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An Assessment of Affirmative Action in Law School Admissions After Fifteen Years: A Need for Recommitment

Leo M. Romero

Introduction

Law schools have been admitting minority students through affirmative action programs since the late 1960s. The number of minority students matriculating in American law schools increased significantly as a result of affirmative action. Nearly three thousand or 4.3 percent of the 68,386 students enrolled in 1969-1970 were members of minority groups.¹ By 1982-1983, the number and percentage of minority students had increased to 11,611 and 9 percent of the law school population of 127,915.² The percentage of minority applicants enrolled in the first year of law school jumped from 4.2 percent in 1969-1970 to 10.5 percent in 1982-1983.³

After fifteen years of experience with affirmative action in law school admissions, it is appropriate to evaluate the results and to determine if affirmative action is needed in the future. The increase in the number and percentage of minority students enrolled in American law schools over a fifteen year period reflects some success of affirmative action. This article will question whether the increase to date in minority enrollment in law schools is satisfactory and, second, will demonstrate that a recommitment to affirmative action is necessary to improve the percentage of minority law students. This article will not restate the positive values that justify a diverse

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1. These data were taken from a Table of Applicant and Student Demographics appearing in the "Law School Admissions Council, A Retrospective," prepared by Thomas White for the National Invitational Conference, Law School Admission, 1984-2001: Selecting Lawyers for the 21st Century, November 3-6, 1983. The data on minority enrollment are collected annually by the Consultant on Legal Education to the American Bar Association, James P. White, as part of the annual survey of law schools by the Section of Legal Education and Admission to the Bar. The figures on minority enrollment appear in the Survey of Minority Group Students Enrolled in J.D. Programs in Approved Schools.

2. *Id.*

3. *Id.*

legal profession which includes within its ranks lawyers who come from the most identifiable segments of society.⁴

Evaluation of the Results of Affirmative Action

The number of minority students admitted to law school over the past fifteen years represents a laudable step toward a significant increase in the number of minority lawyers. The number and percentage of minority law students in 1982-1983, however, falls short of producing an acceptable number of minority lawyers in the United States. Law schools need to increase the percentage of matriculating minority students if the legal profession is to include more than a token representation of minority lawyers.

In spite of affirmative action programs in law school, the legal profession is still underrepresented by many of the minority groups. Blacks, Mexican-Americans, American Indians, Asians, and other minority groups comprised 16.8 percent of the United States' population in 1980.⁵ By comparison, the 600,000 lawyers in the United States included less than 30,000 minority lawyers.⁶ The Bureau of the Census reported that in 1980 there were approximately 15,600 black, 8,900 Hispanic, 3,700 Asian and Pacific Islander, and only 900 Indian lawyers in the United States.⁷ Although the minority population constitutes nearly 17 percent of the population, minority lawyers represent only 5 percent of the legal profession.

Need for Affirmative Action

Affirmative action programs are essential to preserve the gains in minority enrollment and to increase the percentage of minority lawyers. Without a commitment to affirmative action, the quantifiable admissions criteria, the Law School Admission Test (LSAT) and Undergraduate Grade Point

4. See, e.g., Derrick A. Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 U. Tol. L. Rev. 539; Robert M. O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U. Tol. L. Rev. 281; Charles A. Pinderhughes, *Increasing Minority Group Students in Law Schools: The Rationale and the Critical Issues*, 20 Buffalo L. Rev. 447 (1971); Haywood Burns, *Racism and American Law: A New Course in Legal History*, 1970 U. Tol. L. Rev. 903; Walter J. Leonard, *Bakke: Extending the Dream Deferred*, in *Towards a Diversified Legal Profession*, ed. David M. White, 1 (San Francisco, 1981); Allan Nairn, *Standardized Selection Criteria and a Diverse Legal Profession*, in *id.* at 366; Kenneth S. Tollett, *Black Colleges as Instruments for the Study of Affirmative Action* (Washington, D.C., Institute for the Study of Educational Policy, Howard University, 1982); Kenneth S. Tollett, *Affirmative Action in Law Schools: The Declining Concern for the Interest of Blacks and Other Disadvantaged Groups* (monograph prepared for the National Invitational Conference, Law School Admissions, 1984-2001: Selecting Lawyers for the 21st Century, November 3-6, 1983).

5. U.S. Bureau of the Census, *1980 Census of Population, Supplementary Report*, P.C. 80-51-1.

6. Faye A. Silas, *Business Reasons to Hire Minority Lawyers*, 70 A.B.A. J. 52, 53 (1984), citing data from the U.S. Bureau of the Census, 1980 Census.

7. *Id.*

Average (UGPA), will reduce the number of matriculating minority students from the levels reached in 1982-1983.⁸

The hope that affirmative action would be necessary for a short period of time before minority students could compete on an equal footing with white applicants, unfortunately, has not been realized, largely because the pool of minority applicants from which law schools draw has not increased significantly and has not produced a sufficient number of minority applicants whose admissions credentials are high enough to compete effectively with white applicants for admission to law school. Disturbingly high dropout rates for black and Hispanics in high school and college have prevented any significant growth in the college pool of minority students. In 1980, for example, only 54 percent of Hispanics between 18 and 24 were high school graduates compared to 83 percent for whites.⁹ In 1981, the college completion rate of 25-year-old Hispanics was 7.7 percent, for blacks, 8.2 percent, and for whites, 17.8 percent.¹⁰ Moreover, a serious erosion occurred between 1975 and 1980 in the rates of black and Hispanic college enrollments as a percentage of the high school graduates in their populations.¹¹ The dropout rate for black and Hispanic college students is even more alarming. Between 45 and 50 percent of the blacks and Hispanic students drop out during the first two years of college.¹² In fact, blacks and Hispanics received only 6.4 percent and 2.3 percent respectively of the baccalaureate degrees awarded in 1980.¹³

Demographic studies of high school and college minority populations suggest that the pool of college graduates from which law schools draw will continue to have insufficient minority members to warrant abandonment of affirmative action for many years. Indeed, the Law School Admission Council's Minority Enrollment Task Force in *The Challenge of Minority Enrollment, Seeking Diversity in the Legal Profession* recognized that "a significant improvement of minority enrollment depends upon . . . an expansion of the potential minority applicant pool."¹⁴ The Law School Admission Council thus approved a challenge grant program which in part is designed to increase the minority applicant pool through a variety of recruitment programs.¹⁵ Although the "Challenge Grant" program may

8. See Franklin R. Evans, Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall of 1976 in Law School Admission Council, Reports of LSAC Sponsored Research: Vol. III, (1975-77) 531, 636 (Princeton, N.J., 1977).

9. Ian McNett, Demographic Imperatives: Implications for Educational Policy 16, Report on the June 8, 1983, Forum on The Demographics of Changing Ethnic Populations and Their Implications for Elementary-Secondary and Postsecondary Educational Policy (Washington, D.C., 1983).

10. *Id.*

11. *Id.*

12. *Id.* at 17.

13. American Council on Education, Minorities in Higher Education, Second Annual Status Report 11 (Washington, D.C., 1983).

14. Law School Admission Council, *The Challenge of Minority Enrollment, Seeking Diversity in the Legal Profession* 5 (Washington, D.C., 1981).

15. Law School Admission Council, *Minority Enrollment Challenge Grant Guidelines 1983-84* 1-2 (Washington, D.C., 1983).

yield a larger pool in the future, the prospects for the immediate future do not appear promising in view of current demographic figures. The number of minority college graduates will not increase significantly for the foreseeable future. Furthermore, minority group members traditionally have not scored as well on the Law School Admission Test (LSAT) as white applicants.¹⁶ Because the LSAT is an important criterion for evaluating applicants to law school,¹⁷ the number of minority students admitted will be unacceptably low unless law schools use other factors for assessing the ability of minority applicants to successfully complete law school.¹⁸

A debate concerning the predictive value of the LSAT for success in law school¹⁹ is unnecessary to recognize its clear effect on minority applicants: Substantial reliance on the LSAT in the admissions process limits the number of minority group members who will be admitted to law school.

Several factors explain the concern of law schools to admit a student body with high quantifiable credentials—a concern that induces overreliance on the LSAT in the admissions process. A high average or median LSAT score is considered a prestige factor. Law schools view their relative prestige in part by reference to the quality of their student bodies, and they measure in significant part the quality of their student bodies by the LSAT average or median.²⁰ The accreditation system increases the incentive of law schools to admit applicants on the basis of high LSAT scores because the average LSAT score is used, at least indirectly, in evaluating the quality of the student body. Although a high LSAT average is not a criterion for accreditation, law schools must supply the median, highest, and lowest LSAT scores for their student bodies in the accreditation questionnaire.²¹ The relevant accreditation standard requires law schools to “determine

16. See Law School Admission Council, *supra* note 14, at Appendix D, Table 16, where the percentages of whites, blacks, and Chicanos scoring at different LSAT levels are given. See also Joseph Gannon, *College Grades and LSAT Scores: An Opportunity to Examine the “Real Differences” in Minority-Nonminority Performance*, in White, *supra* note 4, at 273, where his study of law school applicants from the same undergraduate schools found that minority applicants earned LSAT scores approximately 100 points below white applicants. See also James C. Hathaway, *The Mythical Meritocracy of Law School Admissions*, 34 J. Legal Educ. 86 (1984).

17. The correlation between LSAT scores and acceptances indicates that the percentage of acceptances is higher for high LSAT scores. For example, in 1977-1978, of the 184 blacks who scored above 600 on the LSAT, 172 or 93 percent were accepted. Of the 27,222 whites who scored above 600, 23,656 or 87 percent were accepted. The percentages of acceptances decline with the LSAT score. See Law School Admission Council, *The Challenge of Minority Enrollment*, *supra* note 14, at Appendix D, Table 16.

18. See note 8 *supra*.

19. See, e.g., David M. White, *An Investigation into the Validity and Cultural Bias of the Law School Admission Test*, in White, *supra* note 4, at 66; Hathaway, *supra* note 16, concludes from a study of students admitted to the Columbia University School of Law, that “correlations between LSAT score and student performance over the course of the J.D. program indicate that the test is a particularly inaccurate predictor of academic success for various subgroups including men, younger students, and members of racial minorities.”

20. Any ranking of law schools is questionable, but it is common for law schools in newsletters to alumni to compare themselves to others in the region or in the nation by reference to comparative LSAT averages.

21. See Question 29(d), Section 5, of the American Bar Association, Section of Legal Education and Admission to the Bar, Fall 1983 Law School Annual Questionnaire.

whether an applicant is adequately equipped for the study of law upon the basis of the undergraduate academic record, an admission test score, training, experience, and other indicia of aptitude for the study of law."²² The accreditation committees view with concern a student body whose average LSAT is around 500 on the 200-800 scale, especially when viewed in conjunction with a low attrition rate. A low average LSAT score may suggest that the law school is accepting students who are not adequately equipped for the study of law and, therefore, that the school may not be in compliance with accreditation standards.

Data accumulated by the Council on Legal Education Opportunity (CLEO) suggest that the LSAT and UGPA should not be used exclusively in determining admission to law schools. Formed in 1968 to increase the enrollment in law schools of students from economically and educationally disadvantaged backgrounds, CLEO enabled some 2,600 minority applicants to matriculate between 1968-1979.²³ The CLEO students admitted to law school during this period had an average LSAT score of 422 and an average UGPA of 2.76.²⁴ The typical CLEO student scored between 350 and 575.²⁵ The LSAT average was substantially below the entering classes at all law schools. For example, the national mean LSAT score for the October 1980 LSAT administration was 551.9.²⁶

Despite lower LSAT scores, a high percentage of the CLEO students graduated from law school. Of 2,015 CLEO students admitted to law school between 1968 and 1976, 1,410 had graduated by 1979.²⁷ Because these figures do not include the graduation history of the CLEO entering class of 1976, the graduation rate of CLEO students was significantly higher than the 70 percent rate evidenced by these data.

The CLEO experience demonstrates that a wide range of LSAT scores indicate an ability to do law school work. It is true that the lower the LSAT score, the greater the risk of failure in law school;²⁸ and perhaps at the level of very low scores the risk is sufficiently high to warrant denial. The experience of CLEO students, however, suggests that the risk of failure for applicants scoring between 400 and 525 is relatively low, even though such applicants present a higher risk than higher scoring applicants.

Even assuming that the dropout rate for CLEO students is higher than the attrition rate for white law students, the admissions policies that favor minority students with lower LSAT scores should not be abandoned or cut

22. Association of American Law Schools, Association Information, Article 6, Section 6-2a of the Bylaws (Washington, D.C., 1983).

23. Wade J. Henderson & Linda Flores, Implications for Affirmative Admissions after Bakke: Preliminary Analysis of Academic and Bar Performance of Council on Legal Education Opportunity Program Fellows, 1968-1978, in White, *supra* note 4, at 31, Table II.

24. *Id.* at 37. Tables IV and V.

25. David M. White, Preface, in *id.*, at vii.

26. Henderson & Flores, *supra* note 23, at 36.

27. *Id.* at 31, Table II.

28. See W. B. Schrader, Summary of Law School Validity Studies, 1948-1975, in Reports of LSAC Sponsored Research, *supra* note 8, at 519.

back. Indeed, the graduation of over 70 percent of the CLEO students, viewed in the context of the desirability of having more minority lawyers in the profession, supports an expansion of affirmative action.²⁹ The odds favor the graduation of minority applicants admitted with an average LSAT score of 422. Although the cost in terms of time, money, effort, and emotional investment to those students who fail to graduate is high, the professional and societal interest in increasing the number of minority lawyers justifies the costs inherent in the failure for some and outweighs the costs to law schools.

Law schools can minimize the attrition rate for minority students, moreover, by creating special programs or courses designed to assist them. A number of schools have successfully initiated innovative programs which help the minority student admitted with a lower LSAT score.³⁰ Special programs include tutorials, writing programs, courses in legal analysis, and assistance in the development of effective study habits. The Law School Admission Council's "Minority Enrollment Challenge Grant Program" specified as one of the suggested projects in its guidelines for grant proposals, "Programs to improve retention and enhancement of performance of minority law students, especially specialized writing programs designed to assist minority law students in their pursuit of a legal career."³¹ In fact, one of the first four challenge grants awarded went to a law school for an internship program with law firms and agencies "to provide the same quality legal education that is associated with law firm 'in-house' training programs, judicial clerkships and public agencies."³²

Although some stigma may be attached to minority students' entering law school through an affirmative action program and participation in special programs, this should not lead to a cutback in minority admissions or in special programs. Any stigma is, or should be, dissipated by the requirement that all students meet the same standards for graduating and for entering the profession. A sense of self-esteem in law school comes not from one's LSAT score, but upon one's grades in competitive courses. Performance on examinations thus becomes the measure of a student's ability. More important, any initial stigma is a cost worth paying when balanced against the goal of increasing the number of minority lawyers.

The LSAT, however, is not the only measure of ability to study law. Indeed, the accreditation standards recognize that it is but one of the criteria for assessing aptitude for law study. The undergraduate record, training, and experience are among the other indicia of aptitude for the study of law according to the Bylaws of the Association of American Law Schools.³³ The

29. See text accompanying note 27, *supra*.

30. See, e.g., Leo M. Romero, Richard Delgado & Cruz Reynoso, *The Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict*, 5 N.M. L. Rev. 177, 222 (1975), for a description of the types of special programs offered.

31. Law School Admission Council, *Minority Enrollment Challenge Grant Guidelines 1983-84* 2 (Washington, D.C., 1983).

32. Law School Admission Council, *Law School Admission Bulletin* 5 (April 1984).

33. See text accompanying note 22, *supra*.

Law School Admission Council in fact cautions law schools to avoid undue reliance on the LSAT in the admissions process.³⁴

Relative aptitude for the study of law, whether measured by the LSAT, UGPA, or other information about applicants, should not be the sole determinant of admission to law school. Although, the accreditation standards require a determination that an applicant is equipped to study law, they do not require that only the most equipped should be admitted.³⁵ Notions of merit may suggest that those applicants with the greatest aptitude for law study be admitted, but other factors such as racial diversity and resident status also should have consideration. Moreover, attributes other than intellectual ability are equally important in a good lawyer. A good lawyer must be adept at human relations and capable of becoming skilled in certain areas of practice.³⁶ These and similar attributes, worthy of consideration in the admissions process, are not measured by the LSAT. Reliance on the "objective" criteria of the LSAT and the UGPA assume that intellectual ability is the full measure of qualified for the study of law.³⁷

Conclusion

Law schools should not submit to the pressures of prestige, accreditation, stigma, or figures of merit that look only to academic aptitude in the admissions process or minority applications will be admitted in only token numbers. Nor can law schools ignore the problem of an applicant pool that includes an insufficient number of minority applicants whose credentials are competitive in terms of LSAT scores. Law schools have a moral and professional obligation to diminish the influence of the LSAT and to give weight to other factors that admit an increasing number of minority students to law school and the legal profession.

If racial and ethnic diversity is important in the profession, law schools should be willing to take a chance on the "higher risk" students. The higher risk is justified by the fact that most minority students accepted through the CLEO program have succeeded in graduating from law school, passing a bar examination, and in serving society in a variety of legal positions. Law schools have both a social and moral obligation to take calculated risks and accept minority applicants who are "equipped to study law."

34. Law School Admission Council, *Cautionary Policies Concerning the Use of (I) The Law School Admission Test (LSAT), (II) The Law School Data Assembly Service (LSDAS), (III) The Law School Candidate Referral Service (LSCRS)* (1983).

35. See text accompanying note 22, *supra*.

36. Calvin Woodard, *The American Law School and the Anglo-American Legal Tradition* 27 (monograph prepared for the National Invitational Conference, Law School Admissions, 1984-2001: Selecting Lawyers for the 21st Century, November 3-6, 1983).

37. *Id.* at 28.