized its issue of not having many minorities, and decided to make adjustments. He stated that "instead of playing shuffle and holistic and all of that stuff," the Law School "decided this problem deserves attention and this is the way to get it." Michael stated that even as early as the 1960s, the Law School was somewhat involved in recruiting minorities. Michael stated that in the 1960s, he and the few other Hispanic students met with Dean Keeton to do "outreach to try and increase the number of minorities in the law school," specifically the Hispanic numbers. He stated that in 1965 "out of fifteen hundred students, there were like seven Hispanics one African American." Although it did not happen right away, a professor from the Law School, Dave Robertson, went to South Texas to try and promote the Law School "among the communities throughout South Texas." He stated that the local colleges "gave him a table and chair outside the student union." He would sit there for a whole day and talk to students. He stated he did that for two years.

Peter supported this as well. He stated that when he arrived in 1977 "there was a push to increase the minority enrollment before I arrived." As to why the Law School did this, he stated that "we were embarrassed because what Harvard was doing." Dean Sharlot stated that "Ernest has to his credit the initiation of the great efforts to integrate the school, to overcome the history of overt discrimination, the tragedy of Heman Sweat." Dean Smith served as dean from 1974 to 1979. Mary mentioned that in the

1980s, the Law School was “throwing money at people;” primarily minority students. At that time, the tuition was not as high as today’s levels, and thus “it didn’t cost them a lot to get students.”

Dean Sharlot stated that the Law School never denied that it was “engaging in race-consciousness” admissions. He stated that it was affirmative action. He stated that many people “never understood what an extraordinary degree of success we had had” in attracting and graduating Mexican-American and African-American students. He stated this began under Dean Smith in the mid-1970s.

CRT states that viewing history such as this, from different angles is important. It is important in understanding why and how the decisions were made by the various administrations to enhance the diversity at the Law School.

CHAPTER 6: DISCUSSION

This study utilized the narratives of faculty, staff and alumni of the University of Texas Law School to tell their story from 1996 to 2003. In addition, it serves to understand the impact of the *Hopwood* decision in order to explain how law schools can adjust to continue to recruit, admit and enroll diverse classes of students in a race-neutral admissions environment.

In the review of the literature, the scholarly research focused on the benefits of diverse higher education environments (e.g., a critical mass of diverse ideas in the classroom). They, nor the historical cases, primarily the opinions of the courts, did not provide a blueprint to show administrators how to deal with the effects or outcomes of race-neutral policies. However, the themes that emerged from this research did provide a blueprint for administrators to follow, and potentially more research opportunities.

Discussion of Key Findings

The numbers reflecting the incoming class (Table 1.2) show the dramatic impact the *Hopwood* decision had on the critical mass needed to benefit society. The first question that led this study asked, “What are the best methods in recruiting diverse students under race-neutral admissions policies?” The second question asked how can admissions professionals recruit diverse students under those polices.

Best Practices

First, it appears as though law schools should be prepared to recruit large donors to provide scholarship money specifically for minority scholarships. The Law School had several alumni step up to donate (e.g., Joe Jamail, Joe and Teresa Long). Although intimidating, being one of a few minorities in a class can be overcome with the

enticement of attending law school with little to no financial restraint. Secondly, law schools should devise a geographic recruitment plan to fill the already declining minority student pipeline. There are over HBCUs in twenty states. There are also numerous HSI and other minority serving institutions (e.g., Tribal colleges, Asian, Alaska, Hawaiian) in which to start or enhance the pipeline to law school. Thirdly, law schools should be ready to invest in programs such as prelaw institutes and plan to visit select colleges at the above mentioned universities as well, similarly to the Law School staff. Fourth, law schools should be prepared to get their minority alumni and current students involved in the recruitment of minority students who have been admitted. This will help increase the yield, along with the scholarships, to the school. Finally, law school professionals must be trained on how to review an applicant's file for clues of diversity. Examples were given as to what to look for, but dialogues with current faculty, staff and students can help determine things that are clues to an applicant's diverse background as well.

Be Prepared

The third research question asked, "How can law school admissions professionals overcome the effects of anti-affirmative action lawsuits?" Based on the data, the effects can come in the form of negative press from potential antagonistic sources both inside and outside of the law school. Law school admissions professionals should anticipate acts of freedom of speech by law school professors and elected officials who oppose affirmative action. Finally, law school professionals should know the history of their schools, regions and their states. Knowing the history can be helpful when working with alumni and other stakeholders in the local and/or regional communities. The best answer to this question is to be prepared for the unexpected. The Law School leadership

encountered several things that it did not expect. However, it was able to overcome those obstacles by reaching out to its alumni, not avoiding the problems, and with dialogues (e.g., public and private).

Areas for Future Research

This study researched a small sampling of alumni and staff from the Law School and it was based on happenings that occurred nearly twenty years ago. More research should be done with faculty, staff and alumni at current law schools who are currently in race-neutral environments. The state of California and its law schools could be test sites, for affirmative action has been banned there since 1996. Five of the accredited law schools in California are state supported law schools such as the University of Texas School of Law. For the same reasons, the University of Michigan would be another great test law school as well. In addition, case studies could be performed at other law schools affected by the *Hopwood* decision (e.g., Louisiana State University and the University of Mississippi).

Another research opportunity could be the story that the law students have to tell. Law students could potentially provide insight as to how to recruit more diversity. In addition, research on the outcomes of affirmative action policies should be measured. Bok et al. (2005) states that academic institutions “need to be accountable for the uses they make of the discretion they are given” (p. 151). This is in reference to the deference allowed colleges and universities by the constitution when using race in admissions (*Grutter*, 2003). One outcome that can be measured, and scrutinized by anti-affirmative action groups (e.g., Sander) are the bar passage rates of minority graduates. Studying these rates from elite law schools such as the Law School may bring to closure to this

debated topic by showing that minority students perform well after graduating law schools such as the Law School.

Limitations of the Study

One of the limitations of this study was the small sampling. Two of the subjects for this study, one key administrator and one alumnus, did not respond to repeated requests to be interviewed. The suggestion was made by other subjects that the administrator may be too stressed to relive the years after the *Hopwood* decision. The alumnus is a prominent, African American male graduate of the Law School. His testimony could have been invaluable as well.

Conclusion

This qualitative case study researched a small sampling of alumni and staff from the Law School to tell the story of what occurred there from 1996 to 2003 without the use of affirmative action to recruit and admit law students. Although the subject of affirmative action is very tense, it is best to understand that its use is not doing the same damage as the separate but equal doctrine prior to the *Sweatt* and *Brown* decisions. As an example, prior to the *Sweatt* decision of 1950, the Law School had graduated zero Black law students. In comparison, in 2013, the African American and Hispanic student populations at the Law School are 4.3 and 15.7 percent (The University of Texas School of Law, 2013). The African American and Hispanic populations in the state of Texas are 12.4 and 38.7 percent. The White population at the Law School is 62 percent, and in Texas, 44 percent. Thus, the White population is not in jeopardy of not being discriminated against as far as representation. According to this data, they are over represented, and the African Americans and Hispanic students are underrepresented.

As Dean Sharlot stated about their efforts after the Hopwood decision, “there had been enormous progress made” and “we graduated during this decade more of these groups combined than any other school in the country.” Based on the evidence from this study, there is still work to do.

Appendices

Appendix A – Email for Participant Selection (Background Survey)

Dear (Participant's Name),

I am writing to ask if you would be a participant in my research study. The purpose of my study is to understand how the administration at the University of Texas School of Law overcame the negative effects of an anti-affirmative action lawsuit. Primarily the *Hopwood vs. Texas* decision and its effects on all of the stakeholders (administrators, faculty, alumni, etc.) and how they adapted and changed the practices of the admissions process in order to the recruit and matriculate a diverse student body.

If you are willing to participate in this study, I would first like you to complete a short survey (see URL link below) and then after completion of the survey schedule a one-on-one interview with you.

There is one attachment for you to review prior to our first meeting. The attachment is the consent form for this study. In addition to survey, please review the consent form, sign your name, and return to me at your earliest convenience.

Here is the link to the short survey:
https://surveystation.austin.utexas.edu/TakeSurvey.aspx?SurveyID=7430m895

This survey asks for your background information. All of your responses to the survey will be kept confidential.

Please let me know if you have any questions or concerns regarding my study or the attached documents. You may reach me at sriley@law.utexas.edu or via phone at (512)232-1206.

Thank you for your time, and I look forward to hearing from you soon so we can coordinate our first interview.

Best wishes,

Samuel R. Riley
Director for Admission Programs – UT School of Law
Doctoral Student, Higher Education Administration – The University of Texas at Austin

Appendix B – Email for Participant (One-on-One Interview)

Dear (Participant's Name),

Thank you for completing the short survey I sent to you on (date).

I am following up with you to schedule a one-on-one interview with you on (day, date, time, and place) or (day, date, time, and place). Please let me know which you would prefer. In order to accommodate your schedule, I am willing to interview you via telephone as well.

There is one attachment for you to review prior to our interview.

• The attachment is the list of interview questions I am going to ask you when we meet.

Please let me know if you have any questions or concerns regarding my study or the attached documents. You may reach me at sriley@law.utexas.edu or via phone at (512)232-1206.

Thank you for your time, and I look forward to hearing from you soon so we can coordinate our first interview.

Best wishes,

Samuel R. Riley
Director for Admission Programs – UT School of Law
Doctoral Student, Higher Education Administration – The University of Texas at Austin

Appendix C – Research Consent Form

Title: Qualitative Analysis of the Effects of the Hopwood Decision on The University of Texas School of Law

Conducted by: Samuel R. Riley, M.Ed., doctoral student, Department of Higher Education Administration, The University of Texas at Austin. Phone: 512-619-6238

Purpose:
The goal of this research is to understand how the administration at the University of Texas School of Law overcame the negative effects of an anti-affirmative action lawsuit. Primarily the *Hopwood vs. Texas* decision and its effects on all of the stakeholders (administrators, faculty, alumni, etc.) and how they adapted and changed the practices of the admissions process in order to the recruit and matriculate a diverse student body.

Procedures:
This research study will involve the following

1. Document reviews
2. Surveys
3. Individual interviews

Time:
Surveys will take approximately 20 minutes and interviews approximately 1 ½ hours.

Risks/Benefits
The risk of participation in this study is minimal. There are no potential benefits to be gained by participants other than receiving a final copy of the treatise.

Compensation:
You will not receive any payment or other compensation for participation in this study. There is also no cost to you for participation.

Confidentiality and Privacy Protections:
Any information that is obtained in connection with this study and that can be identified with you will remain confidential and will be disclosed only with your permission or as required by law. Confidentiality will be maintained by means of a code number. I will not use your name in any of the information we get from this study or in any of the research reports. When the study is finished, I will destroy the list that shows which code number goes with your name.

Information that can identify you individually will not be released to anyone outside the study. I will, however, use the information collected in my treatise and other publications. I may use any information that I get from this study in any way I think is best for publication or education. Any information I use for publication will not identify you individually.

The videotapes that I may make will not be viewed by anyone outside the study unless I have you sign a separate permission form allowing me to use them. The tapes will be destroyed three years after the end of the study.

In the event audio or video recordings are made to gather data, participants will be informed in advance that

1. Interviews or sessions will be audio or videotaped;
2. Recordings will be coded so no personally identifiers are visible;
3. Recordings will be kept in a secure location;
4. Recordings will be heard or viewed for research purposes by the investigator and his associates

You can choose whether or not to be in this study. If you volunteer to be in this study, you may withdraw at any time without consequences of any kind. You may also refuse to answer any questions you do not want to answer. There is no penalty if you withdraw from the study and you will not lose any benefits to which you are otherwise entitled. The investigator may withdraw you from this research if your physician tells us that continued participation may injure your health.

Contact and Questions:
If you have any questions about the study please feel free to contact the researcher now. If you have questions later, want additional information, or wish to withdraw your participation, please call or email the researcher conducting the study. Their names, phone number, and e-mail addresses are at the top of this page. If you have questions about your rights as a research participant, complaints, concerns, or questions about the research please contact James Wilson, Ph.D., Chair, The University of Texas at Austin Institutional Review Board for the Protection of Human Subjects at (512) 232-2685 or the Office of Research Support and Compliance at (512) 471-8871 or email: orsc@uts.cc.utexas.edu.

YOU WILL BE GIVEN A COPY OF THIS INFORMATION FOR YOUR RECORDS.

Statement of Consent:

I understand the procedures described above. My questions have been answered to my satisfaction, and I agree to participate in this study. I have been given a copy of this form.

____
Printed Name of Person Obtaining Consent

___________________________________ ____________________
Signature of Person Obtaining Consent Date

___________________________________ ____________________
Signature of Investigator Date

Appendix D – Interview Questions

In your opinion, were the new admissions policies effective in recruiting African Americans and Hispanics to UT Law?

Could the policies have been better? What would you have changed or done differently today if in the same situation (under Hopwood – before the *Grutter* decision)?

Were UT Law alumni involved to help increase the diversity of the law school?? If so, how?

Were others involved to help increase the diversity of the law school?? If so, how?

In your opinion, what thing(s) had the biggest impact in ncreasing the presence/number of minority students in the entering classes?

Were scholarships used to help?

How were students distinguishable if race was not utilized?

Did the administration face management issues from within the Law School during the Hopwood years? (e.g. disagreements on how to move forward after the Hopwood decision)

Did the administration face management issues from outside of the Law School during the Hopwood years? (e.g. disagreements on how to move forward after the Hopwood decision)

How harmful were Prof. Graglia's words to the recruitment efforts?

Even if they were true, the mission of the university is to serve the people of Texas. How will this be accomplished now that race/ethnicity cannot be used in admissions nor scholarship awarding?

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