Admissions: A Time for Change

Ronald C. Griffin
ronald.griffin@famu.edu

Follow this and additional works at: http://commons.law.famu.edu/faculty-research

Recommended Citation
Admissions: A Time for Change

by Ronald C. Griffin*

Law schools are revered institutions. In America, they have had several missions: to nurture the values of society; to transmit these values to new generations; and to teach young people marketable skills. In recent times law schools have inherited a new function—to suggest and experiment with solutions to our social problems. Assuming that is so (and the education of thousands of minority students is one of those problems), the questions presented are: what solutions have they proposed and to what extent have community concerns thwarted what the law schools have tried to implement.

The answers to these questions are difficult to assemble. Important cases contain useful suggestions but no ultimate answers or final solutions. If answers are to be tendered at all, their discovery requires an examination and evaluation of the market we serve. Answers should emerge if a distillation of community concerns takes place.

I

Let us proceed from that premise. In 1958, Michael Young wrote the fable, The Rise of the Meritocracy,2 in which he described the transformation of a society based upon merit into one based upon something else. Each man's place was fixed by his intelligence and

---

* B.S., Hampton Institute, 1965; J.D. Howard University, 1968; LLM, University of Virginia, 1974. Assistant Professor of Law; University of Oregon.

1. American universities have several missions: to nurture the values of our civilization, to transmit these values to new generations, to teach young people marketable skills. Since law schools are an integral part of university life, what is said about universities presumably applies to them as well. Duncan, Higher Education: The Effort to Adjust, 99 Daedalus 143 (1970); Luria, The Role of the University: Ivory Tower, Service Station, or Frontier Post?, 99 Daedalus 76-77 (1970); Throw, Reflections on the Transition from Mass to Universal Higher Education, 99 Daedalus 2-4 (1970). See Packer and Ehrlich, New Directions in Legal Education, Appendix 1, 164-65 (1972); Wolff, The Ideal of the University 3-4, 9 (1969); Thode, Introduction to the Study of Law 1-4 (1970).

effort. All adults with an IQ above 125 belonged to the Meritocracy. Those lacking the requisite IQ did not.

This arrangement created problems. Talent previously distributed throughout the society was now concentrated in one group. The inner group paraded the markings of acceptance, while the outer group bore the stigma of rejection. A revolt was inevitable. When it came, the leaders (intelligent women confined to household tasks) demanded equality between the sexes and equality for all. Abundant life, they insisted, was not to be determined by this-or-that mathematical test. Men and women were to be free to develop their lives as they saw fit, in accordance with their God-given gifts. The revolters won and the meritocracy came to an end.

This vignette is a mirror image of a condition now prevailing in the United States. If a women's revolt is inspired by a meritocracy, and one is in progress in the United States, prognostically speaking the United States has a meritocracy. If talent is unevenly distributed in a meritocracy, and that observation corresponds with the observed condition in the United States, our country harbors a meritocracy.

In a meritocracy, the allocation of social rewards and the assignment of status both rest on the assumption that there is a close connection between achievement and intelligence. Talented individuals are consigned to small groups. In crises, they are called to the top to share their talents with others. Under this arrangement, questions about intelligence become important. Is intelligence inherited? Can one raise intelligence by nurture? What do standardized tests actually measure? Can one separate inherent ability from improvement in skills acquired through education?

Herrnstein, a professor at Harvard University, is instructive. Using the data assembled by Arthur Jensen, he maintains:

3. Id.
4. Id.
5. Id. at 30.
6. A theoretician of the Technician's Party had argued that marriage partners, in the national interest, should consult the intelligence register. A high I.Q. man who mated with a low I.Q. woman was presumed to have wasted his genes. The activist women, on the other hand, took romance as their banner and beauty as their flag, arguing that marriage should be based upon attraction. Their favorite slogan was, "Beauty is achievable by all." Id. at 30, n.1.
7. Id. at 31.
8. See Jensen, How Much Can We Boost IQ and Scholastic Achievement,
If success in society depends upon superior ability, and if all unfavorable environmental factors are removed, social rewards will be the function of inherited differences. [In a democracy] all people are entitled to an equal start. If equal opportunity is fully realized, heredity will be the decisive factor in all things of consequence.\(^9\)

This idea is unquestionably attractive. However, as adopted by law schools, it becomes alarmingly dangerous and unattractive. How is a law school to respond to applicants—particularly Blacks and Chicanos—who fare poorly on the law school aptitude test? Should these tests be ignored? Should minority students, disadvantaged by education or opportunity, be accepted on faith alone? Is the aptitude test the only instrument to be used when evaluating those persons for legal training?\(^{10}\)

The landmark case of *Defunis v. Odegaard*\(^{11}\) contains one institution's response to the questions posed above, as well as the State of Washington's response to those same questions. The state trial court announced that the preferential admissions program adopted

---

\(^{9}\) Supra note 2, at 32.

\(^{10}\) At the outset, the limited but crucial function of the LSAT must be clearly understood. It is a specially designed tool to predict the student's likelihood of success in the first year of law school. It is not designed to measure his innate intellectual gifts, nor to measure his ultimate potential as a lawyer. Instead, it seeks to measure his present ability to pursue law school work. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. Tol. L. Rev. 377, 390 [hereinafter cited as Summers]. See Consalus, *The Law School Admissions Test and the Minority Student*, 1970 U. Tol. L. Rev. 511, 514-15. Nevertheless, some insist that this test and comparable tests prove the innate inferiority of blacks. Professor Tollett wrote this response: "The short answer to Jensen and Herrnstein is that the dominant class will inevitably define the elements of intelligence in terms of their own developed skills and attributes. . . . Even the kindred culture of England is apparently disadvantaged by American . . . tests." Tollett, *The Viability and Reliability of the U.S. Supreme Court as an Institution for Social Change and Progress Beneficial to Blacks*, 3 Black L.J. 5, 21 (1973). Others argue that the test itself is unfair. Note, *Racial Bias and the LSAT: A New Approach to the Defense of Preferential Admissions*, 25 Buff. L. Rev. 439, 451-62 (1975).

\(^{11}\) 82 Wash. 2d 11, 507 P.2d 1169 (1975), dismissed as moot, 416 U.S. 312 (1974). Some claim that the opinion is a challenging essay and little else. See also, *Defunis v. Odegaard*, 84 Wash. 2d 617, 529 P.2d 438, 448 (1975).
by the University of Washington Law School violated the equal pro-
tection clause of the fourteenth amendment.\textsuperscript{12} The state supreme
court, however, decided differently. It announced that the admis-
sions program was wholly consonant with equal protection, and that
adequate justification had been tendered to overcome the serious
objections raised under the fourteenth amendment.\textsuperscript{13}

Are racial classifications permissible under the Constitution of
the United States? As yet, there is no definitive answer. There are
several arguments, however, that bear study. In my judgment, they
point the way to an answer that we may in the future come to accept:

A. Generally speaking, the equal protection clause permits
—in education and elsewhere—no use of race or ethnicity whatso-
ever. Assuming we are presented with a case in higher education
where documented proof establishes that a racial classification was
used in an admissions process, that admissions process should be con-
demned as inconsistent with the mandate prescribed by the Constitu-
tion.\textsuperscript{14}

B. As a matter of practice, officials administering the public
trust are prohibited by law from engaging in unreasonable dis-
crimination. To deny a state benefit to an applicant who happens
to belong to other-than-the-preferred race is discrimination which is
rightly defined as “unreasonable discrimination,” and, therefore, a
kind of discrimination prohibited by law.\textsuperscript{15}

C. If a racial classification favors a previously despised and
rejected group, the classification is then beyond the constraints of
the fourteenth amendment. All the important cases, counting for-
ward from \textit{Sipuel v. Board of Regents of the University of Oklahoma}\textsuperscript{16}
to \textit{Brown v. Board of Education},\textsuperscript{17} have dealt with invidious
discrimination—conscious attempts on the part of some Americans to deny
to other Americans certain state benefits solely on the basis of race.
There is a clear difference between a classification which produces

\textsuperscript{12} \textit{Defunis v. Odegaard}, Civ. No. 741727, Superior Court of King County,
\textsuperscript{13} 507 P.2d 1169, 1184 (Wash. 1973).
\textsuperscript{14} E.g., \textit{Bakke v. The Regents of the University of California}, 132 Cal. Rptr.
680, 553 P.2d 1152 (1976). Memorandum of Points and Authorities in Support of
Order to Show Cause and Alternative Writ of Mandate (June 15, 1974).
\textsuperscript{15} This view emerged from a conversation with Paul Haskell, Professor of Law,
Franklin T. Backus School of Law, Case Western Reserve University, on Aug. 1,
1975.
\textsuperscript{16} 332 U.S. 631 (1948).
\textsuperscript{17} 347 U.S. 483 (1954).
this mischief, and one that does not. Assuming a real case where
the classification produces something other than malicious mischief,
the classification should stand. Courts should declare the Sipuels
and the Browns inapposite.

D. In an historic sense, is a racial classification suspect when
it favors any group which has borne the brunt of past injustice?
Cannot majority Americans be trusted when they discriminate
against themselves? If the fourteenth amendment was erected to
establish and guarantee civil equality for Blacks, and by extension
to protect other disadvantaged groups, would it not disavow the very
purpose of that amendment to use it as a device to strike down
measures designed to achieve real equality under the law within the
United States?18

No single argument will produce an acceptable answer. Some
suspect that a consensus is lacking as to those arguments which
should be combined to yield an acceptable answer. If those
suspicions prove correct, perhaps further exploration will uncover
grounds on which we can all stand—a vantage point where each ar-

gument can be affirmatively addressed.

Michael Moorhead, a professor of law at Howard University
Law School, points the way. He makes the observation that law
schools make a mistake when they equate depersonalization with ob-
jectivity in their admissions process.19 "Depersonalization," he says,
"makes it possible for admissions people to overlook applicants who
might be qualified for legal training." Studies indicate that the pro-
file for the average minority candidate differs from the profile for
the average white candidate. Professor Moorhead suggests it is this
variance which makes a difference in the decisions arrived at by ad-
missions offices. Law schools, he says, should begin to take sound-
ings for applicants who are "achievers in the face of adversity."20
How does one do that?

Law schools could build a goal or profile-system into their
admissions process. As an illustration, a school could say to the
public, "We declare the following to be our goals:

18. Greenawalt, Judicial Scrutiny of Benign Racial Preferences in Law School
Admissions, 75 Colum. L. Rev. 559, 566-71 (1975). See also Bittker, The Case for
Black Reparation, 110-12 (1973); Ely, The Constitutionality of Reverse Discrimi-
19. Memorandum from Michael J. Moorhead to the Honorable George N. Leighton,
20. Id. at 7.
“(a) To offer graduate education to students of merit;
“(b) To provide competent lawyers for professional roles;
“(c) To contribute to needed societal roles in which law is relevant.”

Thereafter, the school could convert these goals into factors in a formula used to screen candidates. Points could be assigned to each factor; for instance, for demonstrated or probable merit (LSAT), for evidence disclosing an applicant’s interest in fulfilling a professional role, and for evidence (prompted by race or sex) disclosing an applicant’s interest in assuming a needed societal role in which law is relevant. The formula could be constructed to yield 100 points. If the points were distributed evenly (33⅓ points for each of the three factors), applicants with diverse or previously under-represented backgrounds would have access to the law school.

The “profile” system is seemingly the easiest to implement.21 A law school could poll its non-white graduates, make an assessment of their “success,” and by comparing individual backgrounds with their measure of achievement, draw certain measurable conclusions about those accomplishments—particularly in relation to those who were “achievers in the face of adversity.” If, in a relative sense, certain of these individuals have out-stripped their classmates whose earliest academic records were superior by conventional standards, a valuable standard for comparison might be established. Assuming non-white applicants are found whose profiles correspond with successful minority graduates, the law school’s admissions committee could select them for entrance. This approach, of course, will work in some law schools but not in others. Some institutions will have an inadequate pool from which to extrapolate what candidates with similar profiles will do. Nevertheless, this suggested solution is useful. Assuredly, there will be no end to racial and ethnic discussions until we develop a meaningful resolution-of-disputes model, free of such references, to replace the outmoded admissions systems now in use.22

Time and equity demand that we change the way we approach our academic business. Cases construing the Constitution suggest

that a resolution of past inequities must be achieved without further delay.

Can good come from adopting a goal or profile system? Suppose good is defined as the ideal. If the ideal in Oregon—or anywhere for that matter—is that everyone should have access to the services of an attorney, and Blacks more than Whites lack such access, then any program designed to approximate the ideal is "good."

Minority lawyers are drastically underrepresented in the legal profession. Furthermore, such attorneys are noticeably absent in those areas where the need for services is the greatest. Despite impressive efforts to enroll minority applicants, the proportion of minority students in law school remains far below the minority share of the population. If something other than preferential admissions were capable of correcting the imbalance—if universities could produce a great number of well-qualified minority students—preferential admissions as an approach to the problem would be unnecessary. For a variety of reasons, however, nothing short of that can do the job.

What is the reality? While 11.4\% of the national population is Black, barely 1.2\% of the legal profession is Black. If the size of the

23. Statistical Abstracts for the United States 26, 361 (1975). Blacks constitute 11.4\% of the population. About 1.2\% of the legal profession is Black. Figures for other minority groups are also disquieting. Americans of Spanish descent are 4.4 percent of the population. They are 0.9 percent of the legal profession. One census count shows that 800,000 American Indians live in the United States. They are 0.4 percent of the population, yet the nation can boast of only 310 Indian attorneys (0.1 percent of all lawyers), 1970 Census Subject Reports: Occupational Characteristics, Table 39. See Report of the Advisory Committee for the Minority Group Study, (1) 1967 Proceedings of the American Association of Law Schools 160 (1967), quoted in O'Neil, Preferential Admissions: Equal Access to Legal Education, 1970 U. Tol. L. Rev. 295 [hereinafter cited as O'Neill].


25. Id. at 147. Justice Douglas has argued that "The purpose of the University . . . cannot be to produce black lawyers for blacks . . . [but] to produce good lawyers for Americans." 416 U.S. 312, 342 (1974). Realistically, it is inappropriate for a school to produce black lawyers for blacks, in the sense of exacting a commitment from Black applicants to serve Black communities upon graduation. But given the times, who will speak for them? If the integration of American life is an important social goal, eloquent voices representing a culture and a set of experiences hitherto hidden from the majority must speak out. See Karst and Horowitz, Affirmative Action and Equal Protection, 60 Va. L. Rev. 955 (1974).

profession could be kept constant, an additional 30,000 black lawyers would be needed to achieve parity.\(^{27}\) As disheartening as these figures may be, geographical distribution figures tell us something even more disquieting. Seventeen percent of all black lawyers practice in the South, where fifty percent of the black population resides.\(^{28}\) Mississippi has a non-white population of nearly a million serviced by 54 black lawyers.\(^{29}\) In Georgia there are 58 lawyers for a black community of 1.2 million residents.\(^{30}\) In states where the total number of minority lawyers is larger—Virginia, for example—they tend to concentrate in the cities, leaving rural areas (where many Blacks live) without local representation.\(^{31}\) Actual underrepresentation is far more critical than overall figures might suggest.

Figures, of course, provide one important perspective; relevant questions provide another. Those questions are: Can a shortage of lawyers seriously disadvantage a minority group, and if so, do adequate alternatives exist to meet the undoubted need for legal services? Several factors bear study. First, all surveys of the need for counsel confirm the fact that poor people—of whom Blacks constitute a disproportionate part\(^{32}\)—find legal services inaccessible, inadequate, or both. The 1965 report to the National Conference on Law and Poverty\(^{33}\) identified four reasons why the poor do not have, and often do not seek the advice or aid of an attorney:

(a) The poor man does not know that an attorney can help;
(b) . . . [He] does not know where to get legal help;
(c) . . . [He] finds the lawyer remote;
(d) . . . [He] is afraid of reprisals.\(^{34}\)

The report notes that private lawyers do not serve a substantial segment of the poor. In New York City, for example, where half the residents have an income below $5,000, five percent of the bar reported the median income of their clients below that amount.\(^{35}\)


\(^{28}\) O'Neil *supra*, note 23 at 295.

\(^{29}\) Conversation with Elihu M. Harris, Executive Director, National Bar Association, December 7, 1976.

\(^{30}\) *Id.*

\(^{31}\) O'Neil, *supra* note 23 at 295-96.


\(^{34}\) *Id.* at 42-6.

\(^{35}\) *Id.* at 44.
This portrait has a parallel in rural communities. A survey of several North Carolina counties conducted under the auspices of the American Bar Association, disclosed a critical lack of available legal services, and a feeling by some that where services were available they were made inaccessible by Whites. Other studies confirmed this finding. Where the case was controversial or divisive along racial lines, white lawyers were neither able nor willing to take the case.

Black lawyers can correct that. The capacity of black law schools to produce such lawyers, however, is shrouded in doubt. Consider Texas Southern and similar law schools. For the sake of analysis, let us assume that Texas Southern lost its accreditation. What impact would that have upon legal education for black students, and upon legal services in those communities where it is needed? The answer is clear. The closing of that school would lead to a reduction in the number of students studying law, a reduction in the number of graduates practicing law, a reduction in the number of lawyers available to render legal services in those communities where it is needed. That is what we face. Black schools are drifting dangerously close to the precipice. Florida A & M Law School is gone; South Carolina State Law School is gone; Texas Southern may face the same fate. Although Howard University School of Law is a far larger and stronger institution than any of those previously mentioned, a gradual equalization of the racial mix in that school will limit the number of spaces available to black students. Clearly, black law schools can supply some lawyers, but not the number needed to do the job.

Paraprofessionals could be used as an interim remedy. Their talents could be martialed to serve the community until a sufficient

40. O'Neil, supra note 23, at 308.
number of lawyers became available. Unfortunately, few well-conceived programs exist to produce the necessary personnel. Several law schools have undertaken training programs: Columbia, Denver and West Los Angeles. Of the three, West Los Angeles has the only reported program in actual operation.

Justice in education requires discrimination in reverse. Some can comfortably live with that thought. Frequently, however, there are periods of doubt. The disquiet is prompted by many things: the moral society we hope for, as against the one we fear may come to pass. There are countless possibilities. They range from a revolutionary division of the population of the United States into fully autonomous racial groups, to a pre-1954 segregated society, to a fully uniracial society following some moral revolt.

This comment is certainly no place to describe in detail the full range of possibilities, nor to analyze the likely relationships between each and the programs proposed for law schools. However, it is an appropriate vehicle to illustrate the edge of a complexity and to reveal the excruciating difficulty which individuals, groups and institutions experience in their attempt to balance competing interests.

In the real world, a claim is being made by black Americans, disadvantaged by education and color, that their participation in the "defense of democracy" abroad gives them an unqualified right to receive benefits from benefit-conferring institutions like law schools. Some Americans who speak for law schools dismiss this. Others, of course, urge law schools to use race as a component in some cases.

Ideally, if those most concerned could bargain, an agreement could be made in which both parties would realize a gain without either party sustaining a loss. What would be at the heart of the
agreement? That law schools refrain from using race in all cases? That law schools use race in some cases? If the first view is adopted, law schools will realize a gain, but black Americans will not. Assuredly, race will be eliminated as a consideration, but other conditions restricting admissions and the award of degrees, established by the institutions and perhaps harmful to minorities, will not. If the second view is adopted—that law schools use race in some cases—both parties realize a gain. Race will be promoted as a special justification for admitting Blacks and conferring degrees, while other conditions restricting the award of degrees will go untouched.

One view is clearly more desirable than the other. Assuming desirability is assigned to the view which promotes a basic concern of the United States—and the realization of group and industrial expectations is one concern—the second view is clearly more desirable.

Fortunately, the analysis must go beyond that. We need to know whether there is some identity between a desire in the ideal world and a rule rooted in reality; and assuming there is a rule, we need to know whether its implementation will cost this society more than the benefits to be derived therefrom. *Bolling v. Sharp*⁴⁷ and *Korematsu v. United States*⁴⁸ tell us that racial classifications are constitutionally suspect. *Loving v. Virginia*⁴⁹ tells us that such classifications will pass constitutional scrutiny if they are accompanied by a "compelling state interest." Arguably, if a compelling state interest refers to the state's interest in eliminating the effects of adverse racial classifications theretofore imposed, a showing of that will justify the use of race in admitting Blacks to law school.⁵⁰ If a compelling state interest refers to an overriding interest in promoting and executing the laws of the United States which includes, among other things, the promotion of integration in public higher education, a showing of that will justify the use of race in admitting Blacks to law school.⁵¹

---


⁴⁹. 388 U.S. 1 (1967).
⁵¹. Supreme Court cases establish that absent overriding considerations, all per-
The benefits derived from implementing either rule will far exceed the cost to this society. There will be fewer white lawyers: white expectations vis-a-vis law schools will be lowered, and of course, marginal institutions will go under for lack of support. The gains are many: the ranks of black lawyers will swell; black communities will acquire additional and, perhaps, eloquent spokesmen for their points of view before deliberative bodies; larger numbers of disputes between Blacks and Whites will be resolved by the written word as opposed to those formerly resolved by violence; increasing numbers of Blacks will come to respect and support white institutions. Lastly, classic standards so dear to institutions of higher learning will go untouched.

IV

Assuming law schools are free to admit Blacks without reservation, how will they select those students who will be successful? What standards, other than a goal or profile approach, are usable to indicate qualities of personality—evident in those who have overcome obstacles which formerly deterred Blacks from entering higher education?

Persons within a state are entitled to equal access to benefits and opportunities distributed by the state. Statistics can play the vital role of showing that all persons have not enjoyed equal access. The use of statistical information to establish a prima facie case of racial discrimination has long been recognized as constitutionally valid. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886). The validity of this approach was recently reaffirmed by the Supreme Court. See United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972); Wright v. Council of City of Emporia, 407 U.S. 541 (1972). For discussion and application of this approach to race relations, see Nisenbaum, Race Quotas, 8 Harv. Civ. Rights—Civ. Lib. L. Rev. 128, 131-41 (1973). The gross statistical disparities described in the text show a massive differential distribution of a societal benefit—access to public, legal education—according to race and a breach of the principle of distributive justice. Courts have held in such circumstances that the denial of equal access warrants the inference of discrimination, and that when a prima facie case of discrimination is presented, the burden falls upon the State to overcome it. Avery v. Georgia, 345 U.S. 559 (1953). If the state fails to produce positive evidence directly contradicting the prima facie case, a court will hold that no such evidence exists. . . Patton v. Mississippi, 332 U.S. 463 (1947); accord, Hill v. Texas, 316 U.S. 400 (1942). See also Keyes v. School Dist No. 1, 413 U.S. 189 (1973). Thus, unless the state produces the necessary evidence, the gross statistical disparity of access to legal education would be seen by a court as a mandatory presumption requiring a holding of a violation of equal protection of the laws and a court could prescribe a racial quota-like remedy. Thus, the law school could be under a constitutional duty to use a racially conditioned preferential admission policy. Morris, Equal Protection, Affirmative Action and Racial Preferences in Law Admissions: DeFunis v. Odegard, 49 Wash. L. Rev. 1, 39 n.138 (1973).
The traditional admissions criteria for all law schools is performance on the Law School Admissions Test (LSAT) and college grades.52 The LSAT strives to measure skills essential for the study of law, such as reading, writing and abstract analysis.58 Assuming all disadvantaged students take the LSAT and complete college, selection of a particular law school ought to turn on the credentials the student presents. Clyde Summers is instructive.54 There are 163 ABA accredited law schools in the United States.55 Each year they admit approximately 39,038 students. Although admission standards are based upon undergraduate grades and LSAT scores, the level of those standards varies from school to school.56 If a law school admits applicants who have earned B-averages and 450 LSAT scores, black applicants who present that profile should be admitted to that school. Conversely, if black applicants cannot present that profile, each should consider schools where the standards are not so high.57

There are other approaches.58 A law school could institute a special compensatory program, making acceptance of a disadvantaged student contingent upon his participation in or satisfactory completion of the program.59 Under this approach, the degree of risk undertaken by the law school is reduced. The admissions office receives an assurance in the form of the program director's certifica-

53. Id. See Rosen at 325-331.
55. These figures are based upon a conversation with James P. White, Consultant for the Section on Legal Education and Admission to the Bar, American Bar Association, on December 16, 1975. See also, Law School and Admissions Requirements: A Review of Legal Education in the United States 41 (1975).
58. E.g., where the refusal to consider black applicants is hatched in prejudice, and perpetuated by an unbiased inability of a decision-making body to evaluate them, the decision-making body should be enlarged to include members of the excluded group. Candidates should be limited to those necessary to alter the immediate discriminatory practice. New members should be selected from those who are hired, promoted and given tenure under a school's affirmative action plan.
59. Rosen at 338.
tion that the participating student has shown the capacity to do law school work. 60

Assuming a student has been admitted to law school, what happens next? If a student has performed poorly on the LSAT, it may be reasonable to assume that his linguistic or logical skills are wanting. Operating on that assumption, law schools committed to disadvantaged students could give additional work in language development. The students themselves should be prepared to undertake extensive and concentrated courses encompassing written and oral language skills. Several types of programs geared to strengthening these basic weaknesses are presently being tested. Pittsburgh and Stanford, for example, have conducted "stretch" programs. 61

The Pittsburgh program is disarmingly simple. A disadvantaged student bearing admission credentials considerably below the standards usually required for admission is admitted to the law school on the condition that he take the three-year law program in four years. Initially, the student carries a lighter load than is customary. After his first year in the program, his performance is evaluated. If his record shows that he can do the work and presumably compete on an even footing with his contemporaries, he is permitted to accelerate and to graduate after three and a half years of study. 62

Drake Law School has a similar program. It is called pre-start. 63 Students not meeting the normal admissions requirements are offered the opportunity to attend a summer session of eight weeks as conditional non-degree students. If their performance in two law school subjects is C plus or better, they are admitted to the

60. Id.
61. Id. at 357-58. Unfortunately, Stanford University has discontinued its "stretch" program. The Dean advised me that their program was discontinued at the request of black students. I hasten to add, however, that the school does have a minority admissions program, but the Dean expressed some reservation in light of Bakke. Bakke v. Regents of The University of California, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976). Under the new program, there is a floor on the kind of student this institution will admit. If the floor is 1300 PFYA (Predicted First Year Average), for example, then minority applicants within 50 points will be considered for admissions. Conversation with Dean Charles Meyers, Stanford University Law School, November 22, 1976.
62. Id. at 357.
63. Id. at 354. For similar programs, see Kelly, Rogers and Bern, Summer Preparatory Program: University of Missouri—Kansas City School of Law, 1970 U. Tol. L. Rev. 891; Murry, The Tryout System, 21 J. Legal Ed. 317 (1969).
Howard Law Journal

law school in the fall as degree candidates. Full credit towards a degree is given for the courses taken in the summer. The Howard University Law School has perhaps the best program. The school has taken the position that the best way to determine whether a student is fit for legal training is to admit him, and evaluate him on the basis of his performance. That means, that the school is concerned about the student and the positive impact the institution's methods of instruction and environment have upon his learning process. The Paul Diggs Communication Skills Program, as it is called, has as its purpose to improve the writing and speaking skills of law students. All freshmen are required to take tests in these two areas to determine if any problems exist. In the exposition half of the program, those with the poorest test performance (the bottom 50 students) are screened and are broken down into groups. These sections meet weekly to analyze all aspects of a selected legal problem. Afterwards, individual conferences are held with students to discuss their performance.

In the other area of training, articulate persuasion, freshmen are tested by speech therapists. The students are asked to recite a passage which incorporates all of the sounds of the English language. They are evaluated on articulation, voice and rhythm. Thereafter, the students are rated and assigned to classes where individual attention is given to each student by a speech therapist.

Without going into questionable hypotheses on which many educational enrichment programs rest, this program addresses most

64. Id. at 355.
67. Id. at 769, 778-79.
68. The program is named after Paul Diggs, a former Howard University Law Professor, who initiated the project. In the original program, all instruction was tied to a program called "Communication Skills." Also, the program was broad-based, focusing on all students.
69. This information is based on conversations with Dr. Elizabeth Stone, Director of the Speech Division of the Communication Skills Program, and Mr. John Vartoukian, Communication Skills Specialist in Writing Division of the Program, December 9, 1976.
educational imperatives related to methods and facilities for educating students in the skills of the law.\textsuperscript{70} It contemplates that students will be taught; students will be motivated; students will learn.\textsuperscript{71}

Can we quantify the impact such programs have upon students? For example, is a student's confidence in himself undetermined by the inference that he is in law school because of his race? In a highly instructive article, James McPherson states:

\ldots \text{[M]y mind tells me, if I allow myself to take advantage of my color and seek enrollment as a black student \ldots [that] I \ldots [ensconce] myself within \ldots a category that: (a) compel[s] me to accept tutorial help that [suggests], in my mind and in the minds of my classmates, the distance between my ability and my academic responsibility; (b) force[s] me to become a personal symbol \ldots of how paternal and liberal the society is, and how much it is willing, in special cases like my own, to overlook glaring deficiencies in my academic preparation \ldots to make a lawyer of me; (c) force[s] me to question, almost daily, the comparative validity of every good grade I received, every bad grade I received, every friendship I made, every kindness extended to me, and every kindness withheld. \ldots.\textsuperscript{72}

\begin{itemize}
    \item \textsuperscript{70} That was Professor Diggs' intention.
    \item \textsuperscript{71} \textit{Id.}
    \item \textsuperscript{72} McPherson, \textit{Do you See What I See: Two Writers Look at CLEO}, 1970 U. Tol. L. Rev. 579-80.
\end{itemize}

Many minority law students view the highly competitive and somewhat artificial law school world as an alien and hostile environment, populated by law teachers and students who in dozens of ways patronize, offend and disdain them. In this environment, they are forced to confront on the law school level what W.E.B. DuBois described as the “duality” of being Black in America.

As law students they must be able to discuss slavery in dispassionate terms and legalese. As Blacks, they are haunted by the residue of that most insidious institution.

As law students they must ingest and internalize for later regurgitation the operative elements of “probable cause,” “reasonable suspicion” and “due process.” As Blacks, their personal experiences belie the efficacy of these concepts.

As law students they must approach the study of law with the same single-mindedness of their white counterparts. As Blacks they are subjected to the real or imagined pressure to translate immediately very minimal knowledge into positive action.

As law students, they must compete as individuals for grades, jobs and personal gratification. As black law students they are aware that their individual performances are doubly important in that they are watched, monitored, analyzed and translated into statistical arguments for or against the future admission of minority students. \textit{See} Smith, \textit{Double Exposure}, 2 Learning and the Law 24 (1975).
If this is the effect of the programs thus far discussed; if this is the reality a disadvantaged student must face, how can one change that? The student, of course, must be the provocateur of change. He must wrestle with his identity and hopefully assemble feelings and attitudes that are positive to justify his existence in a law school.

The law school as well has a notable role to play. First of all, it must stimulate the student's conscience. Derrick Bell has written an enlightening article on this area. The primary goal of every law school, he says, is to insure that each student is taught THE LAW. If this standard is applied to white students, no less demanding standards should be applied to Blacks. The school should take great pains to convey as specifically as possible what is expected: a step-by-step breakdown of the performance the law school requires will help the ambivalent student decide whether he wants to embark on so rigorous an undertaking. The notice should convey (more certainly than any "pep talk" by the dean) the school's belief that the student admitted is capable of the performance demanded of him. Given an understanding from the outset of what constitutes acceptable performance, with ample opportunity for frequent and precise reviews of his progress, most students in need of help will seek it themselves.

Bell's suggestion is a good one. It is a plea that a school recognize that it has admitted a number of students who have great potential for service to the law, that they are experiencing uncertainties and may have special handicaps not shared by white students; and that whatever the handicap or the uncertainty, they must be taught.

Will there be a change in education? If it comes it will arrive

---

74. Id. at 554.
75. Id.
76. Id.
77. Id.
78. We can build on this. If a disadvantaged student is going to cope with legal instruction, law schools have to experiment. Classes with several teachers and a single student; classes with several teachers and a group of students; students organized into temporary task forces and project teams; students shifting from group work to individual work—all these and their permutations will have to be employed to give our disadvantaged student a taste of what he has to face.
on the wings of a decision which society makes in favor of equity. Lyndon Johnson spoke of it. He dreamed of a society that emphasized equity—an affluent society that called for sacrifice by the majority to bring out the talents and willing cooperation of a submerged and disadvantaged minority. William Graham Sumner expressed a similar sentiment ninety years ago. Every man, according to Sumner, owes it to himself, to his community, and to those who are at once weak and wronged, to go to their aid. Whenever a social arrangement injures someone and he is humbled by the experience, it is the duty of those who are stronger or who know better to fight for redress. We owe each other rights—rights that do not pertain to results, but to chances. If we help a man to help himself by opening the opportunities around him, we put him and perhaps his group in a position to add to this nation’s wealth.

Realistically, however, emphasizing equity without knowing whether there is support for it, or creating opportunities for someone without knowing the social realities may open few, if any, opportunities for minorities. In this country, prosperity and the social opportunities attendant thereto have shifted away from property in real estate to property in one’s work. Under these changing circumstances, new ideas are needed to illuminate the rights and opportunities associated with work. Laws are needed to ensure that people will accord them proper respect. There are many ways of doing this and numerous devices available for applying these ideas to higher education.

80. Sumner, What Social Classes Owe to Each Other 162 (1883).
81. Id. at 162-63.
82. Id. at 163-65.
83. Id. at 166.
86. (a) Definitions:
   (1) $X$ is a paradigm for people who work for someone else.
   (2) $Y$ is a paradigm for people who employ $X$.
(b) Situation:
   (1) $X$ works for $Y$.
   (2) The work which $X$ performs produces income which promotes the welfare of $X$.
(c) Rules:
   (1) If the work done by $X$ produces income which promotes the welfare of $X$, $X$ is entitled to dominion and control over that income.
   (2) The work performed by $X$ presupposes a right to work.
denied essential training, and yet, except for the Law School Admissions Test (LSAT), and the manner in which it is utilized by some institutions, twenty percent of those eliminated could successfully complete law school work. Why should we permit this practice to persist? Why should educational opportunities be limited?

The *Bakke* case is an illustration of what can happen. On September 16, 1976, the California Supreme Court struck down a minority admissions program administered by a state medical school. It announced that the program unconstitutionally denied educational benefits to a nonminority applicant whom the school acknowledged

---

(3) If the right to work presupposes some training, and some X's are denied that, some X's should demand that their right to work be respected.

---


88. 132 Cal. Rptr. 680; 553 P.2d 1152 (1976).
had better credentials than selected minority candidates. A literal reading of the fourteenth amendment lends support to the claim that Bakke (a white applicant) was a victim of discrimination. That is plainly an injustice. Yet that injustice must be weighed against a greater injustice; the certain and systematic exclusion of Blacks and other minorities from graduate schools if preferential programs are eliminated. Quite obviously, we have no clear answer to the question of whether minority programs can survive constitutional scrutiny. *Defunis v. Odegaard* and the recent decision by the New York Court of Appeals in *Alevy v. Downstate Medical Center*, demonstrate that the matter is still open. However, two things are certain: First, the state cannot use race to invidiously distinguish between its citizens. Second, race may be used by the state to promote a proper governmental objective.

The case which is similar on the facts is *Porcelli v. Titus*. White teachers claimed the denial of their rights under the fourteenth amendment because color was used as a factor in the hiring of new faculty. Of course, the state upheld the minority hiring program. It applied the permissive standard of judicial review. State action, according to the court, based on considerations of color, when color is not used per se, is not necessarily a violation of the fourteenth amendment.

Candidly, the Constitution is both color blind and color conscious. A classification which denies a person a benefit, or causes him harm must not be based on race. In that sense, the Constitution is color blind. Where race is used to prevent the perpetuation of discrimination or to undo the effects of past humiliation, the Constitution must be color conscious. To suggest that it should be otherwise would lend support to what the nation has decided is a national disgrace.

89. 82 Wash. 2d 11; 507 P.2d 1169, vacated on rehearing, 529 P.2d 438 (1974).
90. 384 N.Y.S.2d 82; 348 N.E.2d 537 (1976).
93. 431 F.2d 1254 (3rd Cir. 1970).
94. *Id.* at 1257.
96. *Id.*
Thankfully, this case is of limited application. It covers those instances where quotas are used to promote opportunities for minorities. It says nothing about what private institutions may do, nor the political ramifications of nonrepresentation of minorities (e.g. lawyers) in a deliberative democracy. Under these circumstances, both state and private institutions can establish an admissions procedure which takes account of merit and the needs of a disadvantaged group without offending any constitutional guarantees.

To be sure, this case is a cause for alarm. It is a quantification of an attitude shared by some Americans that the chapter on integration should be closed. There are a number of grounds upon which this case can be discredited. First, the court's complete misinterpretation of the legislative history behind the fourteenth amendment; second, the court's equation of racial classification used by the medical school with invidious classifications used by a number of states; and third, the court's misunderstanding that the students admitted under the special admissions programs were unqualified for medical training.

The simple truth revealed by *Bakke* is that any remedy for the inequities flowing from past discrimination will inevitably have some impact upon nonminority groups. Whenever there is a limited pool of resources from which minorities have been disproportionately excluded, equalization of opportunity can only be accomplished by a reallocation of resources. Those who have previously enjoyed a disproportionate advantage must give some of that up if those who have historically had less are to be afforded an equitable share.

Two centuries of slavery and racial discrimination have left our nation with festering suspicions, and a separated society in which wealth, educational resources, employment opportunities—indeed all of society's benefits—are in the hands of white Americans. Until recently, most attempts to overcome the effects of that history have proved unavailing. In the past decade, the implementation of numerous affirmative action programs much like the one challenged in *Bakke*, have resulted in some degree of integration in public

---

higher education. Of course, the federal courts have taken steps to promote this. In 1976, it is anomalous that the fourteenth amendment which served as an instrument for requiring integration in secondary education should now be used as a device to restrain graduate schools from voluntarily seeking that very same objective.

William Raspberry may be a prophet. He wrote, "A few years from now, when people ask you whatever happened to affirmative action, tell them it got crushed to death between hard times and lawyers."100 Fortunately, there are positive ways open to us today to avoid having to say that tomorrow.

100. Raspberry, note 84.