

1-1-1978

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Recommended Citation

Leo M. Romero, *The Quest for Educational Opportunity: Access to Legal and Medical Education in New Mexico*, 53 New Mexico Historical Review 337 (1978).

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SMALL SCHOOL.
BIG VALUE.

*THE QUEST FOR EDUCATIONAL OPPORTUNITY:
ACCESS TO LEGAL AND MEDICAL EDUCATION
IN NEW MEXICO*

LEO M. ROMERO

ACCESS of minority group members to higher education is one of the burning social and legal issues of our time. The issue centers around two problems: first, how can the number of minority students in higher education be increased, and, second, can it be done in a way that does not abuse the constitution? As institutions of higher learning, both medical and law schools have been the focus of this issue, primarily due to the intense competition among applicants for the limited number of positions available.¹ In addition, medical schools and law schools have been the recent targets of lawsuits challenging the constitutionality of special admissions programs. It should be emphasized, however, that this issue is not peculiar to professional schools, but presents itself whenever a school of higher education with limited positions available attempts to increase minority enrollment.

The nature of the problem can be traced to the fact that many minority group members were excluded from higher education by forms of overt discrimination. The "separate but equal" doctrine is an example of such a bar to Blacks prior to 1954.² By the beginning of the 1960s, however, virtually all vestiges of overt discrimination in admission to schools of medicine and law had been removed. Instead, admissions criteria were largely objective, relying on standardized tests and undergraduate grade-point averages. Law schools developed a test called the Law School Admission Test (LSAT) designed to measure aptitude for law study, and the medical schools developed a similar test called the Medical

College Aptitude Test or MCAT. By combining the test scores and the grade-point average, it was relatively easy to rank applicants, and such rankings were the only determinant of admission. These admissions criteria purported to be racially and ethnically neutral. Yet, they produced law students and medical students who were nearly all white and from middle or upper class backgrounds. For example, nationally, the number of minority students enrolled in law schools in 1969 totaled only 2,933 out of a total enrollment of 82,041 students.³ The figures for medical schools are similar. Only 4.2% of all medical students in 1969 were members of United States minority groups.⁴ The statistics are even more shocking when Mexican-American and Native-American enrollments are considered separately. The percentage of American Indians in medical schools in 1969 was .1% and Chicanos only represented .4%.⁵ The New Mexico figures are not much better than the national statistics. Before 1970, the University of New Mexico School of Law had graduated only 23 Spanish-surnamed students in its entire existence—a period of 20 years.⁶ The medical school in 1967 enrolled only one Chicano in the first-year class.⁷

Embarrassed by such figures and prodded by minority groups, institutions of higher education began to take steps to increase their minority enrollment in the late 1960s.⁸ The initial efforts focused on recruitment and special admissions programs. One of the most influential programs was the Council on Legal Education Opportunity, popularly known as CLEO. It was formed in 1968 and was sponsored by the American Bar Association, the Association of American Law Schools, and the Law School Admission Council. CLEO instituted a nationwide recruitment effort and a number of summer law programs designed to assist minority students to adapt to law school. Those who successfully completed the CLEO summer institutes were then accepted by law schools.⁹ The University of New Mexico School of Law has participated in CLEO since its inception, and in 1974, a CLEO regional institute for the Southwest was hosted by the UNM Law School.¹⁰ The University of New Mexico is also the home of the Special Scholarship Program in Law for American Indians. Begun in 1967, this program operates a summer prelaw program and places its American Indian students in law schools across the country.¹¹

Due to the limited number of positions available in CLEO or in the Special Scholarship Program in Law for American Indians, the law school started its own summer institute in 1975, El Instituto Preparativo Legal. Therefore, the law school accepts minority applicants who have successfully completed either the CLEO program, the American Indian law program, or the Instituto.

Special programs like these have been successful in increasing the number of minorities in medical and law schools. Nationally, the number of Chicano law students increased from 412 in 1969 to 1,297 in 1975.¹² American Indian student enrollment jumped from 72 to 295 for the same period.¹³ Medical schools also show an increase in minority students for that period. In the six-year period from 1969 to 1975, the number of Chicano medical students increased from 92 to 638, and the number of American Indian medical students jumped from 18 to 159.¹⁴

The increase in enrollment, however, has not been matched by an equal increase in the percentage of minority students. For example, although the number of Chicano medical students nationally increased from 92 to 638 over this period, the increase only amounted to one percent (from .2 percent to 1.2 percent).¹⁵ Likewise, the percentage of American Indian medical students rose from less than .1 percent to .3 percent.¹⁶

The figures for the University of New Mexico do reflect a greater effort to increase minority enrollment in the medical and law schools. Looking at the latest five-year period, from 1972 to 1976, we see that both the numbers and percentages of minority applicants accepted at the law school have increased. In 1972, the law school enrolled 22 minority students in its first-year class of 103, and by 1976 the number had increased to 39 of the first-year class of 106.¹⁷

The University of New Mexico medical school statistics on minority enrollment reflect the national downward trend of the last two years. In 1972, the medical school enrolled 12 minority students. The number of minority students climbed to 18 in 1974, but dropped to 15 in 1975 and to 9 in 1976. This trend appears to be reversed with the acceptance of 27 minority students for the 1976 entering class.¹⁸

Even with the recent increases in minority enrollment in our medical schools, minorities are still underrepresented in the

schools and in the professions. Of the more than 2,100¹⁹ lawyers in New Mexico, only 7.9% are Spanish surnamed,²⁰ and only 6 lawyers are Native American,²¹ and this in a state where over 40% of the population is Spanish surnamed²² and 90,000 of the population are Native American.²³ The medical profession in New Mexico is similarly underrepresented by members of minority groups. It is estimated that fewer than 3% of the doctors in New Mexico are members of minorities.²⁴

It should be emphasized, therefore, that the recent increase in minority enrollment has not solved the problem of minority underrepresentation in our professional schools or our professions. Special admission programs must be continued and expanded if we are to make meaningful the promise of equal opportunity.

Presently, these programs are now the subject of one of the most difficult constitutional issues of our time—whether special admissions programs violate the Equal Protection Clause of the 14th amendment. Do these programs, by increasing the number of minority students, violate the equal protection to which members of the majority are entitled? This issue has yet to be decided by the United States Supreme Court. The Supreme Court had the opportunity to deal with this issue in 1974 in the case of *DeFunis v. Odegaard*.²⁵ DeFunis, a white applicant, challenged the University of Washington School of Law's minority admissions program. The Supreme Court of Washington rejected his challenge, and the case went to the United States Supreme Court. The Court, however, ducked the constitutional issue by holding that the case was moot because DeFunis had since been admitted to the law school and was about to graduate. The Supreme Court, therefore, left uncertain the constitutional status of special admissions programs. The Washington Supreme Court decision in *DeFunis* upholding the constitutionality of Washington's minority admissions program, therefore, was the leading court decision on this issue.

The next significant development was a decision by the California Supreme Court in 1976. In the case of *Bakke v. California*,²⁶ the California court held that the University of California, Davis, Medical School's minority admissions program violated the Equal Protection Clause of the fourteenth amendment. In order to resolve the conflicting decisions of the highest courts in the states

of Washington and California on this issue, the United States Supreme Court agreed in November 1976 to review the *Bakke* case. A decision is still forthcoming.²⁷

What does the *Bakke* case portend for minority admissions programs? In order to answer this question, one must first look at the medical school's program at Davis. The admissions process at Davis involved a two-track system.²⁸ There was a regular admissions committee and a special admissions committee which dealt only with minority applicants who were disadvantaged. Sixteen positions in the first-year class of 100 were allocated to the special admissions program. Applicants were assigned only to one committee, and each applicant was rated only against other applicants in the same group.

Furthermore, the procedure for selecting applicants for admission was different in each committee. The regular admissions committee eliminated all applicants whose grade-point average was below 2.5. The remaining applicants were then screened in order to determine who to invite for interviews. For those who were interviewed, the regular admissions committee used a numerical rating as a benchmark for selection. Numbers were assigned to a variety of factors including the grade-point average, the Medical College Aptitude Test score, the interview, and letters of recommendation. The maximum score was 600 points, and admission was almost entirely based on the relative ranking of the applicants based on his or her score.²⁹

By comparison, the special admissions program at Davis used a different procedure. Only minority applicants were referred to this committee. After being screened for disadvantaged status, all remaining minority applicants were reviewed to determine who should be interviewed. No applicants were eliminated on the basis of the grade-point average. Those applicants who were interviewed were given scores on the same scale of 0-600. The highest scoring minority applicants were then recommended for admission until sixteen were admitted.³⁰ Therefore, the effect of the dual admissions procedure at Davis was the acceptance of some minority students with scores twenty to thirty points below Bakke's rating.³¹ In addition, the special admissions program did not include whites, even if disadvantaged.³² Subsequently, the California Supreme Court, in a 6-1 decision, held that the Davis

special admissions program was unconstitutional because it afforded a preference on the basis of race to persons who were not as qualified as nonminority applicants denied admission.³³

Whether the California Supreme Court's decision is correct is the subject of much debate in the legal community. It is not certain how the United States Supreme Court will rule since there are persuasive legal and policy arguments on each side; however, it is important to read the *Bakke* case very carefully in the event that the California decision is affirmed by the United States Supreme Court.

A reading of the *Bakke* decision leads this individual to the conclusion that it does not signal the end of minority admissions programs. First, the opinion by Justice Mosk of the California Supreme Court does not say that the purposes of minority programs are wrong or unconstitutional. These purposes, (1) promoting integration of the medical school and the medical profession and (2) increasing the number of doctors willing to serve minority communities, are in fact lauded by the California Supreme Court.³⁴ Furthermore, and more important, the court observed that although it is clear that the special admissions program classified applicants by race, this fact alone does not render it unconstitutional.³⁵

It is thus clear that the one and only matter declared unconstitutional by the court in *Bakke* was the admissions procedure utilized by Davis to reach its admittedly valid ends. The means and not the ends of the special admissions program at Davis were declared unconstitutional. What was it about the admissions procedure that disturbed the court? First, it was the dual system with one admissions procedure for minorities and another for non-minorities. The second factor that disturbed the court was the allocation of sixteen positions to minority applicants. Justice Mosk called this scheme a "form of an education quota."³⁶

This reading of *Bakke* is also shared by the attorney who represents Bakke. In an interview in the *San Francisco Chronicle* in November 1976, Reynold Colvin was quoted as follows:

The case is much misquoted and misunderstood these days. What the court was really saying, in my judgment, was that the medical school at Davis could not employ a racial quota without having tried less intrusive measures in order to reach the same objectives.

There has been some comment that the decision rules affirmative action programs unconstitutional. It does not. It leaves open a whole variety of alternatives.

In fact, the court went out of its way to suggest other alternatives that would overcome the constitutional objections. The court said, "We observe and emphasize . . . that the University is not required to choose between a racially neutral admission standard applied strictly according to grade-point averages and test scores, and a standard which accords preference to minorities because of their race."³⁷ The court conceded that no rule of law requires Davis to afford determinative weight in admissions to quantitative factors and that the University is entitled to consider that low grades and test scores may not accurately reflect the abilities of some disadvantaged students.³⁸ Moreover, the court recognized that Davis may reasonably conclude that the potential of some minority applicants is equal to or greater than that of an applicant with higher grades and scores who has not been similarly disadvantaged.³⁹

The court added that the University may properly consider other factors in evaluating an applicant. For example, the personal interview, letters of recommendation, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals, may be taken into account by the admissions committee.⁴⁰

In short, the California Supreme Court endorsed a flexible admissions system in order to increase minority enrollment. The unconstitutionality of the Davis program was only its use of a quota system and a dual admissions procedure. Thus, even if the United States Supreme Court affirms the California decision in *Bakke*, schools of higher education are still left with considerable discretion to accomplish the legitimate ends of increasing minority enrollment and integrating the profession.

Assuming that the *Bakke* decision is affirmed, are the University of New Mexico special admissions programs vulnerable to a *Bakke*-type challenge? The medical school's and the law school's admissions policies would seem to avoid the constitutional objections that existed in the Davis program. There is neither a quota system nor a two-track admission procedure in either school.⁴¹ For example, the law school's admissions committee reviews each resi-

dent applicant's file, and each committee member records a vote of one to four (one being the highest vote and four being the lowest) for each applicant. The vote represents the individual judgment of each member of the committee with respect to the applicant's probability of success in law school and the applicant's potential contribution to the profession and society. Factors such as those suggested by *Bakke*, including grade-point averages, test scores, and race or ethnic background, are considered by the committee members in deciding what number to give each applicant. The votes are totaled for each applicant, and these totals are used as the primary means of selecting those for acceptance. If a desirable applicant has a mediocre test score, the applicant, minority or non-minority, is accepted upon successful completion of one of the summer law programs.⁴²

This admissions procedure at the law school has been successful in increasing the representation of minority group members. Of the 110 applicants who were accepted for the 1977 fall class and who indicated that they would enroll, 37 were Mexican-American, 6 were Native American, and 4 were Black.⁴³ In other words, 47 of 110 first-year students were members of minority groups.

In conclusion, it seems to me that the *Bakke* case does not mean the end of minority admissions programs. Professional schools still have a great deal of flexibility in devising admissions programs to increase the minority enrollment in their schools without offending the Constitution. A major concern about *Bakke* is that some might want to use it as an excuse to scuttle minority admissions programs. It is important, therefore, to demand of our professional schools a commitment to greater enrollment of this State's minority groups. Each ethnic or racial group in New Mexico—Anglo, Chicano, Indian, and Black—is entitled to fair access to professional schools.

NOTES

1. The number of applicants to medical schools and law schools greatly exceed the number of positions available nationally. For example, of 39,038 positions available to the national first-year law student enrollment in 1975, 133,546 Law Schools Admission Tests (LSATs) were administered. Similar figures from 1963 to 1975 are available in American Bar Association (ABA), *Law School and*

Bar Admission Requirements: A Review of Legal Education in the United States—Fall 1975, p. 45.

2. The "separate but equal" doctrine was declared unconstitutional by the United States Supreme Court in the case of *Brown v. Board of Education*, 347 U.S. 483 (1954).

3. The minority count included traditionally Black law schools. See ABA, *Law Schools and Bar Admission Requirements: A Review of Legal Education in the United States—Fall 1971*; Association of American Law Schools (AALS), "1971 Survey of Minority Group Students in Legal Education," *Journal of Legal Education* (J. Legal Ed.) 24 (1972):488; Millard Rudd and Charles White, "Legal Education and Professional Statistics 1973-74," *J. Legal Ed.* 26 (1974):342-43.

4. "Datagram," Table 4, *Journal of Medical Education* 49 (1974):306.

5. "Datagram," Table 4.

6. Interview, Registrar, University of New Mexico School of Law, Albuquerque, May 11, 1977. During this period—from 1950 to 1969—the law school had graduated a total of 417 students.

7. Interview, Office of Student Affairs, University of New Mexico School of Medicine, Albuquerque, May 11, 1977.

8. A full description of these efforts is set forth in Leo M. Romero, Richard Delgado, and Cruz Reynoso, "The Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict," *New Mexico Law Review* 5 (1975):179-88.

9. The CLEO program is described more fully in Romero, Delgado, and Reynoso, "Legal Education of Chicano Students," pp. 216-21.

10. See Leo M. Romero, 1974 Southwest CLEO Institute, "Final Report of the Director" (on file at the University of New Mexico School of Law) for a detailed description of the Institute.

11. This program is described in Thomas W. Christopher and Frederick M. Hart, "Indian Law Scholarship Program at the University of New Mexico," *University of Toledo Law Review* 2 (1970):691.

12. ABA, *Law Schools and Bar Admission Requirements—Fall 1975*, p. 42.

13. ABA, *Law Schools and Bar Admission Requirements—Fall 1975*, p. 42.

14. The figures for 1969 are available in "Datagram," Table 4. The figures for 1975 are available in "Datagram," Table 3, *J. Legal Ed.* 51 (1976):146.

15. "Datagram," Table 4; "Datagram," Table 3.

16. "Datagram," Table 4; "Datagram," Table 3.

17. Interview, Associate Dean and Director of Admissions at the University of New Mexico School of Law, Albuquerque, May 11, 1977.

18. Interview, Assistant Dean for Admissions at the University of New Mexico School of Medicine, Albuquerque, May 11, 1977.

19. Interview, Personnel, State Bar of New Mexico, 1117 Stanford NE, Albuquerque, May 11, 1977.

20. Statistical data, 1974 poll of the New Mexico Bar by Mexican-American Law Student Association (MALSA) at the University of New Mexico School of Law, Albuquerque. At that time the membership in the bar totaled 1918.

21. Statistical data, Special Scholarship Program in Law for American Indians, University of New Mexico School of Law, Albuquerque, May 11, 1977.

22. U.S. Department of Commerce, Bureau of the Census, General Social and Economic Characteristics of New Mexico, PC (11)-C33.

23. Statistical data, Special Scholarship Program in Law for American Indians, University of New Mexico School of Law, Albuquerque, May 11, 1977.

24. Interview, Personnel, Office of Student Affairs, University of New Mexico School of Medicine, Albuquerque, May 11, 1977.

25. 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated and remanded*, 416 U.S. 312 (1974).

26. 18 Cal. 3d 34, 553 P.2d 1152 (1976).

27. *Bakke v. Regents of University of California*, — U.S. — 78. The United States Supreme Court decided the Bakke case on June 28, 1978. The Court, in a 5-4 decision that produced six opinions, affirmed in part and reversed in part the decision of the California Supreme Court. It affirmed the California decision that ordered Bakke's admission to the Davis Medical School and that invalidated the special admissions program at Davis. The United States Supreme Court reversed that part of the California decision that prohibited Davis from taking race into account as a factor in future admission decisions.

28. The admissions procedure at the University of California, Davis, Medical School is described by the California Supreme Court in *Bakke v. California Regents*, 553 2d, pp. 1156-59.

29. The regular admissions program is described in *Bakke v. California Regents*, pp. 1156-59.

30. The special admission program is described in *Bakke v. California Regents*, pp. 1158-59.

31. *Bakke v. California Regents*, p. 1159.

32. *Bakke v. California Regents*, p. 1159.

33. *Bakke v. California Regents*, p. 1155.

34. *Bakke v. California Regents*, pp. 1165-67. The California Supreme Court concluded that despite the legitimacy of these goals, the University of California had failed to demonstrate that they could not be achieved by means less detrimental to the rights of the majority.

35. *Bakke v. California Regents*, p. 1160.

36. *Bakke v. California Regents*, p. 1171.

37. *Bakke v. California Regents*, pp. 1165-66.

38. *Bakke v. California Regents*, p. 1166.

39. *Bakke v. California Regents*, p. 1166.

40. *Bakke v. California Regents*, p. 1166.

41. Interview, Associate Dean and Director of Admissions at the University of New Mexico School of Law and from the Assistant Dean for Admissions at the University of New Mexico School of Medicine, Albuquerque, May 11, 1977.

42. This admissions procedure has been used by the University of New Mexico School of Law to select the 1975, 1976, and 1977 entering classes.

43. Interview, Associate Dean and Director of Admissions at the University of New Mexico School of Law and from the Assistant Dean for Admissions at the University of New Mexico School of Medicine, Albuquerque, May 11, 1977.