

## STRAW MEN, FIBS, AND OTHER ACADEMIC SINS

*Lloyd Cohen\**

Superintendent Domenech's<sup>1</sup> rhetorical technique can be summarized as: (1) ignore my arguments and evidence; (2) create a straw man; (3) throw a dollop of irrelevant and deceptive statistics at the straw man; (4) add a bit of personal insult; and (5) claim victory. How do I now respond?

Here is the plan of action. I will discuss only some of Domenech's mistakes and sins and in the process restate and elaborate my case. I will not point out every error and deceit in his short paper—it would be too boring a read and a write. I will be very blunt in my criticism. That is important here, because the nature of the Superintendent's reply to my article reinforces my original point: that his racially discriminatory admissions policy, like so many across the country, is a deceitful and obfuscatory one. Aside from restating the truth about the admissions process at TJ, if I can nurture in the reader a more critical eye and mind to recognize and root out cant and error it will be time well spent.

There were two core arguments in my original article, *A Study of Invidious Racial Discrimination in Admissions at Thomas Jefferson High School For Science and Technology: Monty Python and Franz Kafka Meet a Probit Regression*<sup>2</sup> each captured by the respective halves of its title: (1) that TJ is guilty of racial discrimination in its admissions process; and (2) that the entire admissions process is a ridiculous farrago, expressing at one and the same time the dark and sinister themes of Kafka and the comic absurdity of Monty Python. Putting race aside, there is something grotesque and

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<sup>1</sup> See Daniel A. Domenech, *Metamorphosis: from Statistics into Cockroaches, A Response to Professor Cohen's A Study of Invidious Racial Discrimination in Admissions at Thomas Jefferson High School for Science and Technology: Monty Python and Franz Kafka Meet a Probit Regression*, 67 ALB. L. REV. 265 (2003).

<sup>2</sup> Lloyd Cohen, *A Study of Invidious Racial Discrimination in Admissions at Thomas Jefferson High School For Science and Technology: Monty Python and Franz Kafka Meet a Probit Regression*, 66 ALB. L. REV. 447 (2003).

comical in a system in which fifty-four special education teachers, guidance counselors, administrators and the like, arranged in a nine committee hierarchy, provided with tiny shards of data—pureed so as to be more easy for them to digest given their limited arithmetic talents—convene for four days and employ their “expertise” to determine which 450 of the remaining 800 applicants are likely to be the most gifted in math and science.

The second argument, though it takes up the major part of the prose and is by far the more interesting, Domenech addresses not at all. Instead he butts his head up against the wall of my intellectually uninteresting—because irrefutable—claim of racial discrimination.

My claim that there is racial discrimination in admissions was supported by a great body of evidence consisting of: (1) unremitting political pressure directed to increasing “minority” admissions; (2) periodic pronouncements by Mr. Domenech and the principal he appointed to TJ, Mrs. Lodal, of the efforts to foster that result; (3) requiring race data on each applicant; (4) passing on this information to the selection committees (while withholding and distorting GPAs, test scores and the like); (5) staffing the selection committees on the basis of race; and (6) *expressly directing the committees to give preference to “minority” applicants*.<sup>3</sup> The evidence is overwhelming. While I elaborate and measure the magnitude of the discrimination by employing a Probit regression, those inferential statistics are merely frosting on the cake at the end of a complete meal. What is Domenech’s response to this deluge of evidence? Dead silence.

#### I. DOMENECH’S DATA: DO THEY REFUTE COHEN’S?

Domenech attaches an exaggerated importance to the statistical portion of my paper, and focuses his entire effort at undermining my results. Though my statistical results are robust and impervious to any attack had I not included them, my argument would still have been irresistible.

The howler in his effort to refute my statistics is that he has nothing at all to say about my regression technique or results, except for one cryptic, incoherent, and erroneous footnote<sup>4</sup> and the

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<sup>3</sup> See note 11 *infra*.

<sup>4</sup> Domenech stated:

Additional problems include Cohen’s use of a small sample size, which magnifies methodological errors. Cohen does not acknowledge the importance of treating his

following gross misstatement of what I claim my Probit regression demonstrates.

Relying on the fact that some African-American students who were admitted ranked lower in the pool of 800 than some white students who were rejected, Cohen asserts that his regression analysis shows that the differences in academic merit between these two groups were so disparate that the only plausible explanation is that the admissions committee used race as the predominant factor in making its selections.<sup>5</sup>

Domenech either does not understand regression analysis or is being purposely deceitful. To arrive at my statistical results I employed a standard unbiased regression technique and brought it to bear on the entire set of 791 admissions decisions, not on some convenient and favorable subset. The regression does not impose my beliefs as to the merits of the applicants or the weight that should be attached to the admissions index or its component parts, but rather derives the admission committees' own implicit measure of merit. The committees may be absolutely correct in the weight that they give to test scores and grades as measures of academic merit, or totally wrong. It matters not one whit. What the regression shows is that after weighing all those indicators of academic merit as they see fit the committees then place a heavy thumb on the scales in favor of the black and Hispanic applicants.

Perhaps mistakenly thinking that the issue between us turns on some great statistical battle, Domenech marshals his own numbers to battle against mine. By focusing on statistics he gains the added benefit of avoiding an unpleasant confrontation with the discursive evidence including that the Guidelines to the admissions committees expressly instruct them to engage in racial discrimination.

Domenech spends most of his article discussing the standard errors of measurement (SEMs) of the TJ admissions test and then tries to bluff and bluster his way through with the assertion that "Cohen's disregard of the SEM is so fundamental that it taints the

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sample of eleven African-American students in the semi-final pool with caution. He does not recognize that his use of this small group led to an inflation of the proportion of accepted students, and that his reliance on proportions and dichotomies (accepted/not accepted) created additional problems in his analysis.

Domenech, *supra* note 1, at n.14. Perhaps the reader can identify a cogent argument. I could not.

<sup>5</sup> Domenech, *supra* note 1, at 266.

rest of his analysis.”<sup>6</sup> The general mathematics of his discussion of the SEMs appears to be entirely unexceptionable.<sup>7</sup> But how do the SEMs speak to my theses or my evidence? Does he show any mathematical relationship between the SEMs and my regression results? He does not and he can not. Were the SEMs ten times larger, or one tenth as large, as those he reports it would still not have made the slightest impression on my coefficients or their measures of statistical significance. Why not? My regression is explaining and measuring how the committees made their admission decisions. His discussion of SEMs is directed at the reliability of the TJ entrance exam. Apples and orangutans! Even had Domenech’s discussion of SEMs been entirely accurate and honest—which as I will show in section III.A. below it is not—it would have had as little connection to my regression results as a discourse on the Pythagorean Theorem.

In concluding his discussion of SEMs Domenech attempts to tie his statistical argument back to my work. He states: “Table 2 illustrates that Cohen treated individual rankings as precise measures of merit, when they were not.”<sup>8</sup> That would be a telling blow if it were true. Its failing is that nowhere in my article do I state, suggest, or imply that the rankings are precise measures of merit. Perhaps he got confused when several times I said something close to the opposite.<sup>9</sup> Domenech has constructed a classic straw man and slain him.

## II. DOMENECH’S PURPOSE: JUSTIFYING UNFETTERED DISCRETION AND RACIAL DISCRIMINATION

Domenech’s excursion into the land of SEMs is not really intended to join with and refute my evidence, statistical or otherwise. It has a different purpose. His intent is to use it to

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<sup>6</sup> Domenech, *supra* note 1, at 268.

<sup>7</sup> I can not confirm the numbers he publishes in either Table 1 or Table 2, because I have access to neither the test reliability number from American Guidance Services, nor the raw scores of the applicants; Domenech provides neither the data nor a cite to its source.

<sup>8</sup> Domenech, *supra* note 1, at 267.

<sup>9</sup> See Cohen, *supra* note 2, at 454–55 (“Nothing at the first stage of the process is offensive . . . . To characterize the process as inoffensive is not, however, to say it is ideal. . . . [D]espite its shortcomings, the first stage of the procedure is unobjectionable.”), n.60 and accompanying text (“If truly ambitious, the FCSB could try substituting an alternative test such as the PSAT, SAT I, or the ACT to test whether it was a better predictor of success.”), and section VI, “Alternative Admissions Procedures” (“[I]t would be a trivial matter to derive an admissions formula that incorporates all the relevant information currently available to the admissions committees, . . . that . . . would yield results both more reliable and predictive than the current procedure.”).

change the framework of the debate, to jury-rig an argument that justifies unfettered discretion for his admissions committees and implicitly excuses and masks racial discrimination.

Domenech lays out his position in the following paragraph:

In short, a methodologically sound analysis shows that the vast majority of students in the pool of 800 semifinalists have no meaningful differences in their levels of academic skills and achievement. These extremely talented students are all qualified and likely to succeed at TJ. Any other conclusion is simply untrue. That is why the admissions process must take a closer look at the “whole person” when determining who among these gifted students should be admitted to TJ considering a variety of factors, including how a student may contribute to sustaining a well-rounded and diverse community of learners at TJ.<sup>10</sup>

Domenech is an administrator and a “politician” rather than a scholar. He is inclined to employ euphemisms and code-words, to obfuscate and dissemble. So, though I believe this paragraph actually does contain the essence of his position it requires some deciphering.

With respect to the question of racial discrimination, the heart of his position comes in the final clause of the final sentence where Domenech employs the word “diverse.” In the context in which it appears this is a codeword. With its use he tacitly admits the obvious, that race is used to discriminate among applicants.<sup>11</sup> He believes that somehow if the factual predicates he asserts in the three sentences that precede it are satisfied this justifies establishing admissions committees to “look at the ‘whole person,’” a euphemism meaning they are to have unfettered discretion, including discretion to discriminate on the basis of race, and to do so without it being so named or bearing any opprobrium.

Are his predicates accurate, and if so does that justify broad unfettered discretion to engage in a variety of sins including racial

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<sup>10</sup> Domenech, *supra* note 1, at 269.

<sup>11</sup> I note in passing that Domenech is now providing an entirely different rationale (“diversity”) for putting a thumb on the scales to favor “minority” applicants than he does in the Guidelines to the admissions committees. The Guidelines state:

Standardized testing for minority students does not necessarily reflect their abilities.

The scores may be depressed. If test scores are low, then determine judgments from other indicators of success (grades, teacher recommendations, writing, and activities).

As I noted in my earlier article, “[t]he empirical claim that standardized tests underpredict minority performance is not only unsupported both in [The Guidelines] and in the empirical literature on testing it is actually directly *contrary* to that literature.” Cohen, *supra* note 2, at 469, n.40 and accompanying text.

discrimination?

### III. IS THE POOL OF 800 INTELLECTUALLY HOMOGENEOUS?

Immediately after presenting his SEM data Domenech states: “[t]he overlapping nature of any two bands means that the students could easily have had the other rank.”<sup>12</sup> Then on the next page he morphs this into the assertion that “the vast majority of students in the pool of 800 semifinalists have no meaningful differences in their levels of academic skills and achievement.”<sup>13</sup> The first statement, an observation about the sensitivity of the test, albeit imprecise and seriously misleading, is not entirely inaccurate. It does not, however, imply the second, an empirical claim about the fungibility of the applicants, for which he supplies no independent support, and I will argue is thoroughly false.

#### A. *How Imprecise are the Test and the Index?*

As to the sensitivity and power of the index itself, Domenech misleads the reader on a number of scores. First, he confounds the standard error of each portion of the test with the standard error of the index. The index is not based on a single portion of the admissions test, but rather is a linear combination of the scores on each portion of the test and middle school GPA. By focusing on each component of the test instead of the index as a whole, Domenech has in effect shortened the test, thereby exaggerating its unreliability.

More fundamentally, he offers us no insight into the practical meaning of a given SEM. He states with respect to a gap between two applicants of one SEM “that the students could easily have had the other rank.” How easily? Domenech provides no probability number. By my calculation the probability is 2.56%,<sup>14</sup> or if we generously reinterpret his words, 7.8%.<sup>15</sup> So yes it is possible that

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<sup>12</sup> Domenech, *supra* note 1, at 267.

<sup>13</sup> Domenech, *supra* note 1, at 269.

<sup>14</sup> Assuming normality, the probability that the higher scoring applicant would score one SEM or more lower the second time around is 16%. The probability that the lower scoring applicant would score one SEM or more higher the second time around is an identical 16%. Hence the likelihood that both events would take place, that is that they would switch places (or more), is  $(.16)^2 = .0256$ .

<sup>15</sup> Perhaps we should interpret his words more loosely to mean not that the two applicants take on one another's ranks but rather that the one SEM difference in their scores is reversed the second time around. If so the calculation of the probability is as follows. The scores of the two applicants may be labeled A and B. The difference between their two scores is then A - B. The variance of (A - B) = variance of A + variance B - (2 x Covariance A, B). Domenech

their relative ranks are actually reversed, but not very probable. Still more fundamentally and more importantly, he neglects a symmetrical point. As a matter of mathematical logic the probability that the rank ordering of the two candidates remains the same and that the gap between them grows to three or more times its former size the second time around is exactly the same 7.8%. And what is the unbiased estimate of the underlying spread between two applicants who test one SEM apart? Surprise, it is one SEM!

Domenech's entire discussion of SEMs and the unreliability of the index is a distraction to clear thinking about whether and when to employ the index or something like it. Remember Henny Youngman's famous answer to the question "How's your wife?" "Compared to what?" Four hundred and fifty students will be admitted to TJ each year and over five times that number will be rejected. Some criterion must be used. Are Domenech's elephantine herds of committees a more predictive method than the index? He offers no evidence to support this.

There is more than a little deceit in Domenech's position that the index score is so unreliable that it must be set aside in favor of the judgment of special education teachers bringing their mathematical insight to bear on expurgated files. If the index is so unreliable then why is it his *sole* basis of rejecting fully 70% of the applicants out of hand? Why is it the *sole* basis of assigning the three hundred files for review by each committee? Finally, why is it that it tracks so powerfully which students his committees choose to admit to TJ? In the year in question fully 99% of those in the top 100 on the index were admitted while ever decreasing percentages of each successive hundred were admitted, culminating in 20% of the final hundred. Each of these uses of the index demonstrates that Domenech, himself, views it as an ethically and pedagogically sound measure. How can he now claim that it is so unreliable that it must be abandoned in the second stage of the process?

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unfortunately provides the reader with no information to calculate the size of (covariance A, B). While there is reason to believe that it is positive, I will assume in Domenech's favor that it is zero. Because A and B are random variables drawn from the same distribution they have the same variance. Hence variance  $(A - B) = 2 \times$  variance of A. Therefore the SEM of  $(A - B) = \sqrt{2} \times$  SEM of A. The switch in ranks of two individuals who are one SEM apart requires a jump of two SEMs. So dividing 2SEM by  $\sqrt{2} \times$  SEM yields  $\sqrt{2} = 1.414$ . Making the standard and reasonable assumption that  $A - B$  is approximately normally distributed means that 7.8% of the distribution lies at or above 1.41 standard deviations from the mean.

*B. How Homogeneous are the Applicants?*

Domenech morphs his argument that the objective data do not distinguish well among the applicants, into the assertion that there is precious little difference among them. This is an entirely different and more important question than whether the test is reliable.

Consider the following illustration. Imagine that the three thousand applicants were being ranked by height, and that the means of measuring their height was to have them speak to a blind person who would judge their height from the direction of their voice. Employing this measure—one, far more inaccurate than the TJ admissions test and index—we cull the field down to eight hundred. Would it be reasonable to conclude from the fact that our method of estimating height is very unreliable, that is, that its SEM is very large, that there is very little difference in the height of the eight hundred who remain in the pool? Of course not.

So too with regard to TJ. Even if we were to grant that the SEM of the index is large—whatever that might mean—it implies nothing about the intellectual homogeneity of the 800 pool. To answer that question Domenech would have had to look at an entirely different set of data, perhaps something that measures how well the students perform in high school and beyond, such things as scores on the SAT I, SAT II, AP classes taken, AP scores, etc. At present I have no access to this data;<sup>16</sup> I can only offer some statistical theory and casual empiricism to answer the question of how homogeneous is the pool of 800.

Both the psychological theory of intelligence and its empirical measurement commend the view that the distribution of intellectual talents within broad populations is approximately normal. The density of a normal distribution shrinks precipitously the further out in the tail one goes. And it is in the very tip of the tail of the intellectual distribution that TJ fishes; the entire 800 pool represents a measly 4% of the eighth grade population. So even if every eighth grader who could qualify for the 800 pool has done so, these 800 will have greater intellectual dispersion than any other slice of 800 in the distribution. What bizarre sort of distribution of intellectual talent does the Superintendent imagine he is drawing from, one in which there is a distinct group of superstars and

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<sup>16</sup> It would require another FOIA request and I have no expectation that the Superintendent would surrender it willingly.

everyone else is more or less the same?

On the level of casual empiricism I note that some of the kids at the school are science and mathematics prodigies who win national competitions, others merely superb students, and still other quite intellectually ordinary. The variation in intellectual talent is also demonstrated by scores on the PSATs and SATs. From what I have gathered from conversations with TJ kids and some publicly available information, the SAT spread is in the range of 400 to 500 points. And after TJ some of the kids go on to be academic stars at Cal Tech and the like, while others drop out of mediocre colleges.

It is mere cant and deceit to suggest that in terms of academic potential the “vast majority” of the eight hundred pool is effectively a homogeneous mass and that it makes little difference who is chosen.<sup>17</sup>

This then leads us to the next bit of humbug in the Superintendent’s statement that “[t]hese extremely talented students are all qualified and likely to succeed at TJ.” “Qualified” is employed as a rhetorical device in the debate over racial discrimination to persuade the audience to accept treating qualifications as a binary variable, that is, either the applicant is “qualified” or he is not. Because all who remain in the pool after this cut are presumptively “qualified” no further cognitive discrimination should occur. To whittle the field down further now requires the substitution of some alternative criterion of discrimination. Enter race!

The notion that people might either be qualified or not, and that further distinctions are not sensible or useful, has a superficial appeal when applied to certain kinds of employment, those which do not make heavy cognitive demands. It actually is probably misplaced even there; performance in virtually every human endeavor is a positive function of intelligence.<sup>18</sup> But to apply it to admissions at TJ is patently ridiculous.

“Qualified” has become so embedded in the argot of these debates that Domenech does not recognize how comically absurd it is to treat applicants to the premier math and science high school as

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<sup>17</sup> The Superintendent apparently needs to police his minions to ensure that they all adhere to the party line. On September 26, 2003 at a meeting of the TJ Student Services Committee, its director Nina Pitkin in response to a suggestion by a parent to accelerate the curriculum responded that there was already a wide range of ability within TJ, and many kids couldn’t handle that type of academic program.

<sup>18</sup> See, e.g., R.A. Gordon, *Everyday Life as an Intelligence Test: Effects of Intelligence and Intelligence Context (“Life As A Test”)*, 24:1 INTELLIGENCE 203 (1997) and articles cited therein.

either qualified or not. The very purpose of the school is to educate the intellectual elite. Such a goal by its very nature requires an irretrievably relative standard. If next year we get four hundred and fifty Gausses applying to TJ then Ramanijan, Hardy, and Fermat will simply be unqualified second raters.

IV. IF THE 800 POOL IS HOMOGENEOUS, DOES THIS JUSTIFY  
COMMITTEE DISCRETION AND RACIAL DISCRIMINATION?

Even if Domenech's ludicrous position on the question of intellectual homogeneity were correct and therefore that the weight of the thumb on the scale favoring black applicants is light because the differences among applicants is slight, does this do anything to advance his case that there is no racial discrimination at TJ?

Consider the following hypothetical example. Imagine that there are eight hundred people in need of a kidney transplant, and there are 449 kidneys available. I will make the example even more favorable to the Superintendent's position than his characterization of the TJ case. Unlike the Superintendent we need not equivocate with words like "similar," "meaningful," or "nearly," all these 800 kidney patients are, as best we can tell, medically identical. So now I ask the reader whether using race to determine who will be allocated a kidney among these eight hundred is racial discrimination? Is it not the very definition of racial discrimination, to discriminate, to differentiate, to separate, on the basis of race?

The Superintendent's elephantine labor pains on the subject of measurement errors yield him but a mouse, and a dead one at that. If the use of race to discriminate among kidney patients whose medical merit is *identical* is racial discrimination, then the use of race to discriminate among candidates for admission to TJ whose academic merit is "nearly" the same can not be less so.

I was both shocked and surprised by the Superintendent's chosen justification for the broad discretion he claims for his committees. I had thought that he would defend it on the more ethically, legally and politically justifiable ground that there was information about academic merit that could not be reduced to objective measures, that it required the subtle nuanced judgment of human beings.<sup>19</sup> It

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<sup>19</sup> In addition to reflecting common sense, my assumption of the putative purpose of, and justification for, the committees is expressed in the Superintendent's own Guidelines which state: "Committee members are to make the determination for admission based on their best professional judgment of the student's aptitude, achievement, interest and motivation." Cohen, *supra* note 2, at 459.

is in that spirit that at George Mason University School of Law we do not rely on quantitative measures such as law school rank or number of publications in hiring new faculty. We talk to them, read their scholarship, and have them present a workshop—where we try to make them cry. Believing that was Domenech's justification, I argued that his herds of special education teachers and guidance counselors examining the paltriest bits of information to decide who would be the most gifted math and science student was comic and absurd.

But no, this time around he does not defend his regime on the grounds of the need for subjective judgment of academic merit, but more nearly the opposite. Domenech now takes the position that these 800 candidates are nearly intellectually identical and so academic merit can simply be abandoned as a criterion. Then, instead of employing some other race-neutral and impartial means of choosing among these equally worthy children, he embraces this supposed intellectual equivalence as a justification to simply assert discretion to indulge his own social and political agenda.

There is further deceit in the Superintendent's position that "the admissions process must take a closer look at the 'whole person.'" Domenech tries to convey the image of committees engaged in a rich, nuanced analysis of the candidate's personality and character. But from what are they to glean this? The only additional bits of information the committees have are letters of recommendation from largely anonymous teachers, three very short essays on questions such as "If you could un-invent one thing what would it be?" and personal data sheets that are mere lists of extra-curricular activities with an emphasis on math and science. The committee guidelines themselves instruct to be chary of giving undue weight to these factors. While we should be thankful that the committees have too little information to indulge in the unconstrained appraisal ascribed to them by the superintendent, they do have one piece of unexpurgated data about the "whole person" on which to make their judgment, the race of the applicants.

The Superintendent misconceives the heart of the case for exclusively employing an objective measure of academic merit. He imagines that it rests on some ultimate question of how best to provide a hothouse for the intellectually strongest students in the region. He believes that if he can finesse that question by arguing that everyone in the 800 pool is more or less equally talented, he gains a free hand. He is attacking the wrong target; the use of objective standards has a much stronger claim than merely being

the surest path to enhancing and preserving the intellectual excellence of TJ.

While the Superintendent's committee system certainly intellectually damages the school, the practical effect of making a few switches within the pool of 800 should be small, and more importantly there is nothing morally or legally compelling about preserving TJ's academic excellence. No, what fires our blood, the principal reason TJ should choose its students on an objective measure of academic merit, is that that is the only way to vindicate the rights of these children to equal and impartial treatment before the law. Doing otherwise is a grievous wrong to those innocent children who were bumped out of their place in line for some invidious non-intellectual reason. Which should we prefer, a system which grants government officials broad discretion to indulge their tastes, whims, prejudices, and self-interest, or one that ties compels them to employ a fixed rational standard and limits their opportunity to abuse their discretion?

The Superintendent has no humility about the power he may wield. Rather than being reticent to arrogate to himself and his appointees powers too likely to be abused, he eagerly embraces them. The discretion he would wield is so unconstrained that it even countenances racial discrimination. What will it not allow?

#### V. AN ASIDE ON DIVERSITY

Diversity as the term is used in the current discourse about racial discrimination simultaneously takes on two distinct meanings. The original meaning, as still nominally adhered to in legal opinions, is as a putative justification for racial discrimination. But given that it is now the political and legal justification of choice, it has morphed its meaning into the racial discrimination itself.

The justificatory instrumental definition of diversity runs like this. We place a very high pedagogical value on the voicing of diverse, often disturbing and hostile views in the classroom. People of different races and ethnicities have radically different life experiences and thus will provide those diverse voices. Racial discrimination is merely the necessary means to provide the students with those diverse and challenging voices.

There is much wrong with this argument, but I will address none of it. I simply want to suggest that for most of the people who express these views this diversity rationale is no more than a convenient figleaf, and one that they often forget to wear. So it is at

TJ.

If exposing TJ students to diverse views was really such an important value—such a compelling interest—that it justifies racial discrimination against children, that openness to diverse voices would express itself in other ways. Thus, when I was invited by the president of the TJ student government to present it at the school the principal would undoubtedly have congratulated the president for bringing a fresh new viewpoint, and one counter to that of the administration, to the student body. She would not merely have tolerated my appearance, not only accepted it, she would have celebrated it. But no, instead she cancelled my presentation and accused the president of the student government of promoting hate speech.

To Domenech and his supporters diversity is not an instrumental justification for racial discrimination, it is the discrimination itself. And so they often forget their story—especially when the opportunity arises to actually hear a different point of view.

#### VI. DOMENECH'S ANGER: EXPOSING SHAMS & DARK CLOUDS

Domenech is clearly very angry with me, so angry that he resorts to a fifth grade school yard insult in the title of his article. But why?

Prior to 1998 racial discrimination in TJ admissions was transparent and explicit. That policy was subsequently abandoned because it was also believed to be illegal. In its place evolved a dishonest, opaque system that endeavors to conceal and mystify the actual criteria applied. The objection to my study, in large measure, is that it constitutes an effort to de-mystify and make transparent the purposes/effects of the process, and in doing so, it upsets the chief purpose behind the arcane design of the process in the first place. Now under pressure Domenech wishes to perpetrate a linguistic and cognitive revolution in the meaning of racial discrimination. His new rule is, if you do it only a little, and it is in a "good" cause then it doesn't count. He is angry because I have the bad taste to demur.

Domenech is also angry because he believes that I have humiliated and defamed the black students at TJ. He is at least partially correct; the black students are humiliated. But it is not by my accusation of racial discrimination but by its perpetration. At TJ, as throughout the nation's academic institutions, the suspicion, indeed conviction, that race matters in determining who is admitted

and who rejected, has been in the air for years. And if race matters then all will wonder how heavy a thumb is placed on the scales. In the absence of convincing evidence to the contrary they will assume the worst.

The lesser harm in all this for the black kids is that others will doubt whether they are worthy of admission, the greater is that they—like all of us from time to time—will doubt their own merit. Given the pervasiveness of racial double standards, not merely at TJ but in the nation as a whole, they will have few resources to draw upon to reassure themselves.

Consider the following:

I am a black student at TJ. . . . I often find myself wondering if I really got into TJHSST based on my academic achievement; although I am doing very well, the feeling is still present. I believe that no minority student should have to be put into my situation.<sup>20</sup>

This posting to a website was not written in opposition to my article, but rather to the superintendent's earlier proposal to use geographical quotas to achieve his cherished goal of ethnic gerrymandering. Yes, there is a cloud hanging over the accomplishments of the black kids at TJ. What Domenech has blinded himself to is that he is the one responsible for it. His explicit and implicit efforts to impose racial double standards robs minority children of their dignity and their confidence. And he darkens that cloud with every soviet style pronouncement that there is no racial discrimination and no meaningful difference among those in the pool of 800. As the Bard said, 'methinks the Superintendent doth protest too much.'

The irony is that in this case the truth is not that bad. There is no racial discrimination at the first stage of the process and massive discrimination at the second. But, because the first stage is so effective in eliminating the intellectually weakest from the field the differences in qualifications among those who remain in the bottom 2/3 of the pool, though real, are not immense. Moreover, there is something serendipitous as to where in the pool of 800 the black kids will pop up in any given year. While the admissions regime will move mountains to admit them wherever in the pool they lie, it is possible in a given year that almost all of them will be situated high in the food chain. In the data set I examined, the class of 2006,

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<sup>20</sup> Anonymous Posting to Tjhsst.com (Feb. 26, 2003), at <http://tjhsst.com> (last visited Nov. 21, 2003).

the difference in qualifications of the black students was not especially large, certainly not when compared to the results produced by the egregious admissions policies at most universities and professional schools.

## VII. MINIMAL LEGAL ANALYSIS

The Superintendent criticizes my article for containing “minimal” legal analysis. I take deep umbrage at that insult. My analysis was not minimal; it was non-existent! So this time around I will supply a minimal legal analysis.

The Superintendent apparently believe that the Supreme Court’s recent decisions in the University of Michigan law school racial preference case, *Grutter v. Bollinger*<sup>21</sup> can be used to justify the use of racial preferences in admissions to Thomas Jefferson High School.

It is unlikely that “diversity” will be accepted as a compelling interest in the K-12 context, even though it was in higher education. The Court stressed at the beginning of its decision in *Grutter v. Bollinger* “the expansive freedoms of speech and thought associated with the university environment” and that “universities occupy a special niche in our constitutional tradition.”<sup>22</sup> It is much less likely that the justices will give the deference to every local school board that they felt they had to give to the officials running one of the nation’s largest and most prestigious universities. Even Harvard University’s left-of-center Civil Rights Project has acknowledged that the need for a “robust exchange of ideas” in the classroom—likewise stressed by the Court—“is less applicable to education in the lower grade levels.”<sup>23</sup> Finally, the Court thought it important that there be minority access to the learned professions. Attendance at such institutions is discretionary. Were the minority students not admitted to the University of Michigan School of Law they might not attend law school at all; but K-12 “balancing” schemes do not result in a net increase in minorities getting an education.

Of course, even if it were *permissible* for schools to sort children according to race, there is nothing in the Court’s decision to *require*

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<sup>21</sup> 123 S. Ct. 2325 (2003).

<sup>22</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>23</sup> Joint Statement of Constitutional Law Scholars, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases*, C. R. Proj. at Harv. U., 26 (2003), at [http://www.civilrightsproject.harvard.edu/policy/legal\\_docs/Diversity\\_%20Reaffirmed.pdf](http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf).

such a divisive, unfair, and unwise policy, with all its attendant costs, in terms of money, parental involvement and support, and so forth. In sum, the Court's recent affirmative action ruling has removed few if any of the legal objections to race-based student assignments, and absolutely none of the policy objections.

With respect to TJ, there is an additional consideration. For years, it has been clear that many officials have wanted to use racial and ethnic preferences, and have been willing to use any justification, no matter how tenuous, to do so. This context makes it likely that a belated embrace of the "diversity" rationale<sup>24</sup> will be seen for what it is: a pretext for guaranteeing a particular, politically correct, racial and ethnic mix. As the Court warned in *Grutter*, "[t]hat would amount to outright racial balancing, which is patently unconstitutional."<sup>25</sup>

Because I have no expectation that my words will persuade the Superintendent I will be urging the Department of Education's Office for Civil Rights to take prophylactic action to prevent further violation of Title VI of the 1964 Civil Rights Act, which forbids recipients of federal money from engaging in discrimination on the basis of race, color, or national origin.

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<sup>24</sup> See Section V, *supra*; nn. 10 & 17 *supra* and accompanying text.

<sup>25</sup> *Grutter*, 123 S. Ct. at 2339.