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## Minority Preferences in Law School Admissions

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*Minority Preferences*  
In  
*Law School Admissions\**  
BY TERRANCE SANDALOW†

INTRODUCTION

In addressing the subject of “reverse discrimination,” I want to caution at the outset against permitting the use of the word “discrimination” to prejudice consideration of the subject. “Discrimination” has, in recent years, become a bad word. It tends to be used as a shorthand for “unjustifiably unequal treatment.” In its original and still proper meaning, however, the word is quite neutral. Discrimination merely means differentiation. It comes from a Latin word that means “to distinguish.” Accordingly, when we discriminate—i.e., when we differentiate or distinguish—among people, the propriety of our action depends upon the reasons that we have acted as we have. If we wish to know whether an act of discrimination is proper, we must inquire whether the distinction we have made is consistent with our moral principles.

That is, of course, the question that the United States Supreme Court will be addressing in the *Bakke* case.<sup>1</sup> The question presented by that case is whether a professional school, in particular a medical school, is entitled to adopt an admission policy that discriminates in favor of the members of certain minority groups in order to increase the enrollment of those groups within the school’s student body. The California Supreme Court has held that the program of the Davis Medical School was unconstitutional under the federal Constitution. Although it avoided a decision that race could never be taken into account in the admission process, it held that in this situation an adequate justification had not been made out by the university for doing so.

I do not want to address in any great detail what I think most people would call the legal issues that are presented by the *Bakke* case. They are difficult and complex, involving questions about the role of courts in our society, among other things,<sup>2</sup> and I simply cannot deal with all those issues adequately on this occasion. Instead, I want to discuss the social context within which the constitutionality of so-called “special admission” programs must be determined. I shall consider first the purposes that are served by the programs and, second, the reasons why the programs must exist if those purposes are to be achieved.

Now, though I have said that I am not going to address the legal issues, it must nevertheless be understood that I really am addressing the legal issues when I consider the purposes behind the programs, their importance, and the reasons why the programs are necessary if these purposes are to be achieved. For these “social” questions are almost certain

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to prove determinative as the Supreme Court considers the legal issues. The Court has never held that race cannot ever be taken into account by governmental bodies making decisions of one sort or another. At most, it has said that when a racial criterion is used, the validity of that use must be judged under the strictest constitutional standard—a standard of strict scrutiny. To meet the test of strict scrutiny, the Court has told us, classification must be “necessary to serve a compelling governmental purpose.”<sup>3</sup> My purpose in discussing the social context of “special admission” programs is to demonstrate that the programs meet that test.

## I. THE OBJECTIVES OF “SPECIAL ADMISSION” PROGRAMS

Preliminarily, we must recognize that the purposes served by “special admission” programs cannot be considered in isolation from the historical and social conditions that have created the need for the programs. The decisions of the Supreme Court—from *Dred Scott v. Sanford*<sup>4</sup> to *Strauder v. West Virginia*,<sup>5</sup> to *Brown v. Board of Education*<sup>6</sup> and beyond—amply record the efforts to exclude racial minorities from full participation in American life. Until very recently, racial minorities were almost entirely foreclosed from a role in the nation’s public life, not only by excluding them from elective and appointive office in national, state, and local government but, in many sections of the country, by denying them the fundamental rights and obligations of citizenship, including the franchise and the opportunity to serve on grand and petit juries. Their children were required to attend segregated and generally inferior schools. They often received lower levels of governmental services than whites and some services were at times simply withheld from them. In the private sector, minorities fared no better. By custom, and occasionally by law, they were relegated to the least desirable employment, to jobs that paid substantially less than those open to whites and that offered neither an opportunity for advancement nor a chance to participate in the many important decisions made in the private sector. The housing available to them displayed a similar pattern. Life in the ghetto and the barrio not only deprived minorities of contact with the dominant society, it subjected them to crowding, inadequate public services, and often to housing that failed to meet the minimal standards of our society. The unpleasant but inescapable truth is that, the Constitution notwithstanding, there existed in the United States a virtual caste system.

The legacy of that history is the reality we now confront. Despite the important beginnings that have been made since enactment of the Civil Rights Act of 1964, racial minorities are not—and are not close to being—full participants in American life. By every social indicator they continue to constitute an underclass in our society. Their income, life expectancies, and educational attainments are lower than those of whites. They are disproportionately the victims and the perpetrators of crime. Finally, and of more immediate concern for the *Bakke* case, racial minorities constitute approximately 17% of the total population but, as of the 1970 census, barely more than 1.9% of the membership of the bar.<sup>7</sup>

The nation is now committed to eliminating this legacy of racism. We have undertaken to remove the vestiges of caste from our society, not only by improving the conditions of life among historically disadvantaged minorities, but also by creating a racially integrated society. The question presented in *Bakke* is whether, now that we have made that commitment, the Constitution should be construed to forbid measures that are essential to its performance.

Any effort to achieve racial equality must, if it is to succeed, begin with an awareness that, in the United States today, race is a socially significant characteristic. Race, in other words, is not merely a superficial aspect of “deeper” social problems such as poverty or

inadequate education. It is integral to those problems. Many Americans, but especially those who are members of the groups that are the immediate beneficiaries of special admission programs, live in communities and belong to organizations that are defined in racial and ethnic terms. The direction of their loyalties and their sympathies are significantly determined by their racial and ethnic identifications. Whether, or to what extent, that is desirable is currently the subject of much debate. Such identification may, as some contend, lead only to divisiveness. Or, as others maintain, it may foster a sense of belonging and a pride in cultural origins. But whether it is good or bad, it is a reality with which law and the institutions of American life must contend.

In these circumstances, the question whether racial minorities are substantially represented in law school classes and at the bar assumes crucial importance. Gross underrepresentation of these groups has consequences quite different from those that would result from, say, gross underrepresentation of persons with one blue and one green eye. Individuals who share that characteristic have not historically been segregated by our society, nor otherwise subjected to generations of invidious discrimination. Governmental decisions do not affect them differently than they affect other persons and, conversely, their views on issues of public policy are likely to be distributed in the same way as in the general population. In each of these respects individuals who share only a socially irrelevant characteristic differ from the members of racial minorities. And, it is precisely because of these differences that gross underrepresentation of the latter in law schools and at the bar is a pressing social problem.

#### *A. The Need For More Minority Lawyers*

The most important reason for special admissions programs in the law schools is, quite simply, that there is a critical need for more minority lawyers. The 1970 census, as noted above, reported that racial minorities, which constitute approximately 17% of the population, represented barely more than 1.9% of the bar. However dramatic, this gross statistic does not begin to convey the desperate shortage of minority lawyers. A 1968 survey revealed that before special admissions programs began to have an effect there were, in the entire South, only 506 black lawyers. In Mississippi, where the black population was nearly 1,000,000, there were nine practicing black lawyers. In Alabama, with an even larger population of blacks, there were but 20 and in Georgia only 34.<sup>8</sup>

In drawing attention to this data, I do not mean to suggest that any of the compelling reasons for increasing minority representation at the bar that are detailed below require representation proportional to the percentage of the minority in this population. Opponents of special admissions programs have at times sought to characterize the programs as an attempt to achieve such representation among lawyers, an attempt that would, they then contend, necessarily imply maximum quotas for each racial and ethnic group in the profession. Stated bluntly, this objection is simply a "red herring." Neither now nor in the foreseeable future can there be any question of proportional representation in the bar. The serious question is whether publicly-supported schools can take steps to assure that the representation of minorities at the bar will be more than negligible. Reasons of compelling social importance require an affirmative answer to that question.

#### (1) The Public Role of the Legal Profession

Nearly 150 years ago, de Tocqueville described the crucial role of the legal profession in the United States. Lawyers, he wrote,

are naturally called upon to occupy most of the public stations. They fill the legislative

assemblies and they conduct the administration; they consequently exercise a powerful influence upon the formation of the law, and upon its execution.<sup>9</sup>

Time has added prescience to the keenness of these observations. Even more than in De Tocqueville's time lawyers now "form the highest political class" in the nations. No other professional group, no other single class of citizens, exercises or comes close to exercising as pervasive an influence upon the operations of government.

Of the nearly 400,000 lawyers in the United States today, approximately 50,000 are employed by federal, state, and local governments. They serve as legislators and as staff to legislatures; as policy makers, administrators, and litigators within the executive departments; and as judges and staff to the judicial system. Nor is the public role of lawyers confined to the public offices they hold. Acting on behalf of private interests, they exert a powerful influence on public policy, serving not only as intermediaries between citizens and their governments, but also as the architects of law reform aimed at making government responsive to the needs and interests of the citizenry. No less important, if often less fully appreciated, lawyers interpret the actions of government to their clients and their communities, and thereby serve a crucial role in achieving public understanding and acceptance of those actions.

The public influence of lawyers extends far beyond their formal roles in government or in representing clients in their dealings with government. Despite the importance of government in the modern world, the direction of our society and the quality of our national life depend not only, and perhaps not even most importantly, upon the decisions of government, but also upon the myriad decisions made in the private sector. Here too the influence of lawyers is pervasive. Lawyers frequently serve as members of the governing boards, as well as advisors to, private foundations, educational and charitable institutions and corporations. They play an important role in the labor movement. They are often in positions of leadership in the extraordinary variety of community and other organizations that play so vital a role in American life. In all these varied roles, lawyers are influential molders of public policy.

Because of the public importance of the legal profession, there is an imperative need that it include qualified representatives of the diverse groups that constitute our society. Since pre-Revolutionary times, Americans have been committed to the democratic ideal that government derives legitimacy from the consent of the governed, an ideal that we have historically understood to require the active and continuous participation of the governed in their government, either directly or by representation. For this reason, the frequency with which lawyers are elected to public office alone suggests the importance of increasing minority membership in the bar. But as my preceding comments demonstrate, representation does not depend solely upon elected representatives.

In a society as complex as ours, representation throughout the vast network of public and private institutions which shape our national life is required to achieve the active and continuous participation in the governance of society upon which consent is founded. Decisions significantly affecting the lives of minority group members are made daily by zoning boards of appeal, transportation departments, regulatory agencies—everywhere that decisions are made affecting the lives of Americans. At times, perhaps often, these decisions will have a different impact upon minority communities than upon the white community. A minority presence in the decision-making process increases the likelihood that those differences will be recognized and taken into account. Similarly, a minority presence in Wall Street law firms, corporate law departments, labor union legal staffs, law faculties, and the boards of foundations and community organizations—indeed, in all the institutions in which the influence of lawyers is felt—is likely to alter the behavior of those institutions in a

host of subtle and perhaps not so subtle ways, making them more responsive to the varying needs of minority communities. No less significantly, the presence of minorities in these institutions provides evidence to the members of minority groups that these important centers of American life are open to their members, evidence that may be expected to have an important influence upon their acceptance of the institutional framework of American society.

A single illustration may help to demonstrate the urgency of increasing minority representation at the bar. One of the harshest indicators of the economic and social conditions of America's racial minorities is the fact that their members are disproportionately both the victims and the perpetrators of reported crimes. Nationwide, 28% of all persons arrested are members of a racial minority. Unless the number of minority lawyers is raised beyond that which existed prior to the commencement of special admission programs and which will continue in the absence of such programs, the consequence must be a system of criminal justice in which many of the defendants are black or Chicano but in which nearly all judges, prosecutors, and even defense counsel are white. Given the history of racial injustice in the United States, it is not to be expected that such a system can maintain the respect and confidence of the minority communities that is so essential to its mission. I do not, of course, suggest that the fairness and credibility of the criminal justice system depend upon minorities or non-minorities being prosecuted, defended, or judged only by members of their own groups. But it is true nonetheless that the visible presence of minorities as prosecutors, defense counsel, and judges is essential to the appearance of justice, as well as to its reality.

The importance of a visible, and therefore a substantial, minority presence is obviously not limited to the criminal justice system. It exists wherever decisions are made that affect minorities, and that means that it exists wherever decisions are made affecting Americans. To be sure, it is neither possible nor necessary to have minorities represented wherever decisions affecting minorities are made. But substantially increased numbers of minority lawyers will inevitably have the effect of rendering the decision-making process of our society more cognizant of the distinctive interests of minorities.

## (2) Serving the Legal Needs of Minority Communities

Increasing the number of minority lawyers is necessary also to serve adequately the legal needs of the members of minority communities. In stating the existence of this need, we should be mindful of the ideal eloquently expressed by Justice Douglas in his *DeFunis* dissent, that "[t]he purpose of [a state university] cannot be to produce Black lawyers of Blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for the Irish. It should be to produce good lawyers for Americans."<sup>10</sup> This is a compelling social and political ideal. Constitutional law ought not, however, in the single-minded pursuit of that ideal, ignore the existence of other values or the reality of the society in which we live. Although it would be absurd to suppose that only a Jewish lawyer can adequately represent a Jew or that only a black lawyer can adequately represent a black, it is true nonetheless that many Jews and many blacks (like many persons of other backgrounds) would prefer to be represented by lawyers with an ethnic and racial identity similar to their own. Nor should the existence of these preferences occasion surprise. Beyond the natural affinity that many persons feel with persons of a common cultural background, the history and in some measure the present reality of our society afford the members of some racial and ethnic minorities ample reason to perceive the dominant society as alien and to regard it with suspicion and even hostility. When the need for legal assistance arises, often at a time of anxiety or crisis, they may feel the need to turn to a lawyer whom they trust to understand and to empathize with their situation. Law schools need not endorse these feelings to recognize their existence and the importance of providing some outlet for them.

In a society in which racial and ethnic identities play an important role in everyday life, moreover, a lawyer's racial or ethnic background may have an important bearing on his ability to serve his client. Many of the tasks that lawyers perform for their clients require an understanding of the social context in which the client's problem arises. A brilliant and effective tax specialist is, for that reason, unlikely to be an effective representative in a labor negotiation. The reason is not simply that he is unfamiliar with the law of labor relations, it is also and perhaps primarily that he lacks an understanding of the practical problems of labor relations, of the customs that have developed in dealing with those problems, and of the style and manners of collective bargaining. To the extent that racial and ethnic groups form distinctive subcultures within our society, the representation of some of their members in connection with some of their legal needs may involve similar difficulties for the "outsider." The ability to "speak the language" of the client, to understand his perception of his problem, and to deal with others in the community on his behalf are qualities essential to being a "good lawyer." These qualifications are more likely to be found among lawyers who share the client's racial or ethnic identity, at least to the extent that the client's life is bound up in a community defined in these terms.

### *B. Racial Diversity and the Objectives of Legal Education*

At least since the time of Plato it has been understood that those who govern require an understanding of the governed. The need is common to all forms of government, but in a democracy it is critical. In the United States, as I have previously noted, lawyers play a crucial role in the governance of the nation. Successful performance of that role requires an understanding of the diverse elements that comprise our pluralistic society. The need for such an understanding is hardly less important to successful performance of the lawyer's role in the representation of private interests.

For these reasons, a major objective of legal education is to assist students in acquiring an understanding of the social environment within which legal decisions are made. It is inevitable that this understanding, so far as it can be gained in an academic setting, will be acquired largely from books. To a substantial degree, however, it is also acquired by interaction among students, through exposure to differing points of view in class discussion and in less formal settings. The importance of these interactions to the education of lawyers was recognized by the Supreme Court more than a quarter century ago in *Sweatt v. Painter*.<sup>11</sup> "[A]lthough the law is a highly learned profession," Mr. Chief Justice Vinson wrote for the Court,

we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.<sup>12</sup>

The Court's concern in *Sweatt* was, of course, the need of black law students to interact with their white counterparts. But there is no less need for whites to interact with blacks.

The importance that the law faculties attach to achieving diversity within their student bodies will be obvious to those who are familiar with the admission practices of the law schools. Of course, with respect to many of the characteristics that are socially significant in our pluralistic society, substantial heterogeneity is achieved without deviating from admission criteria concerned only with predicting the level of an applicant's academic performance. Thus, even though on the average white applicants from low income families have lower LSAT scores and GPAs than those from more affluent families, substantial numbers do qualify for admission, without special consideration, at schools which have varying admis-

sions standards.<sup>13</sup> To the extent that diversity is not achieved in this way, the schools commonly rely upon non-academic factors to achieve it, always subject to the requirement that an applicant's predicted level of performance exceeds a school's minimum standards. Thus, some schools give preference to students from geographical areas that otherwise would not be represented in their student bodies. Many, perhaps most, are likely to prefer a student who has an uncommon background—e.g., substantial experience in business or law enforcement or, perhaps advanced training in economics or psychology—to others who have scored higher on predictors of academic success. The admission decision in all such cases rests upon the judgment of schools that the existence of this diversity will contribute to the education of other students in the class.

In view of the importance of race in American life and the importance that it is certain to have for the indefinite future, it would be startling if faculties had not concluded that the absence of racial minorities in law schools, or their presence only in very small numbers, would significantly detract from the educational experience of the student body. As a consequence of our history, race accounts for some of the most important differences in our society. Precisely because race is so significant, prospective lawyers need knowledge of the backgrounds, views, attitudes, aspirations, and manners of the members of racial minorities. It is true, of course, that the members of a minority group often differ with respect to these characteristics, and that with respect to some or all of them some members of minority groups are indistinguishable from many whites. Encountering these diversities and similarities is, however, an important part of the educational process. Well intentioned whites, no less than bigots, need to learn that there is not a common "black experience" and to appreciate the oversimplification of such statements as "blacks want (believe, need, etc.). . . ." Moreover, the distribution of attitudes among blacks, or among the members of other racial minorities, undoubtedly is not the same as it is among whites. And that too is worth knowing. If the distribution of perceptions and views about politics or crime or family is different among the several minority groups than among whites, that in and of itself may exert a shaping influence upon law and public policy, an influence to which law students must become sensitive if they are adequately to serve their future clients and perform successfully their future roles as community leaders.

The educational objectives of a minority presence in law school, finally, encompass more than increased understanding of minority groups. There is also a need to increase effective communication across racial lines. The difficulties that stand in the way of achieving such communication are not always obvious. Thus, as I have written elsewhere,

I cannot imagine that any law teacher whose subject matter requires discussion of racially sensitive issues can have failed to observe the inability of some White students to examine critically arguments by a Black, or the difficulty experienced by others in expressing their disagreements with Blacks on such issues. Yet, these skills are not only a professional necessity, they are indispensable to the long-term well-being of our society.<sup>14</sup>

### *C. Increasing The Social Mobility of Racial Minorities*

The special admission programs that have been undertaken by the law schools must be seen as part of a larger effort by the nation to improve the conditions of life of some of its most disadvantaged citizens. In part, that effort involves an attempt to accelerate the growth of a "middle class" within those racial and ethnic minority groups that historically have been denied the opportunity to participate fully in the richness of American life. The justification for minority preferences within that overall strategy is not difficult to discern: because of the continuing importance of racial and ethnic identifications and loyalties, there is reason to

anticipate that the strengthening of the black, Chicano, or Puerto Rican middle class through such preferences will have a catalytic effect. Increased numbers of black and Hispanic lawyers and other professionals should encourage the aspirations of black and Hispanic children. The organizational talent and financial resources of a minority middle class, experience suggests, will to some extent be put at the service of less advantaged members of minority groups. The hope, in short, is to set in motion a chain reaction leading to the breakdown of a complex of conditions that today condemn large numbers to lives of poverty and desperation.

But if this chain reaction is to occur it must begin. Professional education is the last step in a long educational process. The ability of an applicant to compete successfully for law school admission is the product not only of 16 years of previous schooling but also of the applicant's cultural background, a background intimately related to the educational attainments of the applicant's parents and of other adults who have influenced his or her development. Even if there were now to be immediate and effective compliance with the command of *Brown v. Board of Education*, and equal educational opportunity in primary and secondary schools were suddenly to become a reality, considerable time would have to elapse before the effect of these changes could significantly affect the number and quality of minority applicants to law school. The command of *Brown* is not completely obeyed, however, even after nearly a quarter century. And equal educational opportunity does not exist.

To deny professional schools the power to employ race-conscious admissions standards is, thus, to withhold from minorities, for a generation and perhaps longer, an important avenue of social mobility. The costs of withholding realistic opportunities for professional education from the current generation of minority students will not be borne only by them. It will be borne also by other members of minority groups who will be denied the service that would have otherwise been provided to their communities. It will be borne by the next generation of minority children who, like those of previous generations, will lack a visible demonstration of the potential rewards of aspiration and effort. And, not least, it will be borne by white Americans who, once again, will have failed to meet their commitment to achieve racial equality.

## II. THE NEED FOR SPECIAL ADMISSION PROGRAMS

If, as I hope, you are persuaded that the purposes I have discussed are of compelling social importance, it remains only to consider whether special admission programs are necessary to the achievement of those purposes. Accordingly, I turn to that question. With regret, I must report that the answer is not in doubt.

The unpleasant but unalterable reality is that affirmance of the California Supreme Court's decision would mean, for the law schools, a return to the virtually all-white student bodies that existed prior to the Civil Rights Act of 1964 and subsequent congressional enactments which, after so many years of default, finally committed the nation to the goal of racial equality. More specifically, as a result of the current admission practices of the nation's law schools, 1700 black and 500 Chicano students were admitted to the Fall, 1976 entering class. They represented 4.9% and 1.3%, respectively, of the total of 43,000 who were admitted. If the schools had not taken race into account in making their admission decisions, but had otherwise adhered to the admission criteria they employ, the number of black students would have been reduced to no more than 700 and the number of Chicanos to no more than 300.<sup>15</sup> It is virtually certain, however, that the reduction would have been much greater and it is not at all unlikely that even this reduced number would have again been reduced by half or more. Thus, the nation's two largest racial minorities, representing nearly 14% of the population, would have had at most a 2.3% representation in the nation's law schools and, more likely, no more than about 1%.

These conclusions are drawn from the *Evans Report*<sup>16</sup> which studied characteristics of applicants for admission to the 1976 law school class. The length and complexity of that study preclude any effort to set out its findings and supporting data in detail, but it may be useful to set forth briefly the data underlying the conclusions stated in the preceding paragraph and summarize several additional findings that further demonstrate the devastating impact that race-blind admission standards would have upon minority enrollment in law schools.

The ineradicable fact is that, as a group minorities in the pool of law school applicants achieve dramatically lower LSAT scores and GPAs than whites. Illustratively, 20% of the white and unidentified applicants, but only 1% of blacks and 4% of Chicanos receive both an LSAT score of 600 or above and a GPA of 3.25 or higher. Similarly, if the combined LSAT/GPA levels are set at 500 and 2.75 respectively, 60% of the white and unidentified candidates would be included but only 11% of the blacks and 23% of the Chicanos.<sup>17</sup> Such disparities exist at all LSAT and GPA levels. Their effect, under a race-blind system, must inevitably be to curtail sharply the number of blacks and Chicanos admitted to law school.

In 1976, there were more than 80,000 applicants for approximately 39,000 seats in the first-year class. Law schools commonly employ an index number combining LSAT and GPA scores as one means of predicting the probable law school performances of applicants. If all applicants for the 1976 class were to be assigned an index number, computed under two widely-used prediction formulas, the number of blacks in the top 40,000 would have been 370, on one formula, and 410 on the other. The equivalent figures for Chicanos are 225 and 250.<sup>18</sup>

Of course, law schools do not select students solely by "the numbers." Although an important factor in determining who will be admitted to law school, they are not the only one. To determine the number of blacks and Chicanos who would have been admitted to law school under a race-blind standard, it is necessary to estimate how they would have fared if non-quantitative predictors of success (letters of recommendation, experience, etc.) and other nonracial criteria affecting admissions (e.g., the school's interest in student diversity) were taken into account. Obviously, this cannot be done directly. It seems reasonable to assume, however, that if race were not a factor in the admission process, the applications of minorities would be affected by such factors in precisely the same way as those of whites.

On that assumption, the *Evans Report* calculated the acceptance rates for whites for each LSAT-GPA combination.<sup>19</sup> These acceptance rates were then applied to black and Chicano students who had the same combination of LSAT scores and GPAs.<sup>20</sup> On this basis, 700 blacks and 300 Chicanos would have been admitted, a number equal to 40% of the blacks and 60% of the Chicanos actually admitted.

These figures, 700 black and 300 Chicanos, state the outside limit that would have been admitted under a race-blind standard. It is virtually certain, however, that they substantially overstate the number that would actually have enrolled as first-year students. By employing aggregate national acceptance rates, the study in effect treats all law schools as a single school. As the report notes, the implicit assumption of such a procedure is "that minority candidates would apply to and be willing to attend" any school.<sup>21</sup> Common sense rebels against any such assumption. Geographical considerations alone are bound to limit a potential applicant's choice of schools. Moreover, the schools to which these 700 blacks and 300 Chicano students would have been admitted are predominantly the least selective law schools in the country. Since those schools lack the financial aid resources of the more selective institutions, a large portion of the high percentage of minority students who require financial assistance would, for that reason alone, be unable to attend the only schools to which they could gain admission.<sup>22</sup>

No one knows with any certainty how far these factors would reduce the number of blacks and Chicanos attending law school below the maximum eligibility figures of 700 and 300, perhaps by 25%, perhaps by 50%, perhaps by more. Since substantially more than half of both black and Chicano applicants were from low-income families,<sup>23</sup> however, and in view of the limitations imposed by geography, a reduction of 50% seems not at all implausible. On that basis, the number of black and Chicano students enrolled in the first-year class in 1976 would have been approximately 1% of the entering class, roughly the same as in 1964. The progress of a decade would have been wiped out.

The drastic impact of an affirmative in *Bakke* is also demonstrated by the *Evans Report's* findings that under a race-blind admission standard 12 of the nation's most selective law schools, which during 1975 had total minority enrollment of approximately 1,250, nearly 15% of the national total, would have enrolled no "more than a handful of minority students."<sup>24</sup> Yet, these are the schools from which, over the years, many of the leaders of the bar and the nation have been drawn. They are, moreover, the wealthiest institutions and, therefore, those with the greatest resources for the financial aids so sorely needed by many minority students.

The importance of *Bakke* to the future of minority student enrollment in the law schools of this country cannot be overstated. If the schools are prohibited from using race as a factor in admissions, minority enrollment will plummet and the hopes of a generation schooled in the traditions of equal opportunity enunciated by *Brown* will be dashed. This becomes even clearer when one examines the alternatives that have been suggested and realizes that in fact they offer no realistic prospect of substantial minority enrollments.

Arguments have been made from time to time, most notably by the California Supreme Court and by Justice Douglas dissenting in *DeFunis*, that substantial minority enrollments in professional schools can be maintained without using racial admission criteria. If there are means by which that can be done, they are not known to the law schools. We do know, however, that none of those that have been suggested would work. None would permit the enrollment of minority students in numbers even close to those that now exist and some would, in addition, have a destructive effect upon the quality of legal education and of the profession, requiring law schools to admit students—white and black—who are less qualified to study and practice law than students now being admitted.

The California Supreme Court suggested that universities "might increase minority enrollment by instituting aggressive programs to identify, recruit, and provide remedial schooling for disadvantaged students of all races. . . ."<sup>25</sup> Law schools have, however, already directed precisely such efforts toward minority students. An expansion of these efforts to other groups would not increase the number of minority applicants, but it would enlarge the number of whites in competition with them. Recruitment efforts directed toward minorities have been sufficiently successful that for the past several years the ratio of law school applicants to baccalaureate degrees granted has been the same for blacks and Chicanos as for whites.<sup>26</sup> There can be no doubt that this growth in the number of minority applicants is directly related to the existence of the special admissions program. For without these programs, it would have been pointless for most of the minority applicants, including most of those admitted, to have applied to law school at all.

A whole family of other suggestions for maintaining minority enrollments, while avoiding the use of race as an admission factor, depend upon reducing the influence of the quantitative predictors in the admission process. These range from Justice Douglas' extreme suggestion that the LSAT be abandoned to more moderate proposals that would have the schools place greater reliance on personal interviews, recommendations, and the like as a way of predicting academic performance and potential contribution to the society. Some of these

suggestions rest upon the assumption that the LSAT is "culturally biased," i.e., that it underpredicts the probable academic performance of minority applicants. Five separate studies conducted over the past half dozen years have found that assumption is wrong.<sup>27</sup> In the light of these findings, to call for abolition of the LSAT amounts to a demand that the messenger who brings the bad news be shot or, more accurately, that some other messenger who will bring better tidings be substituted.

For both majority and minority students, the combination of LSAT and GPA, with all their limitations, is the best available predictor of academic achievement, especially at the levels of difference which separate majority and minority applicants in nearly all law schools. If they are, for that reason, to be given weight in the admission process, minority students' nonquantitative predictors of academic performance (such as letters of recommendation) would, on the average, have to be a good deal more favorable than those of whites if the former are to compete successfully for admission. But there is not the slightest reason to suppose that they are; indeed, there is no reason to suppose that such subjective factors are distributed on other than a random basis among applicants of different races. There is, accordingly, no reason to suppose that greater emphasis upon "soft data" would lead to admission of any but a very small number of minority applicants.<sup>28</sup>

The same is true with respect to the suggestion that schools should, in the interest of "flexibility" place greater emphasis on factors other than predicted academic performance. Whatever may be the wisdom or unwisdom of such a proposal, there is not a shred of evidence that reliance on any of the nonacademic factors suggested would, unless used as a covert method of applying a racial preference, greatly enlarge the number of minority admissions. Some greater number of minority applicants might be admitted than if purely academic predictors of success were to be employed, but it is by no means obvious that that would be so. It is entirely possible that an admissions process employing standards as flexible as those suggested by the California Supreme Court would disadvantage minority students, favoring instead those applicants who had letters of recommendation from influential persons, or who were most similar to law school professors and admissions office professionals. And the cost of greatly diminishing the role of the best predictors of academic competence would be so intolerable as inevitably to cause abandonment of the endeavor.

We can put aside quickly the suggestion of the California court that professional schools specifically rely more on "matters relating to the needs of the profession and society, such as an applicant's professional goals" as a method of increasing the number of minority lawyers. If "the needs of the profession and society" are defined to include a need for more minority lawyers, the alternative is no alternative at all but a restatement of precisely the admission program that the California court declared unconstitutional. Similarly, if "professional goals" are defined to include an intention specifically to serve minority communities, their use as an admission criterion may be subject to the same attack as the use of the race of applicants in the admissions process. In any event, reliance on the stated goals of applicants for admission is pursuit of a chimera: applicants will inevitably say that which they believe will secure admittance and there is often—we think usually—little relationship between even the sincerely expressed goals of an applicant not yet in school and the professional career eventually pursued.

There is, moreover, a far greater difficulty. If the schools are to admit students upon the basis of their stated professional goals, they must inevitably evaluate and rate these goals comparatively. Is it better, for example, to train a lawyer who says he wants to attack corporations or one who seeks to defend them? Is a practice in the field of securities regulation more or less valuable to society than the representation of labor unions? Choices among applicants on any such basis would thrust the schools into an unwanted and unau-

thorized role of social arbiter. They can properly assess the community's overall need for lawyers; they should not be placed in the position of evaluating those objectives.

Another, superficially more plausible, means that has been suggested for maintaining minority enrollment is to convert special admission programs into programs for the economically disadvantaged. The underlying theory seems to be that a substantial number of minority group members will gain admission to law schools under such a program because minorities are disproportionately included among the economically disadvantaged. Here again, the theory depends upon ignoring the facts. Although racial minorities are disproportionately included among the economically disadvantaged, approximately two-thirds of all disadvantaged families are white.<sup>29</sup> Even if we were to assume that disadvantaged minorities would apply for admission to law school in proportion to their numbers, the size of special admissions programs would have to be trebled to maintain the present representation of minorities in law schools. A school that now specially admits 10% minorities would be required to extend its program to 30% of the class.<sup>30</sup> But there is no reason to believe that there would be anything like that proportion of minority applicants presenting credentials equal to those of white applicants with whom they would be in competition.

The best data now available as to the probable composition of any such disadvantaged special admissions program suggest that, among the present pool of applicants, over 90% of those who would be admitted under such a program would be neither black nor Chicano.<sup>31</sup> And even this necessarily understates the problem. However schools advertise their special admission programs, it is understood that the programs are essentially limited to members of minority groups. But once it is learned that an applicant of any race possessing academic credentials substantially lower than those ordinarily required for admission can gain admission if the applicant shows economic disadvantage, it can be predicted with certainty that two things will happen: (i) there will be a substantial number of unverified and unverifiable claims of childhood economic disadvantage and (ii) there will be a large number of potential applicants who now do not apply who will seek to take advantage of the program.

Moreover, one effect of a racially neutral disadvantaged program, as distinct from a minority program, would be to eliminate those blacks and other minorities who now are able to gain admission but who could not reasonably claim a disadvantage other than race. Among minorities, as among whites, applicants who come from low-income families have, in general, substantially lower LSAT scores and GPAs than those who do not.<sup>32</sup> Many of these latter applicants constitute the most promising of those admitted under the present special admission programs. Yet it is just these applicants who will be denied admission under a racially neutral program for the disadvantaged.

There is, regrettably, one final alternative still to be considered. The suggestion that professional schools abandon special minority admissions programs in favor of programs for the disadvantaged or that they seek to maintain minority enrollments by reducing reliance on quantitative predictors of academic performance may rest upon the premise that either of these alternatives would permit race to be taken into account *sub rosa*. I do not imply that the court below meant to invite such an interpretation of those suggestions, but there are others who have suggested that in the effort to achieve racial equality "we cannot afford complete openness and frankness on the part of the legislature, executive or judiciary."<sup>33</sup> It need hardly be said in response that a constitutional principle designed to be flouted should not be imposed on schools dedicated to teaching the role of law in our society.

## Notes

1. *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1960), cert. granted, 429 U.S. 1090, *aff'd in part and rev'd in part*, 98 S. Ct. 2733 (1978).
  2. See Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975).
  3. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW §16-6 (1978).
  4. 60 U.S. (19 How.) 393 (1857).
  5. 100 U.S. 303 (1880).
  6. 347 U.S. 483 (1954).
  7. BUREAU OF THE CENSUS, DETAILED CHARACTERISTICS OF THE POPULATION, Table 223 (1970).
  8. See Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L. J. 1069, 1073-74.
  9. I A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 329-30 (Schocken ed. 1961).
  10. *DuFunis v. Odegaard*, 416 U.S. 312, 342 (1974).
  11. 339 U.S. 629 (1950).
  12. *Id.* at 634.
  13. See F. EVANS, APPLICATIONS AND ADMISSIONS TO ABA ACCREDITED LAW SCHOOLS: AN ANALYSIS OF NATIONAL DATA FOR THE CLASS ENTERING IN THE FALL 1976, at 63 (Law School Admission Council 1977) [hereinafter cited as EVANS REPORT].
  14. Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 684 (1975).
  15. EVANS REPORT, *supra* note 13, at 44.
  16. *Id.* at 35.
  17. *Id.* at 49-50.
  18. Illustratively, of those whites who had an LSAT score between 600-649 and a GPA between 3.00-3.24, 83% received at least one offer of admission from a school to which they had applied. Of those who had an LSAT between 550-599 and a GPA between 2.75-2.99, 60% received such an offer. These illustrations, and the full range of calculations set out in the EVANS REPORT, demonstrate that, as might be expected, the lower an applicant's quantitative predictors, the lower his or her chance of admission.
  19. For example, since 60% of whites who had LSAT scores between 550-599 and GPAs between 2.75-2.99 were accepted by at least one school, it was assumed that the same percentage of blacks with such credentials would have received at least one offer of admission. Since there were 37 blacks in this group, the assumption is that 22 would have received an offer. In fact, 30 of the 37 blacks in this group received at least one offer.
  20. *Id.* at 44.
  21. *Id.* at 45.
  22. *Id.* at 57.
  23. *Id.* at 29 & 59.
  24. *Id.*
  25. Moreover, low income whites perform sufficiently well on the LSAT and GPA to qualify for admission, in substantial numbers, at schools with varying standards. *Id.* at 63.
  26. Compare ALTESEK & GOMBERG, BACHELOR'S DEGREES AWARDED TO MINORITY STUDENTS 1973-1974, at 4 (1977) (baccalaureate degrees) with EVANS REPORT, *supra* note 13, at 29 (law school applicants).
  27. See Schrader, Pitcher & Winterbottom, *The Interpretation of Law School Admission Test Scores for Culturally Deprived and Non-white Candidates*, LSAC 66-3, in 1 LAW SCHOOL ADMISSION RESEARCH 375 (1976); Flickinger, *Law School Admissions and the Culturally Deprived*, printed with Schrader & Pitcher, *The Interpretation of Law School Admission Test Scores for Culturally Deprived Candidates: An Extension of the 1966 Study Based on Five Additional Law Schools*, LSAC 72-5, in 2 LAW SCHOOL ADMISSION RESEARCH 277 (1976); Schrader & Pitcher, *Predicting Law School Grades for Black American Law Students*, LSAC 73-6, in 2 LAW SCHOOL ADMISSION RESEARCH 451 (1976); Schrader & Pitcher, *Prediction of Law School Grades for Mexican American and Black American Students*, LSAC 74-8, in 2 LAW SCHOOL ADMISSION RESEARCH 715 (1976).
- Research has also been done as to whether there is any possible source of bias in the "speededness" of the test, i.e., the question whether minority candidates may not finish the test in as large a proportion as whites. The first study indicated that, although speededness had a slight effect on scores, there was no differential in

that effect. Evans & Reilly, *A Study of Speededness as a Source of Test Bias*, LSAC 71-2, in 2 LAW SCHOOL ADMISSION RESEARCH 111 (1976) and in 9 J. EDUC. MEASUREMENT 123 (1972). A second, extended study confirmed the absence of any differential effect. Evans & Reilly, *The LSAT Speededness Study Revisited: Final Report*, LSAC 72-3, in 2 LAW SCHOOL ADMISSION RESEARCH 191 (1976).

28. Ironically, it is this very reliance on unverifiable "soft data" which the equal employment regulations seek to limit. See *Employee Selection Guidelines*, 41 Fed. Reg. 51733 (Nov. 23, 1976) (issued jointly by the Departments of Justice and Labor and the Civil Service Commission); *EEOC Guidelines on Employee Selection Procedures*, 29 C.F.R. 1607.1 (1976). See also *Rowe v. General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972) (promotions).

29. Bureau of the Census, CURRENT POPULATION REPORTS, Series P-60, No. 103, *Money Income and Poverty Status of Families and Persons in the United States: 1975 and 1974 Revisions* (Advance Report 1976).

30. Even if the schools were willing to expand the programs to this extent, their inability to provide financial assistance to so sharply increased a number of disadvantaged students would necessarily lead to a very substantial reduction in the number of minority students, if the programs were to operate in a racially neutral manner.

31. EVANS REPORT, *supra* note 13, at 62.

32. *Id.* at 61.

33. Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 361, 410 (1966).