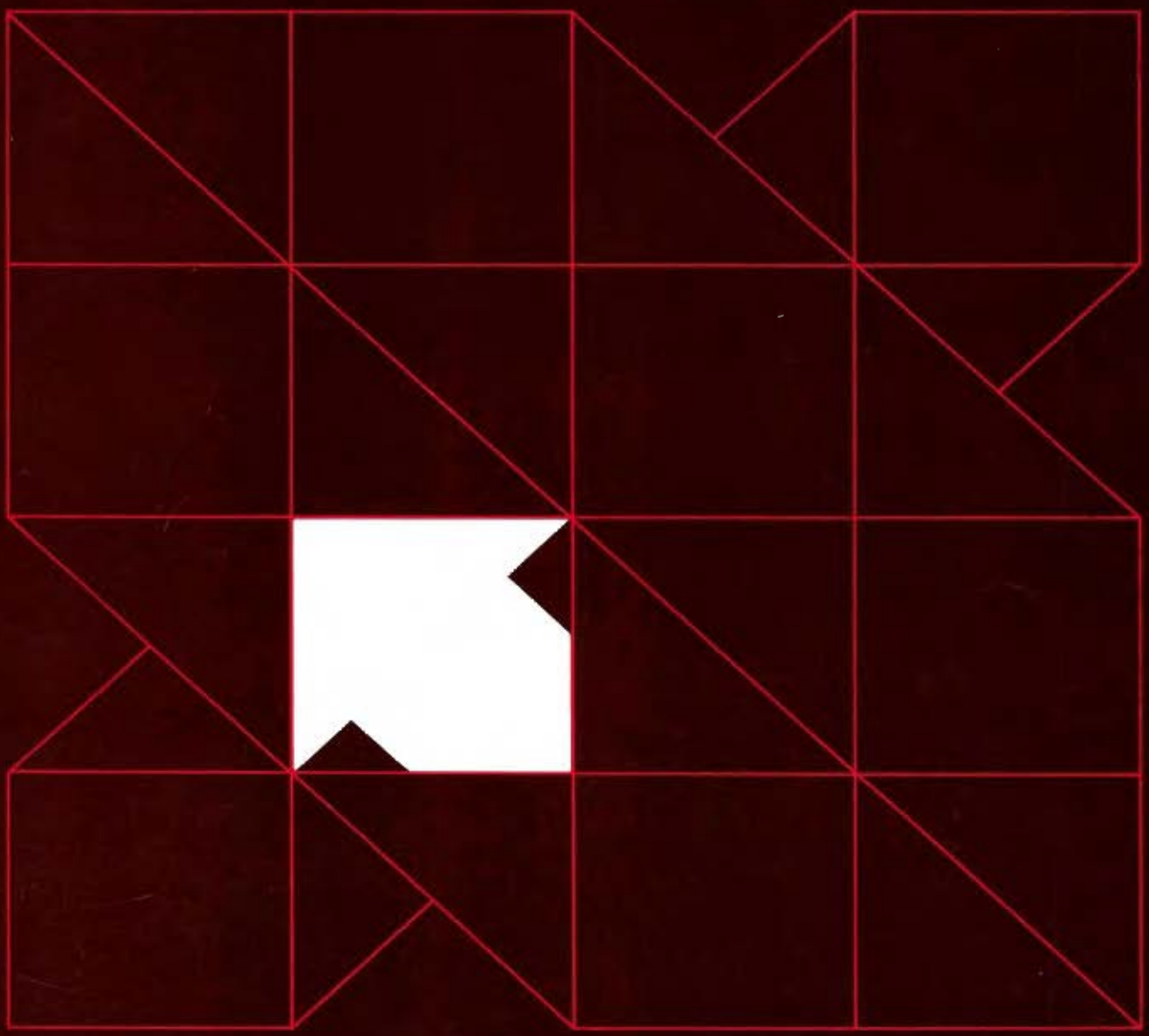
Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools

June 1978



United States Commission on Civil Rights

Clearinghouse Publication 55

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

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- Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to equal protection of the laws because of race, color, religion, sex, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to denials of equal protection of the laws because of race, color, religion, sex, or national origin;
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Preface

This Nation holds an enduring belief in the capacity of education to shape both our personal and national futures. This is evident in the Supreme Court's decision in 1954 in *Brown* v. *Board of Education,* [1] which stressed that where education is provided it must be provided equally to all. That decision gave hope to many minority Americans that they might at last enjoy the educational opportunities taken for granted by many or most of their fellow citizens.

This Nation's commitment to remedying the effects of the discrimination held unconstitutional in *Brown* and related cases is cast in doubt by the growing controversy over affirmative admissions programs in professional schools. Specifically, affirmative student admissions policies and practices[2] at law and medical schools have been challenged on legal grounds as unconstitutional "reverse discrimination" and on educational policy grounds as replacing the merit standard in admissions decisions. The debate involves such questions as whether "racially sensitive" programs undertaken voluntarily by professional schools are consistent with the law; whether unqualified minority students are being given preference in admissions over qualified white students, thus violating merit standards for admission; and whether such programs are in fact necessary to increase minority enrollment in law and medical schools and participation in those professions.

These and other related issues have been discussed at length in recent years. More than 60 legal briefs were presented to the Supreme Court of the United States in connection with the *Bakke* case.[3]

The Commission's concern about remedying discrimination in higher education is not of recent origin. In 1960, the Commission released a major study entitled *Equal Protection of the Laws in Public Higher Education.* The Commission addressed the issue of affirmative action in employment at universities in a 1973 report, *Statement on Affirmative Action for Equal Employment Opportunities.* In 1975, the Commission held a consultation on "Affirmative Action in Employment in Higher Education." In 1977, the Commission released a *Statement on Affirmative Action,* which considered, among other issues, affirmative admissions programs.[4]

This monograph examines affirmative admissions programs at law and medical schools in the context of our national commitments to equal opportunity and to the eradication of the remaining effects of discrimination. The study traces the history of past discrimination in education, particularly higher education, and describes some of its continuing effects, including the underrepresentation of minorities in the legal and medical professions. Next, the traditional admissions process at law and medical schools is examined with respect to both its numerical, objective, or quantitative standards and its subjective or nonquantitative criteria. Affirmative admissions programs currently in operation are then described and analyzed in the context of past discrimination and their relationship to traditional admissions programs.

Commission staff have reviewed relevant literature, including many of the briefs submitted in connection with the *Bakke* case, and have interviewed admissions officers and other key individuals at selected law and medical schools.[5] The schools visited were chosen because they use different approaches to increase minority enrollment, have different minority groups represented in their enroll-

[1] 347 U.S. 483 (1954).

[2] As used in this monograph, "affirmative admissions" refers to various admissions programs at schools of law and medicine in which minority status is considered along with undergraduate grade point averages, entrance test scores, and other traditional criteria in determining which applicants will be admitted to study.

[3] Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P. 2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted,* 429 U.S. 1090 (1977).

[4] See appendix A.

[5] Interviewees included deans, admissions officers, professors, admissions committee members, and students.

ments, and are located in diverse regions of the United States.[6] While these schools employ different approaches to the same basic concern—underrepresentation of minorities in law and medicine—they do not represent, nor were they intended to represent, a scientific random sample.

This monograph does not discuss issues of student recruitment or retention, nor is sex discrimination treated.[7] Furthermore, this study does not purport to be a legal brief. As previously noted, the Commission has discussed the legal and policy context for affirmative admissions programs in its *Statement on Affirmative Action* released in October 1977. That statement notes that the explicit use of race in the design of remedial measures is not unique to admissions programs in professional schools, or even in the field of education generally, and that such measures have been adopted and upheld in other contexts, most notably employment.[8] The statement further explains why the Commission considers the setting of affirmative action goals, including the use of numerically based, racially sensitive remedies for past discrimination, to be in the national interest.

This monograph reviews the problems that gave rise to the need for affirmative admissions programs and looks at the nature and effect of such programs in comparison to traditional admissions programs. The Commission hopes that by synthesizing some of the material on these matters and focusing on several basic issues, it will contribute to a better understanding of the nature and role of affirmative admissions programs at our law and medical schools.

[6] These schools included Georgetown University Law Center, Washington, D.C.; University of California at Los Angeles law and medical schools; University of New Mexico law and medical schools; and Northwestern University Law School, Evanston, Illinois.

[7] As the recent challenges to affirmative admissions programs focus on the role of race and ethnicity in admissions, the Commission restricts its discussion in this monograph to those same issues. Sex discrimination has, of course, been a serious barrier to equal opportunity in the professions. See, for example, M.R. Walsh, *Doctors Wanted: No Women Need Apply* (New Haven: Yale University Press, 1977).

[8] U.S., Commission on Civil Rights, *Statement on Affirmative Action* (October 1977), pp. 9–11.

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The report was edited by Larry Riedman of the Publications Management Division.

Contents

Chapter 1

The Historical Context

Americans have always recognized the importance of education to our democratic society. Thomas Jefferson stressed the paramount need for an educated people if the American democratic experiment were to succeed, and he drafted a law to establish public education in the colonies.[1]

Two hundred years later, Lyndon B. Johnson also noted the importance of an education for all citizens when he declared, "Education, more than any single force, will mold the citizen of the future. That citizen, in turn, will readily determine the greatness of our society."[2]

For most of this Nation's history, however, minority groups were denied the same educational opportunities afforded whites. Ignorance and fear of, and in some cases contempt for, racial and ethnic minorities were the basis for the assumption among many whites that a good education for minorities was either undesirable or unnecessary.

In the case of blacks, for example, the education of slaves was a prospect that for generations filled many whites with deep fear. Education, in their view, would bring not progress and hope but, instead, demands for freedom. In 1832, one member of the Virginia House of Delegates spoke with relief of the black antiliteracy laws passed in the South:

> We have, as far as possible, closed every avenue by which light might enter their [the slaves'] minds. If we could extinguish the capacity to see the light, our work would be completed; they would then be on a level with the beasts of the field, and we should be safe![3]

The fear of black literacy was so strong in the 18th and early 19th centuries that, with the exception of Kentucky, Maryland, and Tennessee, the teaching of slaves was barred throughout the South.[4] Eventually, prohibitions against learning were applied even to freed slaves.[5] In the North, efforts of blacks and whites to maintain schools for freed blacks were often met by arson, angry mobs, and intimidation.[6]

Discrimination against other minority groups in the early part of this century is typified in the views expressed by a county school superintendent in Texas:

> Most of our Mexicans are of the lower class. They transplant onions, harvest them, etc. The less they know about everything else, the better contented they are. You have doubtless heard that ignorance is bliss; it seems that it is so when one has to transplant onions. . . .If a man has very much sense or education either, he is not going to stick to this kind of work. So you see it is up to the white population to keep the Mexican on his knees in an onion patch. . . .This does not mix well with education.[7]

The middle years of the 19th century saw the end of slavery, the Reconstruction period, and the ratification of treaties governing relationships between the U.S. Government and peoples in the conquered territories, i.e., Mexican Americans and American Indians. During Reconstruction, a time of great hope and promise for many blacks, the Federal Government, concerned whites, and blacks from the

[1] Richard Hofstadter, *The American Political Tradition* (New York: Vintage, 1948), p. 27.
[2] Lyndon B. Johnson (remarks before the National Education Association Convention in New York City, July 2, 1965), *Public Papers of the Presidents of the United States* (Washington, D.C.: U.S. Government Printing Office, 1966), p. 716.
[3] Will Goodell, *The American Slave Code in Theory and Practice* (London: Clark Beeton and Co., 1853), p. 323, as cited in John E. Fleming, *The Lengthening Shadow of Slavery* (Washington, D.C.: Howard University Press, 1976), p. 14.
[4] Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford University Press, 1965), p. 508.
[5] Meyer Weinberg, *A Chance to Learn: A History of Race and Education in the United States* (Cambridge, Mass.: Cambridge University Press, 1977), p. 13.
[6] Ibid., pp. 23, 24.
[7] As quoted in Herschel T. Manuel, *The Education of Mexican and Spanish-speaking Children in Texas* (Austin: Fund for Research in the Social Sciences, University of Texas, 1930), p. 77, as cited in Weinberg, *A Chance to Learn*, p. 146.

North and South undertook the task of providing schools for the former slaves who had been forcibly kept illiterate. The Ku Klux Klan and other hostile whites, however, perpetrated widespread violence designed to destroy these efforts.[8] One writer describes the Klan's sustained violence in the South at this time as unequaled.[9] Violence and intimidation became less necessary as whites regained political control of the South, imposed Jim Crow laws and Jim Crow justice on blacks, and acted to disfranchise them.[10] The imposition of "separate but equal" education came as a final, telling blow to black development.[11]

"Separate but Equal"

A brief examination of public elementary and secondary schooling during the first half of the 20th century is informative as to the then-prevailing attitudes toward minority education.

In 1896, the Supreme Court of the United States in *Plessy* v. *Ferguson,* a transportation case, upheld the constitutionality of the separate but equal doctrine, providing the legal basis for the approval of the systems of segregated education which had evolved.[12] In 1899, the Court ruled in *Cumming* v. *Richmond County Board of Education* that educational policies of public schools at the local level are the responsibility of the States, and interference by the Federal Government is not justified, except in the case of a "clear and unmistakable disregard of rights secured by the supreme law of the land." Unequal expenditures, when within the discretion of the school board, were not found to violate the Constitution so long as, it was suggested, they were not prompted by hostility to the black population because of its race.[13]

"Separate but equal" public school systems were thus sanctioned by the Supreme Court of the United States. Separate schools were maintained for whites and for all minority groups. While they were in fact separate or segregated according to race or ethnicity, they were seldom, if ever, equal, as black experience in the South revealed. State and local control of the public schooling of black children in the South was a continuing disaster: for example, between 1901 and 1915 in Virginia, 95 percent of school-age white children were assured seats in white schools while black schools had enough seats for only half of the black children.[14] The South lagged behind the rest of the country in all expenditures for education,[15] but the separate schools attended by blacks in the South were far worse than the schools attended by whites.[16]

Black children in the South were hampered by other disadvantages which prevented them from learning. Black students, due to their parents' precarious economic position, were regularly out of classes for crop work, particularly at harvest time.[17] Black schools were smaller, which typically led to overcrowding and learning in shifts, an exhausting task for teachers.[18] Black teachers generally were paid less than whites (e.g., half as much in Georgia), and black women who taught generally were paid less than any other teachers.[19] Expenditures for books, supplies, and facilities for blacks were markedly lower than similar funding for whites.[20]

Mexican Americans in the Southwest and West suffered a similar fate. Huge tracts of land in the Southwest and West were annexed by this country through conquest, treaties, and purchases.[21] The thousands of Mexican Americans living in the captured area received recognition of their citizenship, property, religion, and liberty rights in 1848 under the Treaty of Guadalupe Hidalgo. In New Mexico, article XII, section 10 of the State constitution guaranteed:

> Children of Spanish descent in the State of New Mexico shall never be denied the right and privilege of admission and attendance in the

[8] Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* (New York: Harper and Row, 1971).
[9] Ibid.
[10] See C. Vann Woodward, *The Strange Career of Jim Crow,* revised ed. (New York: Oxford University Press, 2d ed., 1966).
[11] Fleming, *The Lengthening Shadow of Slavery,* pp. 59–84.
[12] Plessy v. Ferguson, 163 U.S. 537, 544 (1896). This case involved segregated railroad cars, but the Court in *Plessy* cited decisions which upheld separate but equal schools in Massachusetts and the District of Columbia. At issue in *Plessy* v. *Ferguson* was a Louisiana statute which required that railroads carrying passengers within that State provide separate accommodations for whites and blacks. The Supreme Court upheld the statute's constitutionality. In doing so, it noted, among other things, that laws which provided for separate schools for children of different colors had been enacted by legislatures of many of the States and had been generally sustained by the courts.
[13] Cumming v. Richmond County Board of Education, 175 U.S. 528, 544–45 (1899); Weinberg, *A Chance to Learn,* pp. 53–54.
[14] Louis R. Harlan, *Separate and Unequal: Public School Campaigns and Racism in the Southern Seaboard States, 1901–1915* (New York: Atheneum, 1969), p. 166.
[15] Ibid., pp. 9–11, 30–38.
[16] Ibid., pp. 11–15.
[17] Ibid., p. 30; and Weinberg, *A Chance to Learn,* pp. 52–53.
[18] Harlan, *Separate and Unequal,* pp. 13–14.
[19] Ibid., pp. 13, 245.
[20] Ibid., pp. 13–15.
[21] Treaty of Guadalupe Hidalgo, February 2, 1848, United States-Mexico, 9 Stat. 922, T.S. No. 207. The treaty added some 525,000 square miles to the United States. The 1854 Gadsden Purchase added another 29,640 square miles which became part of Arizona and New Mexico.

> public schools or other public educational institutions of the State, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the State.[22]

However, such guarantees were of little protection to a people viewed as alien by the Anglo (white) Americans who controlled the annexed territory. Throughout the Southwest and West, Mexican Americans lost control of the education of their children and the language in which teaching would take place. In New Mexico, Anglo control of the State government delayed the establishment of public schools, kept public education badly underfunded, and finally led to an administrative ruling that English was to be the sole language of public instruction.[23] Funding was "diverted from the common schools to higher education and, therefore, to the use of Anglos."[24]

As was the case with blacks, separate schools, discriminatory funding, and shorter school terms made education an empty promise for Mexican Americans in many communities. Their language and customs were regularly ignored, mocked, or even prohibited in Anglo-controlled schools.[25] Mexican Americans received a second-rate education which left large numbers of students no alternative to the manual labor that had been the lot of their parents.[26]

American Indians also found themselves in separate, unequal schools. Treaties made by various American Indian tribes with the United States Government prior to the Civil War included arrangements that the Government provide teachers, supplies, schools, and funds through trust accounts for land purchased.[27] These early treaties were rarely fulfilled.[28] Schools were mostly conducted by white missionaries whose real aim was to convert the Indians to Christianity.[29]

After the Civil War, the United States established treaties that required for the most part the use of English as the language of instruction for Indian children.[30] Thus, through education the government sought to "civilize" the Indian by replacing Indian language and culture with white ways and speech.[31] Not only were American Indian languages forbidden in the schools, but contempt and even hatred was taught for the traditional Indian ways.[32]

Many Indian children were forced to live in boarding schools at considerable distances from their families. These boarding schools, originally conceived as educationally beneficial, soon came to represent a violent method of inducting American Indians into white society.[33] One author notes that coercion, kidnapping, and the withholding of parents' rations were "customary" means of forcing Indian children into such schools well into this century.[34]

In 1934 Congress passed the Johnson-O'Malley Act,[35] which empowered the Secretary of the Interior to contract with the States and territories to make use of funds appropriated by Congress for Indian education. States and localities regularly frustrated the act's provisions, however, by diverting funds earmarked for Indian schooling to the general educational fund.[36] As a result, American Indian children also continued to face substandard education.[37]

Other minority groups, including Asian Americans and Puerto Ricans, arrived on the North American continent in growing numbers during the latter half of the 19th century and into the 20th century, bringing with them hopes for new opportunities and a brighter future for themselves and their children.

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[22] New Mexico Constitution, Article XII, §10, as cited in Weinberg, *A Chance to Learn*, p. 143.

[23] Weinberg, *A Chance to Learn*, pp. 142–44.

[24] Ibid., p. 143.

[25] The 1971–74 Mexican American Education Study by the United States Commission on Civil Rights offers a detailed assessment of the effect of educational segregation and discrimination against Mexican Americans. The study's six volumes are: Report I, *Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest* (1971); Report II, *The Unfinished Education: Outcomes for Minorities in the Five Southwestern States* (1971); Report III, *The Excluded Student: Educational Practices Affecting Mexican Americans in the Southwest* (1972); Report IV, *Mexican American Education in Texas: A Function of Wealth* (1972); Report V, *Teachers and Students: Differences in Teacher Interaction with Mexican American and Anglo Students* (1973); Report VI, *Toward Quality Education for Mexican Americans* (1974).

[26] Ibid., and Weinberg, *A Chance to Learn*, pp. 140–77.

[27] For example, Treaty of Oct. 3, 1818, United States—Delaware Tribe, Supplementary Article, Sept. 24, 1829, 7 Stat. 327; Treaty of Oct. 24, 1832, United States—Kickapoo Tribe, Art. VII, 7 Stat. 391, 392; Treaty of Sept. 15, 1832, United States—Winnebago Tribe, Art. IV, 7 Stat. 370, 371.

[28] See Virgil J. Vogel, *This Country Was Ours: A Documentary History of the American Indian* (New York: Harper and Row, 1972), as cited in Weinberg, *A Chance to Learn*, p. 181–182.

[29] Weinberg, *A Chance to Learn*, p. 186.

[30] See, e.g., Treaty of June I, 1868, United States—Navajo Tribe, Art. VI, 15 Stat. 667; Treaty of July 3, 1868, United States—Eastern Band of Shashonee and Bannack Tribes, Art. VII, 15 Stat. 673. See also, U.S. Commission on Civil Rights, *The Navajo Nation: An American Colony* (1975), p. 15.

[31] Weinberg, *A Chance to Learn*, pp. 186, 189–91, and 202–08.

[32] Gertrude Golden, *Red Moon Called Me: Memoirs of a Schoolteacher in the Government Indian Service*, Cecil Dryden, ed. (San Antonio: Naylor, 1954), p. 83, as cited in Weinberg, *A Chance to Learn*, p. 206.

[33] Judith R. Kramer, *The American Minority Community* (New York: Thomas Y. Crowell Co., 1970), p. 191.

[34] Weinberg, *A Chance to Learn*, p. 203.

[35] Johnson-O'Malley Act, Ch. 147, 48 Stat. 596(1934) (codified at 25 U.S.C. §§452–455 (1970)).

[36] Weinberg, *A Chance to Learn*, pp. 212–17.

[37] Ibid.

Instead, they found themselves ensnared in the same web of racial hostility and inferior educational facilities that blacks, Mexican Americans, and American Indians were forced to endure.

In 1885, California adopted a school segregation law allowing the exclusion of Chinese and Mongolian children from white public schools.[38] The San Francisco School Board in 1906 directed that all Chinese, Japanese, and Korean students be banned from white city schools and instead be sent to the Oriental Public School.[39] In 1927, in a suit brought by a Chinese student to gain admission to a white school in Mississippi, the United States Supreme Court upheld a Mississippi State Supreme Court ruling that it was not a denial of equal protection to maintain separate but equal facilities. As a result, separate schools were maintained; white children were sent to one, and all other children to the other.[40]

Legislation specifically aimed at limiting immigration of Asian and Pacific Island peoples was enacted.[41] The Chinese Exclusion Act of 1882, which suspended the immigration of Chinese laborers, was the first exclusively racial immigration law in United States history.[42] The Chinese were denied full eligibility for citizenship in the United States until 1943; the Pilipinos until 1946; and Japanese-born residents until 1952.[43] Reminiscent of the Klan's activities against blacks in the South, there were large, hostile, anti-Asian movements throughout the late 1800s and early 1900s.[44] Asians, along with other immigrants, were the subjects of specially assessed taxes in California.[45] Asian immigrants were not permitted to become citizens or to vote and under alien land laws were effectively forbidden from owning or leasing real property.[46] No account of the discrimination directed against Asian Americans can be complete without noting the wholesale internment of Japanese-Americans during the Second World War.[47]

More recently, a court case in San Francisco documented the serious problems of racial segregation and discrimination encountered by Asian and other minority students.[48] In 1974, the Supreme Court in *Lau* v. *Nichols* [49] ruled that under Title VI of the Civil Rights Act of 1964,[50] affirmative steps must be taken by school districts to meet the special language needs of Chinese and other non-English-speaking students in school.

The combination of color and culture, including language, has also been a major obstacle to equal educational opportunity for Puerto Rican students. Although Puerto Ricans, unlike Asian Americans, arrived on the United States mainland as United States citizens, primarily in the 20th century, little effort was made to aid their adjustment to mainland public schools.[51]

Negative counseling of minority students has been another form of discrimination. For example, blacks in North and South were deliberately counseled for careers below their ability.[52] Such advice was routinely directed at other minority group students as well.[53] They were often told that it was pointless

[38] The California State Legislature provided in 1885 that:

> [t]rustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious diseases, and also to establish separate schools for children of Mongolian or Chinese descent. When such schools are established Chinese or Mongolian students must not be admitted into any other schools.

Act of March 12, 1885, ch. 117, §1, 1885 Cal. Stats. 99. This provision was reenacted and amended several times before its repeal in 1947. Act of Sept. 19, 1947, ch. 737, §1, 1947 Cal. Stats. 1792. One such amendment added children of Japanese descent to those who could be excluded. See note 39.

[39] This was done by resolution of the San Francisco School Board on October 11, 1906. Inclusion of the Japanese children among those to be segregated prompted protests from the Japanese Government. Faced with a potential international crisis, the Federal Government intervened and finally convinced the school board in February 1907 to rescind the segregation policy in return for a commitment from President Theodore Roosevelt to take steps to end immigration of Japanese laborers to the U.S. mainland.

The California Code was amended in 1921 to include Japanese children among those for whom separate schools could be established; and who, if such schools were established, could not be admitted into any other schools. Act of 1921, ch. 685, §1, 1921 Cal. Stats. 1160. This provision remained in effect until its repeal in 1947. Act of Sept. 19, 1947, ch. 737, §1, 1947 Cal. Stat. 1792. See also Charles Wollenberg, *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855–1975* (Berkeley, Calif.: University of California Press, 1976), pp. 52–67, 72.

[40] Gong Lum v. Rice, 275 U.S. 78 (1927).

[41] Brief for the Asian American Bar Association of the Greater Bay Area as Amicus Curiae at 5, Regents of University of California v. Bakke, 18 Cal. 3d 34, 553 P. 2d 1152, 132 Cal. Rptr. 680, *cert. granted,* 429 U.S. 1090 (1977) (No. 76–811) (hereafter cited as Asian American brief).

[42] Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58. See Derrick A. Bell, Jr., "American Racism and other 'Non-Whites'," *Race, Racism, and American Law* (Boston: Little, Brown, 1975), p. 70.

[43] Bell, *Race, Racism and American Law,* pp. 71–74.

[44] Asian American brief, pp. 5–8.

[45] Foreign Miner's License Tax, ch. 97, §1 *et seq.,* 1850 Cal. Stats. 221 (1950); Act of April 28, 1855, ch. 153, §1, Cal. Stats. 194; Act of April 26, 1862, ch. 339, §1, 1862 Cal Stats. 462, as cited in the Asian American Brief, p. 6.

[46] See, e.g., Cal. Const. art. I, §17 (1879), amended 1894, 1954, repealed 1974. See also the Asian American Brief, pp. 6–10.

[47] Asian American brief, pp. 5–10. See also, *Civil Rights Digest,* fall 1976, pp. 8–10, 37.

[48] Lee v. Johnson, 404 U.S. 1215 (1971).

[49] Lau v. Nichols, 414 U.S. 563 (1974).

[50] Civil Rights Act of 1964, Pub. L. No. 88–352, §§601–607, 78 Stat. 252 (current version at 42 U.S.C. §§2000d to 2000d-6 (1970)).

[51] Weinberg, *A Chance to Learn,* pp. 230–59.

[52] Ibid., p. 80.

[53] U.S., Commission on Civil Rights, *Puerto Ricans in the Continental United States* (October 1976), pp. 105–08; U.S. Commission on Civil Rights, *Toward Quality Education For Mexican Americans* (February 1974), pp. 109–27.

for them to seek advanced education since the curriculum would be too difficult for them.[54]

The outcome of these patterns of isolation, exclusion, and indifference has been severe for minority young people. They have had fewer years of completed schooling than whites or Anglos, higher dropout rates, higher levels of functional illiteracy, and a significant underrepresentation in institutions of higher education.[55]

Higher Education

Similar racial segregation and discrimination faced minority young people who had managed against difficult odds to complete school and who sought higher education. The Morrill Act[56] passed by Congress in 1890 permitted "separate but equal" higher education, but the agricultural and mechanical colleges and normal schools that were eventually established for blacks in the South were generally marked by "meager financial support" and inadequate facilities and staffing.[57] Financial leverage by State legislatures and philanthropic backers discouraged the black, primarily vocational, schools from challenging academically the second-class employment status that their students longed to escape.[58]

The mockery of "separate but equal" colleges and universities in the South was further demonstrated by the fact that, as one author notes, "In Texas, the constitution of 1876 pledged to establish a State university for blacks 'when practicable.' Seventy years later, the pledge was still unredeemed."[59]

The experience of blacks in higher education in the North was only slightly better. A small number of private white colleges admitted a few black students prior to the Civil War. Berea College in Kentucky, a Border State, opened in 1858 without racial bias. Oberlin and Antioch Colleges in Ohio and New York Central College admitted some black youths. Furthermore, three institutions of higher education—Avery College and Ashmun Collegiate Institute (later Lincoln University) in Pennsylvania and Wilberforce University in Ohio—were established for blacks.[60] Elsewhere in the North, however, the admission of blacks and other minority students to university studies was restricted or totally banned:

> Between 1876 and 1900, some 13 blacks a year graduated from northern colleges or universities, one third from Oberlin [Ohio] alone. While racial restrictions appeared even at Oberlin during these years, at other schools outright exclusion was the rule. Amherst College's President. . .advised blacks against attending a northern college [because of social disadvantage]. . .Princeton continued to turn away all black applicants; Vassar strongly advised blacks not to come. . . .[61]

Other universities restricting or barring black admissions included Rutgers, Columbia, the University of Chicago, Northwestern, Butler, Colgate-Rochester Divinity, and (as late as 1931) Holy Cross and Notre Dame.[62] In 1932, only 2,538 black students were enrolled in northern universities, and "[o]nce enrolled in college, blacks were sometimes excluded from specific curricula, especially from medicine."[63]

In the 1930s, two legal challenges— *Murray* v. *University of Maryland* [64] and *Missouri ex rel. Gaines* v. *Canada* [65]—provided that white, publicly supported higher education institutions were obligated to admit black students where separate facilities were not otherwise provided for them by the State.

Following the Second World War (and again after U.S. involvement in Korea and Viet Nam), veterans' benefits provisions contained in economic readjustment legislation, popularly known as the "GI Bill,"[66] made possible financial assistance by which a large number of veterans could attend college. This

[54] *Toward Quality Education for Mexican Americans,* p. 118.

[55] Mike Murase, "Ethnic Studies and Higher Education for Asian Americans," *Counterpoint: Perspective on Asian America* (Asian Studies Center, University of California at Los Angeles, 1976), pp. 218–20.

[56] The Morrill Act of 1890, ch. 841, 26 Stat. 417 (current version at 7 U.S.C. §§321–328 (1976)).

[57] Fleming, *The Lengthening Shadow of Slavery,* pp. 50–51; and U.S. Department of Health, Education, and Welfare, National Institute of Education, *Minority Students: A Research Appraisal,* by Meyer Weinberg (Washington, D.C.: U.S. Government Printing Office, 1977), p. 6.

[58] "[A] firm precedent prior to the turn of the century was established. . .[An] overemphasis on industrial education for blacks impeded the overall educational advancement and subsequent social, political and economic progress of the race. The foundation for the inferior education of the Negro was firmly established prior to 1890. The decades preceding and following 1900 were the years in which black people were unmitigatedly entrenched into second-class citizenship, and not until the post-World War II years were efforts made which substantially reversed this process." Fleming, *The Lengthening Shadow of Slavery,* p. 58.

[59] Weinberg, *Minority Students,* p. 30.

[60] U.S., Commission on Civil Rights, *Equal Protection of the Laws in Public Higher Education* (1960), p. 3.

[61] Weinberg, *Minority Students,* p. 7.

[62] Ibid., p. 7.

[63] Ibid., pp. 6–8.

[64] Murray v. University of Maryland, 169 Md. 478 (1936).

[65] Missouri ex. rel. Gaines v. Canada, 305 U.S. 337 (1938).

[66] Servicemen's Readjustment Act of 1944, ch. 268, §§400–403, 58 Stat. 284, as amended by Act of December 28, 1945, ch. 588, 59 Stat. 623 59 Stat. 623 (expired 1956); Act of Sept. 2, 1958, Pub. L. No. 85–857, §§1601–1669, 72 Stat. 1174 (repealed 1966); Veteran's Readjustment Benefits Act of 1966, Pub. L. No. 89–358, §§2–3, 80 Stat. 12 (current version in scattered sections of 38 U.S.C.). See generally, 38 U.S.C. §§1601–1698 for current provisions for veterans' education benefits.

enabled many blacks and other minority and poor youth to take advantage of a higher education.[67] While these programs provided the financial wherewithal to attend college, they did not open doors to those colleges and universities or the graduate and professional schools which barred or restricted admission of minority students.

In 1950, two decisions of the Supreme Court[68] (*Sweatt* v. *Painter* and *McLaurin* v. *Oklahoma State Regents*) sounded the death knell for segregation in State-supported professional schools. Texas had gone so far as to establish a separate law school for minorities when Sweatt had petitioned in 1946 for admission to the University of Texas Law School at Austin. The University of Oklahoma Graduate School, while admitting McLaurin, forced him to sit in a seat designated for "colored" students.[69] The Supreme Court found both actions unconstitutional as unequal and ordered the students admitted to their respective State universities.[70]

The Civil Rights Act of 1964, with its Title VI provisions prohibiting the granting of Federal funds to institutions that discriminate,[71] enabled HEW's Office of Civil Rights in 1969–1970 to notify 10 States—Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Tennessee, and Virginia—that they were operating segregated systems of higher education and stood in danger of losing Federal grants.[72]

Minorities in Medicine and Law

As the institutional practices that have denied minority Americans equal education took form, the United States was developing into a highly industrialized society with a substantial well-educated and professional class. An undergraduate degree assumed steadily growing importance as a prerequisite to responsible, well-paying jobs. Partly because relatively few minorities had been able to acquire the necessary undergraduate education, their enrollments in law and medical schools were negligible. Even when the undergraduate prerequisites were met by minorities, they were still not welcome at most graduate schools.[73]

Medical Schools

It was not until 1847 that the first black, David J. Peck, received an M.D. from an American medical school, Rush Medical College.[74] The first medical school to enroll large numbers of blacks was Howard University, which was established in Washington, D.C., in 1868 in an attempt to meet the urgent health needs of thousands of freedmen.[75] Meharry Medical School at Central Tennessee College was the second medical school established primarily for blacks; it began operating in 1876 with fewer than a dozen students.[76] Meanwhile, prospects for black students at white medical schools were bleak. Three blacks were admitted to Harvard Medical School in 1850, but were ejected after a year at the insistence of white students.[77] In 1876, a black admitted to the University of Pennsylvania Medical School was asked to sit behind a screen in the classroom.[78]

Despite these obstacles and indignities, a trickle of black doctors did emerge from the Nation's medical schools. Still, the chronicle is hardly one of steadily increasing gains and acceptance; rather, there were frequently bitter reversals, as when Northwestern University in 1928 initiated a policy of excluding blacks from its medical school.[79]

In 1938 only 1.6 percent of all medical students were black.[80] By 1948 a third of the approved medical schools in the United States still did not admit black students.[81] The result of such patterns was that blacks by 1950 were only 2.2 percent of all physicians while they were 10 percent of the Nation's total population.[82] Minority talent therefore sought opportunity beyond the borders of the United States.

[67] For example, in 1971, approximately 24 percent, or roughly 15,000, of the projected black enlisted non-officer males separated from service during fiscal year 1971 used their veterans' education benefits to attend college. "Readjustment Profile for Recently Separated Vietnam Veterans; Training Following Service," U.S. Veterans Administration, Office of Comptroller, Reports and Statistics Services, Statistical Survey Division, June 1973.

[68] Sweatt v. Painter, 339 U.S. 629 (1950) and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[69] McLaurin v. Oklahoma, 339 U.S. at 642.

[70] McLaurin v. Oklahoma, 339 U.S. at 642 and Sweatt v. Painter, 339 U.S. 629 at 636.

[71] Civil Rights Act of 1964, Pub. L. No. 88–352, infra, §§601–607, 78 Stat. 252 (current version at 42 U.S.C. §§2000d to 2000d-6 (1970)).

[72] Weinberg, *A Chance to Learn*, p. 313.

[73] Weinberg, *Minority Students*, p. 30.

[74] James L. Curtis, *Blacks, Medical Schools, and Society* (Ann Arbor: University of Michigan, 1971), p. 9.

[75] Ibid., p. 13.

[76] Ibid., p. 14.

[77] Martin R. Delaney and Victor Ullman: *The Beginnings of Black Nationalism* (Boston: Beacon, 1971), p. 18, as cited in Weinberg, *Minority Students*, p. 6.

[78] Curtis, *Blacks, Medical Schools, and Society*, p. 16.

[79] Charles S. Johnson, *The Negro College Graduate* (Chapel Hill, N.C.: University of North Carolina Press, 1938), p. 131, as cited in Weinberg, *Minority Students*, p. 8.

[80] Curtis, *Blacks, Medical Schools, and Society*, p. 34.

[81] Leonard W. Johnson, "History of the Education of Negro Physicians," *Journal of Medical Education*, May 1967, p. 441.

[82] Dietrich C. Reitzes, *Negroes and Medicine* (Cambridge, Mass.: Howard University Press, 1958), p. xxii, as cited in Charles E. Odegaard, *Minorities in Medicine* (New York: Josiah Macy Jr. Foundation, 1977), p. 18.

For example, Dr. Charles R. Drew, a black physician, received his M.D. from McGill University in Canada and carried out some of his best work in England.[83]

Their exclusion from American medical schools led Mexican Americans in the early 1970s to appeal to the President of Mexico for assistance. He responded by offering 40 scholarships to medical schools in Mexico, with the expectation that the graduates would practice in the Southwestern United States. The program has produced four doctors, and several dozen students are currently enrolled.[84]

By 1970 blacks were still only 2.1 percent of all physicians in the United States although blacks were a little over 11 percent of the Nation's total population.[85] In the Nation's medical schools during the same year, blacks were 3.8 percent of enrollment;[86] Hispanics accounted for at least 4.4 percent of the population, but only 0.5 percent of medical school enrollment;[87] while American Indians were 0.4 percent of the population in 1970, only 18 American Indians were enrolled.[88]

Data on minority students in medical schools in California further illustrate the underrepresentation. In 1965, the University of California's medical schools at Los Angeles and San Francisco enrolled just two blacks and no Mexican Americans out of a total of 198 students.[89] First-year enrollment grew to a total of 400 medical students by 1968 with the addition of several medical schools, but of this number there were only seven blacks and one Mexican American.[90] Yet in 1970, Mexican Americans and blacks constituted about 25 percent of the population in California.[91]

President Lyndon B. Johnson summed up the dismal historical record when he said of the underrepresentation of black physicians, "That just is not right. That is a tragedy. . .a complete indictment of our entire educational system. . . ."[92]

Law Schools

The position of minorities in law has been similar. In the early years of this Nation's development, one entered the legal profession by serving an apprenticeship under a sponsor, who was usually a well-known and respected lawyer. Blacks had great difficulties obtaining the required sponsors, however, and thus were blocked from practicing law.[93] As noted, even during the early decades of this century few minorities were able to attend major universities, and the only black institution offering a full legal program was Howard University.[94]

Members of other minority groups faced similar obstacles. For example, two Asian American applicants to the bars of California and the State of Washington in 1890 and 1902 were denied admission as a result of their race and despite the fact that one had studied at Columbia and Yale universities.[95] In 1970 blacks were 1.3 percent, Hispanics 0.9 percent, and American Indians 0.1 percent of the legal profession.[96] That same year, total enrollment at the Nation's law schools was only 2.6 percent black, 0.7 percent Hispanic, 0.6 percent Asian American, and less than 0.1 percent American Indian.[97]

[83] Phillip T. Drotning, *Black Heroes in Our Nation's History* (New York: Cowles Book Co., 1969), pp. 190, 191. In one of the bitterest ironies to mark the life—or rather, the death—of any black American, Drew bled to death in 1950 after an auto accident, reportedly because he was refused admission to a North Carolina "white" hospital—refused access to the lifesaving blood plasma bank he himself had developed.

[84] Francisco Velazquez, director, Texas Institute for Educational Development, telephone interview, Sept. 23, 1977. A recent informal survey revealed that 16 of the 18 Hispanic physicians in San Diego County, California, had been educated outside of the United States. Testimony of Mary Bush, staff member, student services, University of California (San Diego), before California Assembly Education Subcommittee on Post-Secondary Education, transcript and statements (Sacramento, Calif.), Mar. 2, 1977, p. 52.

[85] U.S., Commission on Civil Rights, *Twenty Years After Brown: Equality of Economic Opportunity* (1975), p. 33. See also, American Public Health Association, *Minority Health Chart Book*, U.S. Department of Health, Education, and Welfare, Public Health Service, Contract No. HRA 906-74 (Oct. 20, 1974), p. 88.

[86] Association of American Medical Colleges, *Medical School Admissions Requirements 1978-1979, United States and Canada* (Washington, D.C., 1977), p. 47, table 7-C.

[87] Ibid.

[88] Ibid.

[89] Brief for the Mexican American Legal Defense and Education Fund as Amicus Curiae at 30, Regents of University of California v. Bakke, 18 Cal. 3d 34, 553 P. 2d 1152, 132 Cal. Rptr. 680, *cert. granted*, 429 U.S. 1090 (1977) (No. 76-811) (hereafter cited as MALDEF brief). Figures provided to MALDEF by Donald Reidhaar, University of California Counsel, contained in document entitled "U.S. Medical Schools, First Year Minority Enrollment 1965-68" (Apr. 22, 1977).

[90] Figures provided to MALDEF by Donald Reidhaar, university counsel, and contained in document entitled "U.C. Medical Schools, 1969-76, Entering Classes by Ethnicity" (Apr. 14, 1977), as cited in MALDEF brief at 31.

[91] MALDEF Brief at 30.

[92] Lyndon B. Johnson (remarks before the Annual Convention of the National Medical Association (a predominantly black association), Houston, Tex., Aug. 14, 1968), *Public Papers of the Presidents of the United States* (Washington, D.C.: U.S. Government Printing Office, 1970), p. 888.

[93] Irving C. Mollison, "Negro Lawyers in Mississippi," *Journal of Negro History*, vol. 15, Jan. 1930, pp. 38-71.

[94] Fleming, *Lengthening Shadow of Slavery*, p. 89.

[95] Asian American brief, p. 12.

[96] U.S., Department of Commerce, Bureau of the Census, *Census of Population, Detailed Characteristics, United States Summary*, table 223.

[97] American Bar Association, *Law School and Bar Admission Requirements, A Review of Legal Education in the United States, Fall 1975* (Chicago: 1976), p. 42.

Minority Needs in Law and Medicine

Minority underrepresentation in the study and practice of law and medicine is particularly serious given the great need for improved health care and legal services among minority groups. A recent report on the health differentials between white and nonwhite Americans concluded:

> The health of nonwhites is not as good as that of whites, yet nonwhites get less—and possibly less effective—health care than whites do. . . .Nonwhites still experience nearly 50 percent more bed disability days, 70 percent higher infant mortality and a life expectancy six years shorter than that of whites. Nonwhites more likely than whites are to suffer from a number of specific conditions known to be improved by health care, which may indicate failure to receive needed prevention or treatment.[98]

The study also found that:

> . . . .whites make about 10 percent more visits to physicians on the average than do nonwhites. This is primarily because fewer nonwhites see a physician at all, which is in turn attributable to lack of a regular source of care. . . .So far as effectiveness is concerned, the care nonwhites receive is more likely to lack continuity and personal attention.[99]

Language and cultural barriers pose an obstacle for some minority groups seeking health care. Few health and welfare agencies have bilingual staffs, and the haphazard administration of these services for the non-English-speaking clients results in poor services for language-minority citizens. The elderly in minority communities are an example of a group especially prone to suffer from this problem.[100]

The fact that nonwhites face barriers to adequate health care that may include "shortages of health manpower or facilities where they live and discrimination in areas where providers do exist"[101] makes abundantly clear how past and continuing discrimination against minorities has affected their physical well-being.

Similar problems exist with respect to legal services. The American Bar Association has noted that:

> the shortage of minority attorneys, resulting in the shortage of minority prosecutors, judges, public officials, governors, legislators, and the like, constitutes an undeniable compelling state interest. If minorities are to live within the rule of law, they must enjoy equal representation within the legal system.[102]

The Legal Aid Societies of nine cities and the NAACP emphasize the importance of minority participation in the field of law:

> In many individual lawyer-client relationships, the race of the lawyer is undoubtedly irrelevant, but it can hardly be disputed that the rights of minority groups will be better protected if there are more minority attorneys. This is especially true in those situations in which racial discrimination is involved, or in cases in which it might be unpopular for white attorneys to represent minority clients.[103]

Legal training does more, of course, than prepare young people for careers as lawyers. It also prepares them to teach law and to serve as administrators at law schools. A background in law also often sets the stage for public service through both elected and appointed positions, including legislators, mayors, district attorneys, and judges. Minority groups remain seriously underrepresented in such positions.[104] Before the fair representation of minority lawyers as prosecutors, legislators, judges, and Governors can occur, a sufficient number of minority lawyers—who will also articulate and defend the legal concerns of minorities—must be educated.

It has been argued that for both doctors and lawyers:

> Race is, in fact, an important factor. . .in choosing what kind of practice to pursue, in what location, and for the custom of what kinds of clients. Further, doctors perform important

[98] U.S., Congress, Congressional Budget Office, *Health Differentials Between White and Nonwhite Americans* (1977), p. xi (hereafter cited as *Health Differentials Between White and Nonwhite Americans).*

[99] Ibid., pp. xi, xii.

[100] Sharon Fujii, "Older Asian Americans: Victims of Multiple Jeopardy," *Civil Rights Digest,* fall 1976, p. 22. See also, New York Advisory Committee to the U.S. Commission on Civil Rights, *The Forgotten Minority: Asian Americans in New York City* (1977).

[101] *Health Differentials Between White and Nonwhite Americans,* p. 15.

[102] Brief for the American Bar Association as Amicus Curiae at 23, DeFunis v. Odegaard, 416 U.S. 312 (1974).

[103] Brief of the Legal Aid Society of Alameda County and the National Association for the Advancement of Colored People, et al., as Amici Curiae, at 66–67, DeFunis v. Odegaard, 416 U.S. 312 (1974).

[104] In 1977, blacks, for example, were about one-half of one percent of all elected officials in the United States. Joint Center for Political Studies, Press Release, *JPS News* (Washington, D.C.: Dec. 1; 1977), pp. 1–4.

> functions in determining priorities and modes for the delivery of health services, as lawyers and judges do for legal services. In all the varieties of judgments that need to be made in such matters, it is certainly not irrational to believe that racial diversity is desirable, indeed essential. Nor is it inconsistent with known facts to think that clients to be served by the professions, particularly the poor, the under-represented, and the disadvantaged, deserve the choice of the opportunity of consulting with racially identifiable doctors or lawyers they believe will best understand and sympathize with their problems; it is certain that race has, in fact, played an enormously important role in their own lives.[105]

The Society of American Law Teachers observed that the unmet health and legal needs of minorities were compounded by the fact that ". . .in the past at least, white physicians and lawyers have shown no great disposition toward meeting the needs of racial minorities for medical and legal services."[106]

Need for Leadership and Role Models

Lack of opportunities for minority members to study and practice law and medicine has had consequences that extend far beyond those professions. One of the most important has been to deprive a multiracial, multicultural Nation of the potential talents of minority leaders, and this in turn has left minority youth with proportionately fewer role models than in the majority community. As has been pointed out:

> the role of the lawyers and physicians within a community often goes well beyond their professions. . . .They serve as community leaders, as a means by which the community gains access to government officials and legislators, and as role models for youth in the community.[107]

As another commentator concluded, "Professional status is a vitally important factor in shaping minority group self-respect and capacity for effective civic participation and self-government."[108]

Minority professionals are also needed to help important institutions become better able to serve all citizens. For example, an assistant attorney general for the United States recently observed:

> We need role models, not only for black students, but for universities to fashion programs to maximize minority student retention, for recruiting programs for faculty and other employees, and for programs to ensure nondiscriminatory treatment of minority students and faculty.[109]

The Carnegie Council on Policy Studies in Higher Education recently concluded that:

> Individuals with potential talent from all segments of society should have a fair chance to rise to positions of leadership both in simple justice to them and in service of the need for leaders, models of advancement, and mentors for those in comparable life circumstances. The need is especially urgent within those groups deprived of such opportunities in the past.[110]

[105] Brief for the Lawyers' Committee for Civil Rights as Amicus Curiae at 8, Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, *cert. granted,* 429 U.S. 1090 (1977) (No. 76-811).
[106] Brief for the Society of American Law Teachers as Amicus Curiae at 26, Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, *cert. granted,* 429 U.S. 1090 (1977) (No. 76-811).
[107] Brief of the Association of American Law Schools as Amicus Curiae at 9, Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 *cert. granted,* 429 U.S. 1090 (1977) (No. 76-811).
[108] R.M. O'Neil, "The Case for Preferential Admissions," in *Reverse Discrimination,* ed. Barry Gross (Buffalo, N.Y.: Prometheus Books, 1977), p. 70.
[109] Drew S. Days III, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice (address before Black Council on Higher Education, New York, May 7, 1977).
[110] Carnegie Council on Policy Studies in Higher Education, *Selective Admissions in Higher Education* (San Francisco: Jossey-Bass, 1977), pp. 6, 7.

Chapter 2

The Admissions Process at Law and Medical Schools

The process of admitting students to law and medical schools has come under increasing scrutiny in recent years but it remains misunderstood by much of the American public. A common but erroneous belief among persons outside the academic world is that written entrance tests and undergraduate grade point averages provide absolute indicators of student ability and that high test scores and grades largely guarantee admission to the study of law and medicine.

While these measures are given heavy weight in the evaluation of applicants for admission, other important aspects of a student's background are also considered. These include undergraduate major and course work, extracurricular activities, community service, past employment, motivation, place of residence, age, sex, and race. The Association of American Law Schools (AALS) observes, "The focus of the admissions decision is. . . which of the applicants will best serve the purpose for which the school was created, that of supplying professionals needed by the community."[1]

The Association of American Medical Colleges (AAMC) describes the admissions process as intended "to select from among applicants deemed qualified to study medicine those who, in the judgment of a duly constituted admissions committee, will become high-quality physicians most likely to contribute to the needs of the nation or the state for medical care."[2] The numerical and subjective criteria that are the basis of admissions decisions by law and medical school administrators are identified in this chapter.

Numerical Factors

Entrance Tests

Entrance test scores are used by many law and medical schools in an effort to predict student performance. The Law School Admission Test (LSAT) and the Medical College Admission Test (MCAT) were first used as standardized examinations in the late 1940s. These tests (which are taken at a full 1-day session) are now required almost universally of law and medical school applicants. Quantitative test scores, however, are seldom, if ever, used as the sole standard for ranking applicants. Individual schools vary the weight they place on MCAT and LSAT scores.

The MCAT is administered by the American College Testing Program of Iowa City, Iowa, under the supervision of the Association of American Medical Colleges. Scores are reported in six areas of knowledge and ability: biology, chemistry, physics, science problems, and two skills sections—reading and quantitative analysis.[3] Most medical schools agree that in reviewing applicants' test results "the science and quantitative scores are the two figures that should be concentrated on."[4] Other areas of academic knowledge examined by the MCAT test generally are given less weight in the evaluation of

[1] Brief for the Association of American Law Schools as Amicus Curiae at 21, Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, *cert. granted,* 429 U.S. 1090 (1977) (No. 76-811) (hereafter cited as AALS brief).

[2] Brief for the Association of American Medical Colleges as Amicus Curiae at 5, Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, *cert. granted,* 429 U.S. 1090 (1977) (No. 76-811) (hereafter cited as AAMC brief).

[3] Mary H. Littlemer, ed., *New MCAT Student Manual* (Washington, D.C.: Association of American Medical Colleges, 1976), p. 2.

[4] Bart Waldman, Association of American Medical Colleges, telephone interview, June 20, 1977 (hereafter cited as Waldman Interview). See also, Brief for Petitioner at 30, Regents of the University of California v. Bakke, 18 Cal. 3d 34, 1152, 132 Cal. Rptr. 680, *cert. granted,* 429 U.S. 1090 (1977) No. 76-8110 (hereafter cited as Petitioner's Brief).

test scores. The practice of placing heavier emphasis on just two areas of inquiry rather than others reflects the discretionary judgment employed by professional institutions in their admissions procedures.

Mean scores achieved on the MCAT rose from 500 (out of a possible 795) in 1951 to 600 in 1976[5] as competition for admission intensified with the increasing number of applicants. An official of the Association of American Medical Colleges observed that any score "over 600 is considered good,"[6] but the association points out that applicant scores of less than 600 do not necessarily indicate the absence of qualification for the study of medicine.[7]

The MCAT examination was originally developed as a means of reducing medical school attrition, and it has successfully done so over the years.[8] The AAMC emphasizes, however, that medical colleges have long made use of a variety of other evaluative criteria in addition to the MCAT, and that researchers are currently "exploring the development of additional instruments to measure personal qualities deemed necessary for the practice of medicine."[9] The MCAT has been the subject of a substantial body of research, and some studies have suggested that the test may possibly be negatively (or only minimally) correlated to specific performance as a student, intern, clinician, or practicing physician.[10]

The Law School Admission Test (LSAT) is administered by the Educational Testing Service of Princeton, New Jersey, under the direction of the Law School Admission Council. The LSAT is divided into six sections (reading comprehension, reading recall, error recognition, sentence correction, data interpretation, and principles and cases).[11] Scores are reported as a single combined figure, with a possible top score of 800. LSAT scores rose so substantially between 1961 and 1976 that a score which in the 1960s would have secured access to the Nation's most selective law schools was by 1977 the bare minimum required at a full two-thirds of all law schools.[12] The numerical test scores of many applicants currently being rejected would easily have qualified them for study just 10 years ago.[13] Admission to the Nation's top law schools currently requires LSAT scores of about 690.[14]

The LSAT, like the MCAT, is not claimed to predict actual future performance as a practicing professional.[15] One expert even questions the value of the LSAT as the sole indicator of future performance in law school. He observed that "an applicant's UGPA [undergraduate grade point average] is normally a better indicator of law school performance than is the LSAT, and if a school had to choose to use only one predictor it should choose the UGPA."[16] The UGPA, this expert added, may serve as an indicator of motivation and effort in undergraduate studies.

The law school admission process typically combines LSAT scores with the undergraduate grade point average of applicants in a mathematical formula that produces a single figure variously known as an admission index, predictive index, or predicted first-year average. At some schools, the use of this combined admission index also provides for adjustment of the weight given to grade averages and to LSAT scores. For instance, at the Georgetown

[5] Waldman Interview.
[6] Ibid.
[7] AAMC brief, p. 9.
[8] Ibid., p. 6.
[9] Ibid., p. 7.
[10] See, for example: James W. Bartlett, "Medical School and Career Performances of Medical Students with Low Medical College Admission Tests Scores," *Journal of Medical Education,* January 1967, p. 231; Maurice Korman, Lawrence W. Martin, and Robert L. Stubblefield, "Patterns of Success in Medical School and Their Correlates," *Journal of Medical Education,* March 1968, p. 405; and John V. Haley and Melvin J. Lerner, "The Characteristics and Performance of Medical Students during Preclinical Training," *Journal of Medical Education,* June 1972, p. 446.
See also, Malcolm M. Helper, S. David Kriska, and Edward V. Turner, "Predictors of Clinical Performance," *Journal of Medical Education,* April 1974, p. 338; Margaret A. Howell and John W. Vincent, "The Medical College Admission Test as Related to Achievement Tests in Medicine and to Supervisory Evaluations of Clinical Physicians," *Journal of Medical Education,* November 1967, p. 1037.
[11] Franklin R. Evans and Frederick M. Hart, "Major Research Efforts of the Law School Admission Council," in *Reports of LSAC Sponsored Research* (Princeton, N.J: Law School Admission Council, 1976), p. 9. Although particular skills areas tested by the LSAT change as a result of research and revision, the examination always emphasizes verbal and reasoning problems.
[12] See admissions data and analysis presented throughout Seymour Warkov, *Lawyers in the Making* (Chicago: Aldine Publishing Co., 1965) (Warkov's study, made during the 1960s, offers a detailed study of admissions and testing questions); and Franklin R. Evans, *Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall of 1976* (Princeton, N.J.: Law School Admission Council, 1977), pp. 4–5 and 7 (hereafter cited as Evans, *Applications and Admissions to ABA Accredited Law Schools).*
[13] Evans, *Application and Admissions to ABA Accredited Law Schools,* pp. 4–5 and 7.
[14] Ibid.
[15] Brief for the Law School Admission Council as Amicus Curiae at 50–51, Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, *cert. granted,* 429 U.S. 1090 (1977) (No. 76–811) (cited hereafter as LSAC brief).
[16] Frederick M. Hart, then president, Law School Admission Council and dean, University of New Mexico School of Law, testimony before the Special Subcommittee on Education and Labor, U.S. House of Representatives, Sept. 20, 1974, pp. 19–22.

University Law Center, the index incorporates the candidate's weighted[17] LSAT score, adjusted undergraduate average, and LSAT college mean figure (which increases or decreases the weight placed on the applicants' grades).[18] At institutions using such a procedure, the weight given in the formula to grades or test scores is determined by admissions officers on the basis of experience and validity studies.

At the UCLA School of Law, the predictive index formula has in the past weighted the UGPA and LSAT scores equally in a single combined figure. Most admissions to the 350 first-year places in the 1976–77 entering class were made from the predictive index scores of some 3,400 applicants and produced a group of enrollees whose median LSAT score was 670 and whose median UGPA was 3.82.[19]

Undergraduate Grades

Undergraduate grade point averages are the second set of numerical criteria evaluated in the admissions process. Again, these numbers may be subjectively weighted and evaluated. Some schools place heavier weight on grades than on test scores while other schools reverse this emphasis,[20] and some professional schools consider that grades earned at some undergraduate schools are "worth more" than those earned at other universities. Thus, a set value may be added to or subtracted from each candidate's UGPA depending on the perceived excellence or weakness of the institution from which the UGPA was earned.[21] Furthermore, a steadily rising grade curve in the last 2 years of undergraduate work is sometimes interpreted favorably and can serve as grounds for discounting a relatively low 4-year average.[22]

The grade point averages of applicants may on occasion receive seemingly arbitrary interpretations that may be plausible but difficult to validate. One medical college noted, for instance, that it rarely takes a straight "A" student because "that is likely to mark the kind of uptight individual who is unsuited for medicine."[23] In the case of law school applicants, a UGPA, a low LSAT score, and the absence of extracurricular activities or work while attending undergraduate schools may offer similar negative implications for future professional work.[24]

Subjective and Qualitative Factors

As noted, law and medical schools do not determine admissions solely on the basis of numerical indicators. They attempt to obtain a broad understanding of the applicant as a student, citizen, and aspiring professional. One law school administrator stressed, "You have to look at the total person. Admissions committees must look beyond the LSAT and UGPA. It takes some special effort to get all the information you need to do this, but it is there."[25] This view is echoed by the Association of American Law Schools:

> [E]ach school, in its own way, attempts to make the best possible prediction as to the relative quality of the applicants. Everything that is known about them is taken into consideration: the applicants' personal statements, their work histories, the nature of subjects taken in undergraduate college or differences in grading standards between colleges, the trend of an applicant's undergraduate grades, the possible effect of a disadvantaged background upon the validity of predicted performance, and every other factor that the particular school thinks can possibly be utilized in making a judgment as to the relative quality of the applicants.[26]

In the same vein, the Association of American Medical Colleges stresses:

> Undergraduate grade point averages (UGPAs) and Medical College Admission Test (MCAT) scores alone are insufficient to predict more than the ability to study medicine, [and] admis-

[17] A value is placed on the LSAT in figuring the admissions index. Thus, the LSAT is "weighted" slightly more heavily than undergraduate average grades.

[18] David W. Wilmot, assistant dean and director of admissions, Georgetown University Law Center, Washington, D.C., memorandum to Georgetown University Law Center Admissions staff, Oct. 14, 1976; and staff interview, May 11, 1977 (hereafter cited as Wilmot Interview).

[19] Michael D. Rappaport, assistant dean of admissions, UCLA School of Law, staff interview, May 16, 1977 (hereafter cited as Rappaport Interview).

[20] See *Prelaw Handbook* (Washington, D.C.: Association of American Law Schools and the Law School Admission Council, 1977) (cited hereafter as AALS, Prelaw Handbook) and *Medical School Admission Requirements 1978–79, United States and Canada* (Washington, D.C.: Association of American Medical Colleges, 1977) (cited hereafter as AAMC, Medical School Admission Requirements).

[21] Rappaport Interview.

[22] Peter Winograd, associate dean for admissions, University of New Mexico School of Law, staff interview, May 18–19, 1977 (hereafter cited as Winograd Interview).

[23] Martin A. Pops, M.D., assistant dean, student affairs, UCLA, School of Medicine, staff interview, Los Angeles, Calif., May 17, 1977 (hereafter cited as Pops Interview).

[24] Peter Winograd, "Law School Admissions: A Different View," *American Bar Association Journal,* August 1973, p. 862 (hereafter cited as Winograd, Law School Admissions).

[25] Thom Edmunds, assistant dean for placement and personnel, Northwestern University School of Law, Evanston, Ill., staff interviews, Chicago, Ill., May 25–26, 1977.

[26] AALS brief, pp. 17–18.

sions committees rely on the personal interview, commitment to service, and a variety of other biographical characteristics to determine which academically qualified applicants will make the best doctors.[27]

The decision of particular institutions to rely on their own judgment and experience in reviewing a variety of applicant criteria as part of the admissions process is backed by experts in the field. The president of the Educational Testing Service observed:

> [There is an] assumption. . .that scores and grades, properly combined, constitute an adequate or sufficient basis for defining relative merit. The facts simply don't support that assumption. Major areas of human characteristics and functioning, directly relevant to the likelihood of academic and career success, are omitted from those two useful but incomplete sources of data about a student. It is not only proper for, but incumbent on, an institution to use additional information if it is seeking those applicants most likely to use limited places to best advantage. . . .[We] must resist the temptation to fall back on the easily-quantified indices as the sole or sufficient basis for a rank-order list on which to judge the propriety and even legality of admissions.[28]

Areas of Consideration

An applicant's age is a factor often considered during the admissions process. More mature students with some "real world" work experience are frequently given a degree of preference over younger applicants, but paradoxically one medical school admissions dean commented, "We have to consider the actuarial tables: older candidates would be graduated with fewer years of work ahead of them, and students over 30 seem to perform with less success than those who are younger."[29]

In addition to age, an applicant's past work experience, undergraduate activities, and community service are often viewed as possible assets which "may demonstrate that a superior academic record was not created only at the expense of everything else."[30] Another consideration is where the applicant comes from: many schools seek geographic balance or a national cross section of students.[31] Preference is generally given, however, to State residents. Some preference may also be accorded applicants who come from urban or rural settings or from an area in the State which is underrepresented in the student body, as is the case at the University of New Mexico, for example.[32]

Letters of recommendation are reviewed for insights into the character and abilities of the applicant. The name or title of the person signing a reference may in some cases be more important than the content of the letter.[33] However, one law school admissions officer told Commission staff that he was personally interested only in "specifics" regarding what the applicant has actually done that demonstrate ability, motivation, and character.[34]

An essay may be required of applicants concerning their professional interests and goals. Evaluation of these individual essays is subjective and depends largely on the values of the admissions officer reviewing them.[35]

Personal interviews with applicants also are one of the most subjective aspects of the admissions procedure. Admissions officers conducting interviews generally have wide latitude in their questioning and discussions. The open-ended nature of the interview is considered an ideal opportunity to test

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[27] AAMC brief, p. 5.

[28] William W. Turnbull, president, Educational Testing Service, "On Educational Standards, Testing, and the Aspirations of Minorities" (address before the Conference on Academic Standards and their Relationship to Minority Aspiration, the American-Jewish Congress, Columbia University, Dec. 8, 1974), as cited in Winton H. Manning, *Some Current Controversies in Educational Measurement* (Princeton, N.J.: Educational Testing Service, 1976), pp. 40–41.

[29] Pops Interview. In a recently published report on age discrimination in the administration of programs or activities receiving Federal financial assistance, this Commission found that admission to some medical schools may, in fact, be denied on the basis of age. See U.S. Commission on Civil Rights, *The Age Discrimination Study* (1977), p. 76.

[30] Winograd, Law School Admissions, p. 864.

[31] Frederick M. Hart, dean, University of New Mexico School of Law, and past president, Law School Admission Council, staff interview, Albuquerque, N. Mex., May 18, 1977.

[32] Diane Klepper, M.D., assistant dean for admissions and student affairs, University of New Mexico School of Medicine, telephone interview, May 6, 1977, and Paula Thackett, former student member, admissions committee, University of New Mexico School of Law, staff interview, Albuquerque, N. Mex., May 19, 1977 (hereafter cited as Thackett Interview).
Dean Klepper emphasized that New Mexico is a small State (by population) and, as a result, the school of medicine maintains a keen awareness of specific health needs within the State. Rural areas and American Indian communities and reservations are persistently underserved, and applicants from such areas whose character, interests, and interview statements reveal a desire to practice in these areas are viewed positively for the contributions they can make.

[33] Thackett Interview; and W. Garrett Flickenger, professor, University of New Mexico School of Law, staff interview, Albuquerque, N. Mex., May 19, 1977 (hereafter cited as Flickenger Interview).

[34] Wilmot Interview.

[35] Flickenger Interview. One admissions reviewer at the University of New Mexico School of Law negatively assessed the written statement of a woman applicant to the effect that she intended to become the first female Supreme Court Justice. The reviewer considered this degree of optimism to be an indication of immaturity.

the aspirations and personal qualities of the applicant. One admissions interviewer explained:

> We study the students to see exactly what they plan to contribute to the medical profession. I would be appalled at any professional school which was willing to admit a student simply on the basis of test scores or grade point averages without looking at their character or the contribution the individual will make to the profession.[36]

Special Interest Admissions

On occasion university presidents, deans, and other top academics do make "special interest admissions" outside normal admissions procedures and standards. At one law school, those eligible for such admissions include sons and daughters of alumni, faculty, and staff as well as persons designated by the university president or the dean of the school. "Benefit" to the school is said to be the controlling factor in such admissions.[37]

The national media in the last 2 years have carried reports indicating that professional school admissions have, in some cases, been viewed as a means of maintaining good relations with influential or well-to-do individuals who are in a position to assist university appropriations or endowment funds.

Most recently news accounts have focused on remarks of the president of Boston University during a 1973 school committee meeting. A transcript quotes President John R. Silber as having said:

> We need, for example, a list of admissions considerations that we've given. There have been any number of people crawling all over me for admission to our Medical School and our Law School who have never been tapped systematically for a gift to this university. I'm not ashamed to sell those indulgences. We don't admit someone to our Medical School or our Law School who isn't qualified to get in, but at the same time when we facilitate that admission there's no reason why we shouldn't go right back to the person, the father of the person who's been admitted and talk to him about a major gift to the school. We have not done this systematically.[38]

At the University of California at Davis, the dean of the medical school, in several instances reported in the *Los Angeles Times,* intervened in the admissions process "to correct injustices in the admissions procedure and for public relations reasons."[39]

In October 1975, *New Physician* magazine reported that school records indicated that the Chicago Medical School had in 1973 favored 77 out of 91 qualified applicants on whose behalf pledges of financial support were made to the institution over other applicants otherwise equally qualified.[40]

Most recently, NBC television's "Weekend" program reported on illegal and questionable admissions procedures in the State of Pennsylvania. The U.S. Attorney for the Eastern District of Pennsylvania charged:

> [T]hese schools live and die by what happens in Harrisburg [the State capital], and I think that's why the legislators and the politicians have this kind of hammer over the schools. It is pretty clear, the word on the street is you have to pay off somebody to get into medical school.
>
> * * *
>
> It is extremely pervasive, far more pervasive than we thought when the investigation started.[41]

Legislative pressure on the medical school admissions process in Pennsylvania appears to be a matter of routine, according to one academic official. Dean Joseph DiPalma of Hahnemann Medical College in

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[36] Donald Sanders, member, Graduate Student Association; president, UCLA Student National Medical Association; and member, subcommittee on disadvantaged applicants, UCLA School of Medicine, staff interview, Los Angeles, Calif., May 16, 1977.

[37] David W. Wilmot, assistant dean and director of admissions, Georgetown University Law Center, memorandum to Georgetown University Law Center faculty, Apr. 23, 1973.

[38] John R. Silber, president, Boston University, meeting of the select committee on university needs, Oct. 13–14, 1973, transcript, pp. 93–94. See also, *Washington Post,* Mar. 16, 1978, p. A5, which states that Mr. Silber, in an interview, confirmed the accuracy of the transcript but added that his remarks regarding "indulgences" were made as "a humorous aside." The *Post* noted:

> No evidence has been produced showing that a student was admitted to the BU law or medical school on the precondition that the applicant's parents make a "major contribution" to the school. And it is common practice for colleges and universities to solicit contributions from the families of students almost from the moment they are admitted.
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> However, publication of the alleged remarks. . .has caused much consternation on campus and has raised anew questions of access to higher education—particularly, access to potentially lucrative professional degrees.

[39] "Medical Dean Aids 'Special Interest' Applicants," *Los Angeles Times,* July 5, 1976, part II, p. 1. See also the following *Los Angeles Times* stories: "Bending of Medical School Admission Rules Rapped," July 14, 1976, part II, p. 1; "Davis Medical School, Policy to be Revised," July 18, 1976, part II, p. 1; also, "Bakke Also Vied With the Well-To-Do," *Washington Post,* Oct. 2, 1977, pp. 1 and 12, and Norman Melnich, "The Back Door Into Davis," *New Physician,* November 1976, p. 33.

[40] Margot Slade, "What Price Admission?" *New Physician* (October 1975), p. 27.

[41] NBC, "Weekend," Aug. 6, 1977, program transcript, pp. 34–36.

Philadelphia explained on the same "Weekend" program:

> I would say of all the applications we have, more than half of them will have a letter from a legislator. . .and certainly when any politician recommends a candidate, and does so very strongly, I would be foolish to say that I didn't try to listen and I didn't try to do everything possible that I could. Let's say there's an instance where there's two applicants and by chance. . .the admissions committee considers them to be eligible for admission, and one of these applicants is favored by a prominent politician, well naturally you'll take the one who's favored since the world works by doing favors. . . .So I think there is this slight disadvantage.[42]

The Carnegie Council on Policy Studies in Higher Education recently concluded that "too many favors have been given by too many institutions, including professional schools, to those with special influence. Such actions do not meet the test of fairness, however realistic they may be as specific policy actions."[43]

In sum, admissions based solely on quantifiable indicators appear to be the exception at the majority of law and medical schools throughout the United States. More than two-thirds of all American law schools specifically state that admissions decisions are based on factors beyond grades and test scores. The 117 medical schools emphasize, without exception, that admissions are not based on quantifiable factors alone—character, personality, age, residence, general health, recommendations, background (geographic, economic, ethnic, or racial), and extracurricular activities are among other areas of consideration.[44] Most schools choose to employ the admissions process as an effort to come to a broader understanding of the applicant as both a student and as a member of society.[45] In the final analysis, the admissions process at law and medical schools depends for fairness, equity, and credibility upon the thoughtful nature and even-handedness of those making admissions decisions and administering schools of professional education.

[42] Ibid, pp. 32–33.
[43] Carnegie Council on Policy Studies in Higher Education, *Selective Admission in Higher Education* (San Francisco: Jossey-Bass, 1977), p. 11.
[44] See AALS, Prelaw Handbook, and AAMC, Medical School Admission Requirements. These volumes detail admissions requirements at 163 ABA-approved law schools and at the Nation's 117-medical schools.
[45] Ibid. See also, LSAC Brief at 51 and Petitioner's brief at 30.

Chapter 3

Affirmative Admissions Programs

The underrepresentation of minorities in the study and practice of law and medicine has led many educators to reevaluate the traditional admissions process in order to identify the major barriers to minority admissions and to determine how these barriers might reasonably be removed. The growing realization that changes were necessary was expressed by a former president of the Law School Admission Council:

> We cannot continue to penalize people because of the past educational deprivation. We cannot simply "endorse" consequences of past discrimination. We must take into account that minorities have been denied educational opportunities available to others. [And we must be] always influenced by the fact that college grades depend on high school attended. . .which depends on the grade school attended. . .which depends on the background, and the like.[1]

Consistent with this understanding, many admissions officers concluded that still greater flexibility was needed in the traditional admissions process in order to assess properly minority applications. As noted, this approach had steadily gained support with respect to evaluation of the increasing number of all candidates for law and medical schools.

Growing recognition that entrance tests served as the major barriers for minorities added further support for change. Because minority students generally tend to score lower than nonminority students on the Law School Admission Test and the Medical College Admission Test,[2] minorities have been blocked at disproportionate rates from attending law and medical schools.

Some critics maintain that those tests have a built-in "cultural bias" that accounts for the lower scores of minorities. In 1974 the president of the Law School Admission Council, which supervises the LSAT program, urged that reviewers be "suspicious of traditional predictors of success for minority applicants because of the strong possibility of bias."[3] Former Supreme Court Justice William O. Douglas also questioned the LSAT's ability to measure minority qualifications for law study:

> These minorities have cultural backgrounds that are vastly different from the dominant Caucasian. Many Eskimos, American Indians, Pilipinos, Chicanos, Asian Indians, Burmese, and Africans come from such disparate backgrounds that a test sensitively tuned for most applicants would be wide of the mark for many minorities. . . .Insofar as LSAT's reflect the dimensions and orientation of the Organization Man they do a disservice to minorities.[4]

A task force report on the MCAT by the Association of American Medical Colleges observed, "The verbal and general information sections of the current MCAT . . . have potential for unfair bias against

[1] Harry Reese, former president, Law School Admissions Council, and professor, Northwestern University School of Law, interview, Chicago, Ill., May 26, 1977 (hereafter cited as Reese Interview).

[2] Franklin B. Evans, *Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall of 1976* (Princeton, N.J.: Law School Admission Council, 1977), tables 12, 13, 14, and 15 (hereafter cited as Evans Report); and Bart Waldman, *Economic and Racial Disadvantage as Reflected in Traditional Medical Schools Selection Factors: A Study of 1976 Applicants to U.S. Medical Schools* (Wash., D.C.: Association of American Medical Colleges, 1977), figures 1, 2, 3, 4, and 5 and tables 1 and 2 (hereafter cited as Waldman Study).

[3] Frederick M. Hart, president, Law School Admission Council, and dean, University of New Mexico School of Law, statement before the Special Subcommittee on Education and Labor, U.S. House of Representatives, Sept. 20, 1974, pp. 19–20 (hereafter cited as Hart Testimony).

[4] DeFunis v. Odegaard, 416 U.S. 312, 334–335 (1974) (Douglas, J., dissenting).

many applicants, particularly socially deprived students and students from many racial and ethnic minority groups." [5] This question of test bias against minorities is argued at length in numerous studies.[6]

In light of the fact that, on the average, minorities do score lower than nonminorities on these tests, LSAT and MCAT scores are weighed less heavily in affirmative admissions programs than in traditional admissions programs, and greater attention is paid to other, nonquantifiable standards. To be sure, the MCAT and LSAT are still widely used to screen out those persons who are manifestly unqualified to study medicine and law, but once the field has been narrowed, the task of admissions committees turns from exclusion to selection.

The essential difference between "traditional" and "affirmative" admissions programs at law and medical schools is that the latter have added race or minority status or cultural disadvantage to the numerous nonacademic criteria (such as residence of applicant, political or alumni contacts, veteran status, physical handicaps, or location of intended professional practice) used in the final selection of those applicants who have already qualified for further consideration by virtue of their test scores and undergraduate record. In this context, "the practice to be justified [was] not the departure from test scores and grades, but the much narrower decision to include race among the factors that may warrant such departures."[7] Administrators felt compelled to conclude that "what might be an impermissible way to take race. . .into account in the ideal society, may also be a desirable and appropriate way to take race. . .into account, given the social realities."[8]

By the close of the 1960s, more than half of the Nation's law schools and at least two-thirds of its medical schools had implemented some type of affirmative admissions program.[9] At present almost all law and medical schools have included some consideration of racial or ethnic background in their admissions processes.[10] Although the mechanics of affirmative admissions programs vary from school to school nationally, the principle basic to each program is that "differences in academic credentials among qualified applicants are not the sole nor best criterion for judging how qualified an applicant is in terms of his potential to make a contribution. . ."[11]

The Role of Race Or Minority Status in Affirmative Admissions Programs

In attempting to consider more fully the applications of minorities, admissions committees attempt to "look at the total person,"[12] so that the "credentials of an individual [can be assessed] in terms of the factors that influenced the production of those credentials."[13] Accordingly, many law and medical schools take note of a wide range of background information, including racial and ethnic origins.

[5] Association of American Medical Colleges, "Recommendations for Development of the American Medical College Admissions Assessment Programs" (November 1973), p. 17 (hereafter cited as "Medical College Admissions Assessment Program").

[6] See, for example: Winton H. Manning, "Some Current Controversies in Educational Measurement" (Princeton: Educational Testing Service, 1976); Franklin R. Evans and Frederick M. Hart, "Major Research Efforts of the Law School Admission Council" (Princeton: Educational Testing Service, 1976); Hunter M. Breland, "DeFunis Revisited: A Psychometric View" (Princeton: Educational Testing Service, 1974); Wendy D. Cooper, Carolyn Lee, and Albert P. Williams, *Factors Affecting Medical School Admission Decisions for Minority and Nonminority Applicants: A Comparative Study of Ten Schools* (Santa Monica, Calif.: Rand Corp., 1976); Association of American Medical Colleges, "Medical Colleges Admissions Assessment Programs"; Asian American Law Students' Association, "Report of the Boalt Hall Asian-American Special Admissions Research Project" (Berkeley, Calif.: 1976), pp. ii, 28–42; Robert L. Linn, "Test Bias and the Prediction of Grades in Law School" (Princeton, N.J.: Educational Testing Service, 1974); Dorothy R. Clark, "Going to St. Ives: Some Observations about Black Applicants and the LSAT," *Learning and the Law* (1977); Irving Lorge, "Differences or Bias in Tests of Intelligence," in *Testing Problems in Perspective,* ed. Anne Anastasi (Washington, D.C.; American Council on Education, 1966), pp. 465–71; William W. Turnbull, "On Educational Standards, Testing, and the Aspirations of Minorities" (address before the Conference on Academic Standards and Their Relationship to Minority Aspirations, American Jewish Congress, at Columbia University, Dec. 8, 1974).

[7] Robert M. O'Neil, "Racial Preference and Higher Education: The Larger Context," *Virginia Law Review,* vol. 60 (1974), p. 946 (hereafter cited as O'Neal, "Racial Preference").

[8] Richard A. Wasserstrom, "Racism, Sexism and Preferential Treatment: An Approach to the Topics," *UCLA Law Review,* vol. 24 (1977), pp. 583–84.

[9] John S. Wellington and Pilar Gyorffy, "Report of Survey and Evaluation of Equal Educational Opportunity in Health Profession Schools," unpublished mimeographed draft (San Francisco: University of California, 1975); and Colorado Advisory Committee to the U.S. Commission on Civil Rights, *Access to the Legal Profession in Colorado by Minorities and Women* (June 1976), p. 8.

[10] Dario O. Prieto, director, minority affairs, Association of American Medical Colleges, telephone interview, May 27, 1977 (Mr. Prieto stated that almost all medical schools have instituted some type of flexible admissions policy directed toward increasing minority enrollment. He added that it is difficult to categorize or label these programs for comparative purposes because each school may vary the manner in which it implements affirmative admissions principles); Brief for the Association of American Law Schools as Amicus Curiae at 2, Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553, P.2d 1152, 132 Cal. Rptr. 680, *cert. granted,* 429 U.S. 1090 (1977) (No. 76–811) (hereafter cited as AALS Brief).

[11] Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 1173, 132 Cal. Rptr. 680, (1976), *cert. granted,* 429 U.S. 1090 (1977) (Tobriner, J., dissenting).

[12] Thom Edmunds, assistant dean for placement and personnel, Northwestern University School of Law, interview, Chicago, Ill., May 25–26, 1977.

[13] Steve Yandle, assistant dean for admissions, Northwestern University School of Law, interviews, Chicago, Ill., May 25 and 27, 1977.

One prominent researcher has suggested that the following variables may be reliable indicators of minority academic success:

1. Positive self-concept;
2. Ability to understand and deal with racism;
3. Realistic self-appraisal;
4. Willingness to defer immediate gratification for long-range goals;
5. Availability of strong support person;
6. Successful leadership experience within the racial/cultural environment;
7. Demonstrated community service.[14]

Successful completion of previous academic work by a minority candidate despite substandard school environment and socioeconomic disadvantage may indicate a high level of motivation. One observer said that in his years of admissions work he had found that:

> Minorities. . .frequently demonstrate a motivation and a commitment which is unusual, extraordinary. . . .This motivational factor is a significant predictor of future performance whereas the LSAT is still not satisfactorily measuring all that goes into professional accomplishment and performance.[15]

To the extent that academic credentials are still relied upon in the admissions process, race or ethnicity often serves as an interpretive factor in examining minority test scores and undergraduate grades. At some universities affirmative admissions means that "academic achievement is measured not only by how high the applicant stands, but also by how far he has had to climb from where he began."[16]

An acceptable or good academic record supplemented by extracurricular activities, community service, or self-support during college may reveal a unique breadth of experience and the ability to handle heavy workloads. An expressed commitment by a minority candidate to assist underserved (or unserved) minority communities or geographic locations may coincide with a law or medical school's determination to play a larger role in addressing society's unmet needs. The backgrounds of minorities may typically reveal strengths in languages and an understanding of minority cultures and socioeconomic settings largely absent from the current practice of law and medicine. Thus, race or ethnic background can serve to identify candidates who bring special, needed attributes and knowledge to their professional studies.[17]

To assess fully the qualities that minority applicants may bring to professional studies, minority professors or students often participate in the selection process at institutions with affirmative admissions programs. For minorities, a key question put by the chairperson of the Asian American Law Students Association is: "Who participates in the evaluation process—who is applying the criteria? This is crucial because no matter what criteria are established, it is the persons who apply them that make the ultimate, final, subjective decision."[18] Some law and medical schools have designated minority students or admissions subcommittees to recommend which minority applicants should be admitted.[19] For example, a panel of minority students at the UCLA School of Law reviews the qualifications of minority applicants, interviews them, and ranks its choices.[20] Panel recommendations have generally been accepted by the law school,

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[14] W. Sedlacek and G. Brooks, *Racism in American Education: A Model for Change* (Chicago: Nelson—Hall, 1976), pp. 55–59.

[15] Reese Interview.

[16] Brief for the Law School Admission Council as Amicus Curiae at 47, Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553, P.2d 1152, 132 Cal. Rptr. 680 *cert. granted,* 429 U.S. 1090 (1977) (No. 76-811) (hereafter cited as LSAC Brief).

[17] David Lujan, member, Organization of Student Representatives, Association of American Medical Colleges, and member, subcommittee on disadvantaged applicants, UCLA School of Medicine, interview, Los Angeles, Calif., May 16, 1977 (hereafter cited as Lujan Interview); and Donald Sanders, member, Graduate Student Association; president, UCLA Student National Medical Association; and member, subcommittee on disadvantaged applicants, UCLA School of Medicine, interview, Los Angeles, Calif., May 16, 1977 (hereafter cited as Sanders Interview). Mr. Sanders observed, "The appreciation of those aspects of medicine which are unique to certain groups within one society can only come with the knowledge gained through contacts with minority persons who have this knowledge. . . ." Mr. Lujan added: "There are disease processes that are seen as being practically eradicated, but among Mexican Americans or immigrants or people who are coming from across the border or in the ghettos, there is the knowledge that these [problems] are still here. . . .The treatment of tuberculosis is [a] real [problem] because you see it being eliminated from the white population, but [it] is still currently a serious disease in the Chicano community."

[18] Edward Chen, chairperson of the Asian American Law Students Association, Berkeley Law School, telephone interview, June 6, 1977.

[19] See Charles E. Odegaard, *Minorities in Medicine: From Receptive Passivity to Positive Action, 1966–76* (New York: Macy Foundation, 1977), pp. 108–10.

[20] Robert Brown, Larry Esterwood, Lair Franklin, Darryl Gaines, Michael Kellar, Keith Waytt, members, Black Law Students Association, UCLA School of Law; Ben Campos, Armando Duron, Richard Gomez-Hernandez, Bernice Hernandez, Ernesto Perez, members, Chicano Law Student Association, UCLA School of Law; Linda Tiggs, executive director, UCLA's *Black Law Journal,* group interview, Los Angeles, Calif., May 16, 1977.

which since 1967 has admitted entering classes that are approximately 20 percent minority.[21] The minority student panel offers familiarity with minority communities and schools, understanding of social, economic, and educational disadvantage and the obstacles that minorities face in higher education, and knowledge of professional needs within minority populations. Thus, the participation of minorities in the admissions process provides some further assurance that the backgrounds of minority applicants will be thoroughly understood and evaluated.

Such consideration of minority applicants in affirmative admissions programs is viewed by legal and medical professional associations as necessary to increasing the number and quality of minority students. The Association of American Medical Colleges (AAMC) maintains that the evaluation process can and should consider race among the other "relevant personal characteristics" of applicants:

> At the request of the medical schools, the Association is exploring the development of additional instruments to measure personal qualities deemed necessary for the practice of medicine. Seven of these qualities have been identified by AAMC researchers for study: compassion, interprofessional relations, coping capability, sensitivity in interpersonal relations, decision-making capacity, staying power, and realistic self-appraisal. . . .[22]

> Most medical schools believe that race is a very relevant personal characteristic which should be considered with other criteria to provide insight into the kind of physician the applicant will become.[23]

This emphasis in affirmative admissions programs on personal qualities was explained by a professor at UCLA's medical school:

> There was the realization among the faculty that perhaps there had been injustices, inequities. We looked around and found qualified applicants, minorities and whites, that the application procedures were missing. We moved to revamp the process to look at the total person. There's now a great emphasis on potential.[24]

Similarly, the Law School Admission Council maintains:

> Like academic achievement, other accomplishments may help to predict the professional role a student will fill, and how well he will succeed. Non-academic experience, demonstrated interests, personal qualities, geographic and cultural ties are all relevant as predictors of the probable professional contribution, and how and where it will be made. To fill all the varying needs, law schools seek a wide diversity of backgrounds among their students. To this end, an applicant's status as a member of a racial or ethnic minority is undeniably relevant in appraising his potential contribution to the profession.[25]

Taking race or ethnicity into account in the admissions process has by no means meant that "unqualified" minority applicants are being admitted to professional studies. As noted earlier, available research questions the contention that applicants with higher MCAT or LSAT scores are better qualified to enter medical or legal studies and careers.[26] Despite this evidence, these test scores have been combined with undergraduate grades to produce "benchmark scores," which then may be applied with little flexibility to rank qualified applicants. Any individual ranked in this way may appear to be less qualified than he or she actually is.

As one faculty member put it, "The serious thought that goes into the admissions process is to achieve fairness, and that requires that every applicant admitted be fully qualified."[27] The Law School Admission Council notes, "Those [minorities] admitted are fully qualified for law study, exceeding the average levels for all applicants of fifteen years ago, and are predicted to perform well above minimum law school standards."[28] The Association of American Medical Schools explains that:

> It must be clearly understood that many of the minority applicants who were and would still be excluded from medical school in the absence of

[21] Murray Schwartz, professor and former dean, UCLA School of Law, interview, Los Angeles, Calif., May 17, 1977; and Michael D. Rappaport, dean of admissions, UCLA School of Law, interview, Los Angeles, Calif., May 16, 1977.

[22] Brief for the Association of American Medical Colleges as Amicus Curiae, at pp. 6–7, Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 *cert..granted,* 429 U.S. 1090 (1977) (No. 76–811) (cited hereafter as AAMC Brief).

[23] AAMC Brief, p. 5.

[24] James D. Collins, professor of radiology, UCLA School of Medicine, interview, Los Angeles, Calif., May 17, 1977.

[25] LSAC Brief, pp. 51–52.

[26] See chapter II of this report.

[27] Garrett Flickenger, professor, member of admissions committee, University of New Mexico School of Law, interview, Albuquerque, N. Mex., May 19, 1977.

[28] LSAC Brief, p. 6.

special admissions programs are academically qualified to study medicine.[29]

The longstanding exclusion of minorities owing to heavy reliance on numerical qualifications now has been generally recognized by both legal and medical schools and the professional associations. Affirmative admissions principles have been accepted as the best way to ensure equal educational opportunity and to encourage adequate representation of qualified minorities in the study and practice of law and medicine.[30]

Minority Academic Performance

Available data tend to support the contention that minorities, once admitted, have increasingly attained a level of academic performance in law and medical schools generally comparable to that of nonminorities. Many of those successful minority students would not have been enrolled were it not for affirmative admissions programs.

Research involving minority students in UCLA's Legal Educational Opportunity Program (LEOP) compared their academic credentials (LSAT scores and grades) and subsequent performances in law school with those of the white students. The study showed that "minority students with good, but not necessarily [top] law school credentials, that is, LSAT above 520 and GPA (grade point average) above 3.20, seem to perform almost as well as their regularly admitted counterparts with LSAT's one hundred and fifty points higher."[31]

Another research project, at the school of medicine at the University of California, San Diego, compared the performances of 23 black and Mexican American students enrolled under affirmative admission procedures with 21 students admitted under regular procedures. The two groups were compared at three stages: MCAT entrance scores and undergraduate grade point averages; the National Board of Medical Examiners Test (completed midway through medical school); and performances on the medicine, surgery, and pediatrics internships (completed near the end of medical education). The wide gap between the two groups on quantitative entrance criteria diminished slightly by the time the national board examination was taken. Following completion of two of three major clinical internships, however, the difference between the two groups was no more than "the distinction between a 'slightly above average' level of performance for the regularly admitted students and an 'average' level [of performance] for students admitted on variances."[32] Only one of the 23 minority students in this study would have been admitted to this medical school had it not been for affirmative admissions considerations.[33]

Further support for the assertion that differences in minority and nonminority test scores do not predict comparable differences in academic performance is found in a 1970 study by the Association of American Medical Colleges. Data from that study show that blacks who had successfully completed their first 2 years of medical school had lower mean MCAT scores than whites who had been dismissed for academic reasons.[34] The study concluded that "blacks can succeed in medical school with lower levels of MCAT performance than the successful white student."[35]

Effect of Affirmative Admissions Programs

In the past decade, affirmative admissions efforts appear primarily responsible for the increasing minority enrollment in law and medical schools. For example, before the Legal Educational Opportunity Program at UCLA started in 1967, that law school was averaging only two minority graduates a year. The dean of admissions there stressed:

[29] AAMC Brief, pp. 8–9, states:

> The mean MCAT science and quantitative ability scores for all applicants accepted in 1957–58 were 516 and 517 respectively. In 1975–76, these mean scores for all Black Americans accepted were 500 and 515 respectively. Other minority acceptees scored slightly higher. But 1975–76 white acceptees averaged 627 and 629 in these two scores and the whole pool of white applicants averaged 580 and 594 respectively.

[30] The Carnegie Council observed that affirmative admissions programs are particularly crucial for professional schools because these are "gatekeeper schools that lead to the most visible and the most prestigious of all the professions." Carnegie Council on Policy Studies in Higher Education, *Selective Admissions in Higher Education* (San Francisco: Jossey-Bass, 1977), p. 7.

[31] Michael D. Rappaport, "The Legal Educational Opportunity Program at UCLA: Eight Years of Experience," *Black Law Journal*, vol. 4 (1974), p. 510.

[32] Harold J. Simon and James W. Covell, "Performance of Medical Students Admitted Via Regular and Admission-Variance Routes," *Journal of Medical Education* (July 1975), p. 739 (hereafter cited as Simon and Covell, "Performance of Medical Students"). Similar results were obtained at the University of California at La Jolla and at the Buffalo School of Medicine at the State University of New York. See Colorado Advisory Committee to the U.S. Commission on Civil Rights, *Access to the Medical Profession in Colorado* (1976), p. 27.

[33] Simon and Covell, "Performance of Medical Students," p. 739.

[34] Robert H. Feitz, "The MCAT and Success in Medical School," session 9.03, Division of Educational Measurement and Research, AAMC (1970) (unpublished), p. 3, table 2.

[35] Ibid., p. 6.

> To go from having virtually no minority students in 1966 to admitting 232 in the next five years and 444 in the eight years since the program began represents a very significant development in legal education and in the future of the legal profession.[36]

Nationwide, affirmative admissions programs brought rapid results as they became widely used in the late 1960s. A study of the 1,122 black, Puerto Rican, American Indian, and "other" minority first-year law students in 1968 found "that about 40 percent of the minority students enrolled that year would not have been accepted (in the judgment of the admissions officer) under the regular entrance criteria."[37] In a similar study in 1974, when there were 3,308 first-year minority law students, interviews with 250 of them (205 blacks and 45 Chicanos) disclosed that 80 percent of the respondent law students felt that they were "special admits."[38] Citing the "roughly five-fold increase" in minorities in medical education since 1968–69, the past president of the University of Washington stated, "Most of this increase, which was brought about by increased enrollment in predominantly white medical schools, would not have occurred had it not been for changes made within these schools. . .to improve the representation of these minorities."[39]

By fall 1977, minority enrollment in U.S. medical colleges had increased to just over 10 percent of the total from the less than 3 percent that existed in the late 1960s. Blacks were 6 percent; Mexican Americans, 1.4 percent; Asian and Pacific Island Americans, 2.4 percent; mainland Puerto Ricans, 0.4 percent; and American Indians, 0.3 percent.[40] During the 8-year period from 1969 to 1977, overall enrollment in medical school increased from 37,690 to 60,039 (a 59 percent increase), while minority enrollment grew from 1,630 to 4,880 (an increase of nearly 200 percent).[41] However, it should be noted that 83 percent of the 6,000 black physicians in 1967 were trained at Howard and Meharry medical schools.[42]

The primary benefiaries, however, of this medical school enrollment growth have been white students who have continued to be enrolled in numbers well above the proportion of whites in the total population.[43] In 1970, first-year minority medical students were 4.5 percent of the total. In 1974, minority enrollment was 10 percent. The proportion of first-year minority students in medical school has dropped substantially from the peak reached in 1974.[44]

In law schools, minority enrollment in first-degree legal studies rose in the fall of 1977 to approximately 8.4 percent from just 4.3 percent in the late 1960s. In 1977, blacks were 4.7 percent out of all first-degree law students; Mexican Americans were 1.2 percent; Puerto Ricans and all other Hispanics were about 1 percent; Asian and Pacific Americans were 1.2 percent; and American Indians and Alaskan Natives were 0.3 percent of the total.[45] Between 1969 and 1977, total national enrollment in ABA-approved legal studies increased by 68,386 to 118,557 (a 73.5 percent increase). During the same 8-year period, total minority enrollment grew from 2,933 to 9,597 (an increase of more than 225 percent).[46]

In law schools, minorities also accounted for just over 8 percent of all students in 1976–77, nearly double the proportion in 1969–70. Some 4.8 percent of all law students in 1976–77 were black; 2 percent were Hispanic; 1.1 percent, Asian and Pacific American; and 0.2 percent American Indian.[47] There was an increase of 43 percent in total law school enrollment from 1969–70 to 1976–77, but minority enrollment jumped by 225 percent during that same period.[48]

An important byproduct of the affirmative admissions programs in higher education has been a

[36] Rappaport, "Legal Educational Opportunity Program," p. 520.
[37] *LSAT-CLEO-AALS Survey of Minority Group Students in Legal Education,* table I (mimeo. 1968), as cited in O'Neil, "Racial Preference," p. 950.
[38] William Boyd, "Legal Education: A Nationwide Study of Minority Law Students 1974," *Black Law Journal,* vol. 4 (1974), p. 529.
[39] Odegaard, *Minorities in Medicine,* p. 8.
[40] Association of American Medical Colleges, Division of Student Studies, "Fall Enrollment Questionnaire—1977–78, Preliminary Data," Nov. 4, 1977.
[41] Computed from data supplied by the Association of American Medical Colleges.
[42] James L. Curtis, *Blacks, Medical Schools, and Society* (Ann Arbor: University of Michigan, 1971), p. 57.
[43] Ibid. See also, Barbara Caress (with Judy Kossy), *The Myth of Reverse Discrimination: Declining Minority Enrollment in New York City's Medical Schools* (New York City: Health Policy Advisory Center, 1977).
[44] Data supplied by Association of American Medical Colleges.
[45] Data derived from figures provided by Cathy Schage, Administrative Secretary to James P. White, Consultant on Legal Education to the American Bar Association and Dean of Academic Planning and Development, University of Indiana at Indianapolis, telephone interview, Mar. 22, 1978.
[46] Ibid.
[47] James P. White, Consultant on Legal Education to the American Bar Association and Dean of Academic Planning and Development, University of Indiana at Indianapolis, memorandum to Deans of ABA Approved Law Schools, Mar. 22, 1977, as reprinted in Evans report, pp. 106–108; and Marilyn S. Shannon, administrative secretary to Dean White, telephone interview, June 22, 1977.
[48] Computed from data supplied by the Association of American Law Schools.

heightened sense of anticipation among minorities about opportunities once closed to them. In a 1974 analysis of affirmative admissions, one scholar noted that although:

> many factors undoubtedly account for the rise in minority [applications to professional schools]. . . .chief among them appears to be the knowledge that predominantly white institutions will now give special consideration to race—that there is, in other words, some incentive to apply.[49]

The deterrent effect of traditional college admissions policies on minority aspirations through the late 1960s seems to have lessened considerably with the increasing perception by minorities that the door to professional study has finally been opened by affirmative admissions efforts.

Another important reason for and result of the development of affirmative admissions programs is the enhanced quality of education received by all students through minority presence in the educational environment. The Association of American Law Schools states:

> In view of the importance of race in American life and the effect 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.[50]

The importance of diversity is further emphasized in an *amicus* brief before the Supreme Court filed by Columbia University, Harvard University, Stanford University, and the University of Pennsylvania:

> A policy of increasing the number of students from minority groups is, in our judgment, the best choice for all of our students because it is the best way to achieve a diverse student body. . . .Just as diversity makes the university a better learning environment for the student, so it makes the university a better learning environment for the faculty member. . . .It has been the experience of many university teachers that the insights provided by the participation of minority students enrich the curriculum, broaden the teachers' scholarly interests, and protect them from insensitivity to minority perspectives.[51]

The American Association of University Professors also considers the diversity afforded by affirmative admissions programs essential to the study of law and medicine:

> There is little doubt that for a subject, such as law, which must confront every pressing social issue, the participation of students of varied social and ethnic backgrounds provides vital additional perspectives and thus a fuller education than were the class socially and ethnically homogeneous.
>
> In medical education. . .the reliance of medical schools upon the indigent as clinical "teaching material" establishes an institutional setting which reinforces the pre-existing class biases of an overwhelmingly white, middle-class medical student body. . . .The introduction into the student culture of students [from disadvantaged, racial, or ethnic backgrounds] may play an important role in the process of professional socialization of the entire student class, i.e., in the production of a group of physicians who may be more understanding of—and compassionate toward—patients.[52]

The Carnegie Council also stressed the relevance of race in admissions when it stated that professional schools:

> . . .must also be conscious of the need to supply graduates who will meet the varied needs of the profession. These schools therefore have a quite legitimate interest in special persons with special characteristics—for example, those who have shown a strong interest in community service, or those who have shown they can face adversity and conquer it, through the force of their own personalities—for these characteristics relate directly to potential service within the profession.[53]

[49] O'Neil, "Racial Preference," p. 950.

[50] AALS Brief, p. 51.

[51] Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania as Amici Curiae, pp. 12–13, Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, *cert. granted,* 429 U.S. 1090 (1977) (No. 76–811).

[52] Brief for the American Association of University Professors as Amicus Curiae, pp. 8–9, Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, *cert. granted,* 429 U.S. 1090 (1977) (No. 76–811).

[53] See Appendix B for full statement.

Two other points may be noted in this discussion of affirmative admissions programs at law and medical schools. One concerns the question of whether minority law or medical school graduates would in fact practice in the minority community. Substantial evidence indicates that they do. A 1976 study by the National Planning Association, for example, showed an initial correlation indicating that black physicians have a greater tendency than their white counterparts to practice in the primary health care fields which administer direct client services to the minority communities.[54] A survey of graduates of Meharry Medical College, a predominantly black institution, revealed that some 80 percent of the graduates were currently practicing in minority communities.[55] Another study by the Association of American Medical Colleges found that minorities showed the highest interest in practicing in "physician shortage areas," with 78 percent of the minority students showing such an interest in contrast to 41 percent of the white students.[56] Finally, a California study revealed that 84.9 percent of the minority graduates of the major dentistry schools in California were practicing in or immediately adjacent to minority "Critical Shortage Manpower Areas," which have a 50 percent or higher minority population, while 37 percent of these professionals were practicing in areas with higher than 90 percent minority clientele.[57]

A second issue involves minority enrollment trends in recent years. It is important to note that minority enrollments have leveled off since 1974. Although minorities now comprise just over 8 percent of the medical school enrollment, that figure has remained constant since 1974. Also, the proportion of four selected minority groups (blacks, American Indians, Mexican Americans, and mainland Puerto Ricans) enrolled in first-year medical classes peaked in 1974 at 10 percent and has since declined to just over 9 percent.[58] In law schools the proportion of minorities is still gradually increasing but the pace has slowed since 1974.[59] The director of AAMC's office of minority affairs attributes the slowdown of minority enrollment in medical schools to two factors:

1. the bleak outlook for financial aid to medical students, especially in light of rising tuition rates, and
2. the increased legal issues confronting medical schools with regard to reverse discrimination beginning with the *DeFunis* case a few years ago.[60]

A recent study of New York City's seven medical colleges reports that "after five years of affirmative action, there are fewer minority students enrolled in the 1976 entering class. . .than there were in 1971." Citing the 1974–75 economic recession and the decreasing availability of government funding for medical education as primary causes for the decreasing minority enrollment, the report warns that "admissions officers now predict that economic conditions coupled with the escalating costs of attending medical school could erase past gains in a few short years."[61] With respect to the decreasing availability of financial assistance for medical students, another expert agrees that "it seems highly probable that this financial problem contributed to the subsidence in minority first-year enrollment from 1974–75 to 1975–76."[62]

The same observer commented: "Since 1973. . .the *DeFunis* case and similar challenges of reverse discrimination in medical school admissions have encouraged a tendency to vest actual decisions about the admission of all applicants in one committee."[63] Enrollment gains have slipped in recent years as "many universities and colleges. . .have changed their practices in anticipation of a later Court decision" that might force termination of affirmative admissions programs.[64]

[54] Michael Koleda and John Craig, "Minority Physician Practice Patterns and Access to Health Care Services," *Looking Ahead* (Washington, D.C.: National Planning Association, November/December, 1976).

[55] K. Abarbenal, "After Intensive Care: Is a Relapse Ahead for Minority Medical Education?" *Foundation News* (November/December 1976), p. 24, cited in MALDEF brief at 34.

[56] U.S., Department of Health, Education, and Welfare, Health Resources Administration, 77-21 *Medical Student Indebtedness and Career Plans: 1974–75*, by Davis, Gordon, and Montovani (Washington, D.C.: September 1976). This report was prepared by the Association of American Medical Colleges.

[57] Robert Montoya, Director of Health Professions Career Opportunity Program, California State Department of Health, telephone interview, Jan. 24, 1978.

[58] *Medical School Admission Requirements*, p. 47.

[59] After the rapid growth of minority enrollment in law schools between 1969 to 1973, that growth slowed. Minorities constituted between 7 and 7.5 percent of total law school enrollment until 1976 when it rose above 8 percent. Data supplied by the Association of American Law Schools.

[60] *Minority Student Opportunities in United States Medical-Schools, 1978–79* (Washington, D.C.: Association of American Medical Colleges, 1977), p. xi.

[61] Barbara Caress, *The Myth of Reverse Discrimination: Declining Minority Enrollment in New York City's Medical Schools* (New York: Health Policy Advisory Center, 1977), pp. 6, 8.

[62] Odegaard, *Minorities in Medicine*, p. 64.

[63] Ibid., p. 110.

[64] Marshall Cohen, Thomas Nagel, and Thomas Scanlon, eds., *Equality and Preferential Treatment* (Princeton, N.J.: Princeton University Press, 1977), p. 65.

Minority Enrollment: The Future

Fears as to the dire consequences for minorities if law and medical schools were to revert to sole reliance upon traditional, numerical admission standards are supported by recent research of the Educational Testing Service (ETS) and the Association of American Medical Colleges (AAMC). One conclusion of the ETS study was that:

> If the nation's law schools were to adopt an admissions policy taking no account of minority backgrounds of blacks and Chicanos, a majority of the students from those groups now admitted and enrolled would be excluded. If blacks and Chicanos were accepted at the rates for non-minorities at the same levels of LSAT and UGPA, the reduction in their enrollments would be 60 percent and 40 percent, respectively. If numerical predictors were employed exclusively for all applicants, the resulting reductions would be 76 to 78 percent for blacks and 45 to 48 percent for Chicanos. When law schools were asked to estimate the number of those minorities who would have been admitted if their minority status was unknown, they estimated reductions of 80 percent for blacks and 70 percent for Chicanos. The percentage of blacks among first-year law students would drop to between 1 and 2 percent from the current 5.3 percent, and the percentage of Chicanos would fall to between .4 percent and .8 percent from the current 1.36 percent.[65]

Similarly, the research by the AAMC concludes that:

> If medical schools had chosen to admit students based solely on one or several of these five traditional criteria [GPA and scores from the four sections of the MCAT], the 15,774 acceptances offered in 1976 would quickly have gone to individuals identified at the extreme high performance side of the curve. At this extreme only a very small proportion of minority applicants could qualify.[66]

Clearly then, the effect of affirmative admissions programs over the last decade has been to provide educational opportunity and encouragement to a minority population too long without its fair share of either. The Association of American Medical Colleges predicts that "without special admissions programs it is not unrealistic to assume that minority enrollments could return to the distressingly low levels of the early 1960s."[67] The Association of American Law Schools warned that, if law schools discontinue their efforts to seek out and admit qualified minority students, then "minority enrollment will plummet and the hopes of a generation schooled in the traditions of equal opportunity enunciated by *Brown* will be dashed."[68]

[65] Evans Report, pp. xvi–xvii.
[66] Waldman Study, p. 5.
[67] AAMC Brief at 18.
[68] AALS Brief at 32.

Chapter 4

Conclusion

For more than 200 years minorities in the United States were systematically denied equal opportunity at all levels of our society and in particular our educational system. Few now question the historical record although the pervasive effects of this regrettable past still may not be fully appreciated by many Americans. Most minority students still must overcome problems related to lower income, language, inferior educational resources, and discrimination. Such problems leave most white or Anglo students at a relative advantage in the pursuit of college and postgraduate degrees. For many minority students, graduation from high school and college are major successes that white students are likely to take for granted.

One consequence of this history of disadvantage is that minority Americans have been severely underrepresented in two important professions, law and medicine, while their basic needs in both areas receive inadequate attention. Entrance to law and medical school has become increasingly costly and competitive. It has been pointed out that the numerical test scores of many applicants currently being rejected would easily have qualified them just 10 years ago.[1]

This Commission has addressed what one commentator refers to as the "fallacy" that student admissions to law and medical schools traditionally are based on simple mathematical projections.[2] In fact, various categories of nonminority students have long been "preferentially treated" for a number of reasons, some of which have nothing to do with test scores or grade point averages. This is not to argue that two wrongs make a right. Consideration of nonnumerical selection factors such as physical handicap, a student's intention to practice in an area underserved by his or her chosen profession, or geographic location of student applicants is certainly valid and reasonable in admissions decisions. To be sure, the use of race or minority status is different. It is no less fair, however; given the long and lamentable history of discrimination against minorities in higher education, consideration of race or minority status in the admissions process of law and medical schools is certainly justified and appropriate.

The Commission also has cited evidence that indicates that the beneficiaries of affirmative admissions programs are as well qualified to study law or medicine as their "conventionally" admitted peers. Experience increasingly suggests that early disadvantages are remediable and that latent but unquantifiable ability, if detected by discerning admissions officials, can be brought to maturity. The ingredients of this alchemy are the commitment and motivation of minority students; the catalyst is simple opportunity.

The efforts of law and medical schools to increase minority opportunities for study at these institutions have been among the most significant and gratifying civil rights initiatives undertaken in the history of our society. Affirmative student admissions programs were initiated by administrators and faculty who accepted as their duty the need to correct, in a positive and reasonable manner, the shameful educational wrongs of the past and the resultant low representation of minorities in law and medical schools. Accordingly, they determined that the student admissions process at these institutions should be revised so as to remove unfair or

[1] Franklin R. Evans, *Application and Admissions to ABA Accredited Law Schools* (Princeton, N.J.: Law School Admissions Council, 1977), p. 7.

[2] Robert M. O'Neil, "Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education," *Yale Law Review*, vol. 80, no. 4 (March 1977), pp. 699, 702.

unnecessary barriers to minority access without jeopardizing academic standards.

Questions that arose over the value or reliability of entrance tests have led to less reliance on them and to greater interest by admissions officers in such other considerations as the work background, ethical sense, commitment, and motivation of each applicant. The inclusion of these factors provides a more rational process for evaluating not only minority students but also all the Nation's future attorneys and doctors. In this regard, affirmative admissions programs may have contributed to the same kind of beneficial review and reappraisal of traditional educational policies that school desegregation has brought about in many public elementary and secondary schools.[3]

In addition to the salutary effects affirmative admissions programs have had on the career opportunities of individual members of minority groups, these programs address a clear, indeed compelling, national interest. Minorities and, indeed, the Nation stand to gain improved and critically needed health services. They stand to gain essential legal training that not only contributes to improved legal services but also prepares them for greater participation in the political process. A law or medical school has an affirmative obligation to meet such basic health and legal needs of its given geographic area.

In addition, minorities will gain both important role models that will enhance minority group self-respect and greater representation in the influential upper income and occupation levels. The professions will benefit from the addition of new viewpoints and understanding. Affirmative admissions, by demonstrating to alienated groups the openness and fairness of our society, will strengthen the Nation as a whole.

For these compelling reasons, the Commission considers affirmative admissions programs at the Nation's law and medical schools entirely proper and worthy of emulation rather than condemnation. Turning away from these programs would be an appalling step backward for this society. It could also serve as a signal to individuals and institutions throughout the Nation that what is past is not prologue but is simply forgotten, and that our legacy of historical obligations can be ignored.

[3] U.S., Commission on Civil Rights, *Fulfilling the Letter and Spirit of the Law* (1976); *The Diminishing Barrier* (1973); *Five Communities: Their Search for Equal Education* (1972).

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Statement on Affirmative Action

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CONTENTS

INTRODUCTION

In the year 1977, nothing is more central to the success of the long struggle to eliminate racial discrimination from American life than the effort to establish equal access to job and career opportunities. For the better part of two centuries the Federal Government was indifferent to employment discrimination or actively fostered its imposition on black people and on other minorities and women as well. Only 13 years ago, with passage of the Civil Rights Act of 1964, did the emerging consensus that employment discrimination was wrong become a national policy favoring equal employment opportunity.

Title VII of the 1964 law was a clear statement of the national will to end unfair treatment of minorities and women in the job market. What was not fully apparent in 1964 was the magnitude of the effort that would be required to create genuine equality of opportunity and the specific measures needed to accomplish the task.

While progress has been made during the past decade, the current employment situation provides disturbing evidence that members of groups historically victimized by discriminatory practices still carry the burden of that wrongdoing. Unemployment statistics—a critical indicator of economic status—reveal a worsening situation for black people and members of other minority groups. In 1967 the national unemployment rate was 3.4 percent for whites and 7.4 percent for racial minorities.[1] During the economic expansion of the late 1960s, the ratio of black to white unemployment declined. But when the economy entered a recession in the 1970s, minority workers suffered disproportionately. In 1976 the rate of unemployment was 7 percent for whites and 13.1 percent for blacks and other minorities.[2] In August 1977 white joblessness declined to 6.1 percent, while minority unemployment increased to 14.8 percent.[3]

The persistence of problems of providing equal opportunity is also evidenced by the crisis in unemployment for minority youth. In 1971, when 15.1 percent of white teenagers were jobless, the unemployment rate for minority teenagers was 31.7 percent.[4] In 1976 white teenage unemployment stood at 18 percent, while 39.8 percent of minority teenagers were unemployed; and by August 1977 unemployment for minority teenagers had reached a staggering 40 percent.[5]

Income is another important indicator of the status of efforts to achieve equal opportunity. In 1974 the annual median family income for whites was $13,356, compared with $7,808 for blacks and $9,559 for Hispanics. For most of the past decades, the ratio of black to white family income has remained fairly constant while the dollar gap between the two groups continues to grow. For example, in 1964 the median annual income for black families was $3,724 compared with $6,858 for whites. In 1974 the annual median family income for blacks increased to $7,808 compared with $13,356 for whites. While the ratio of black to white family income has remained fairly constant (at about 2:3), the dollar gap between the two groups has increased from $3,000 to $5,500.[6] Similarly, the annual median income in 1973 for families headed by males was $12,965, while that for families headed by females was only $5,797. In 1973 women earned a median income which was only 57 percent of that earned by men.[7]

As the status and rewards of particular types of employment increase, minority participation tends to decline. This is particulary true in the professions where blacks, who are 11 percent of the popula-

[1] U.S., Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, October 1974, p. 51.

[2] Robert W. Bednarzik and Stephen M. St. Marie, *Monthly Labor Review* (1977), p. 8. For Hispanic American men, the unemployment rate in 1976 was 10.7 percent and for women, 12.5 percent. U.S., Bureau of the Census, *Persons of Spanish Origin in the United States*, Current Population Reports (March 1976), p. 10.

[3] U.S., Department of Labor, Bureau of Labor Statistics, *Employment Situation*, August 1977.

[4] U.S., Department of Labor, Bureau of Labor Statistics, *The Social and Economic Status of the Black Population in the United States* (1971), pp. 52–53.

[5] U.S., Department of Labor, Bureau of Labor Statistics, *Employment Situation*, August 1977.

[6] U.S., Department of Labor, Bureau of Labor Statistics, *The Social and Economic Status of the Black Population in the United States* (1974), p. 25; U.S. Bureau of the Census, *Persons of Spanish Origin in the United States*, Current Population Reports, Series P-20, No. 290 (1975).

[7] U.S. Department of Labor, Women's Bureau, *1975 Handbook on Women Workers*, Bulletin 297, pp. 127, 138.

tion, constitute only 2.2 percent of all physicians, 3.4 percent of the lawyers and judges in the country, and hold only 1 percent of the engineering jobs.[8] At the gateway to these occupations stand the graduate and professional schools. Although progress has been made in recent years, in 1976 the minority enrollment of American law schools was only 8 percent, including 4.8 percent black and 2 percent Hispanic American students. Medical schools had a similar enrollment pattern, with an 8 percent minority enrollment, including 6 percent black students and 1.2 percent Mexican Americans.[9]

While these racial disparities in job and economic status may stem from a web of causes, they provide strong evidence of the persistence of discriminatory practices. As the Supreme Court has observed, statistics showing racial or ethnic imbalance are important in legal proceedings:

> because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.[10]

As the difficulty of fulfilling this expectation has become apparent, debate has also intensified about the necessity and propriety of specific measures designed to eliminate discriminatory practices and their effects on both hiring and admissions decisions. In 1977 the controversy is centered around the concept of "affirmative action," a term that in a broad sense encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future. Particular applications of the concept of affirmative action have given rise to charges of "reverse discrimination," "preferential treatment," and "quota systems"—all, in essence, claims that the action sought or imposed goes beyond what is needed to create conditions of equal opportunity for minorities or women and that it imposes unfair treatment on others.

The Commission believes that a sensible and fair resolution of the controversy is best served by an examination of the specific decisions made by agencies charged with implementing and interpreting the law, of the reasons for the decisions, and of what the decisions have meant in practical terms to the people affected by them. To this end and to offer our own views, the Commission has prepared this position statement for public discussion and consideration.

Part I. Institutional Barriers to Opportunity

Perhaps the single most important occurrence in the evolution of equal employment law was the recognition by the U.S. Equal Employment Opportunity Commission and by the Supreme Court of the United States that the mandate of the Civil Rights Act of 1964 could not be fulfilled simply by prohibiting practices intentionally designed to deny opportunities to minorities.[11] In a society marred for years by pervasive discrimination in hiring and promotion, practices that are not racially motivated may nonetheless operate to disadvantage minority workers unfairly. Accordingly, in the landmark case of *Griggs v. Duke Power Company*,[12] the Supreme Court applied Title VII of the 1964 act to invalidate general intelligence tests and other criteria for employment that disproportionately excluded minorities if they were not shown to be dictated by business necessity. It was conceded that the tests used were not deliberately discriminatory, but the Supreme Court concluded that:

[G]ood intent . . . does not redeem employment

[8] U.S., Department of Labor, Bureau of Labor Statistics, Current Population Survey, May 1977, and *The Social and Economic Status of the Black Population in the United States*, p. 75.

[9] National Board on Graduate Education, *Minority Group Participation in Graduate Education*, A Report with Recommendations (Washington, D.C.: Report No. 5, June 1976), p. 61.

[10] International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843, 1856–57 n.20 (1977).

[11] The decisions of the EEOC and the Supreme Court that the concept of discrimination could not be limited to racially motivated acts were foreshadowed by the adoption of the principle of affirmative action in Executive orders governing Federal contracts. See discussion below, p. 5.

[12] 401 U.S. 424 (1971).

[13] *Id.* at 432. In a subsequent decision, Albemarle Paper Company v. Moody, 422 U.S. 405 (1975), the Court made clear that even if tests are shown to be job related they may not be used if alternative devices are available that do not have a discriminatory effect and that also serve the employer's interest in an efficient and trustworthy work force.

procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.[13]

The principle of the *Griggs* case has been applied to other practices that constitute barriers to equal employment opportunity even though they are not invidiously motivated. Among these practices are the following:

- The reliance of employers and unions on word-of-mouth contact as a means for recruiting new employees. Minority workers generally have less access than others to these informal networks of employment information, especially when the existing work force is largely white.[14]
- The use of minimum height and weight standards as requisites for jobs in law enforcement and other fields. Such requirements screen out many women and may also have an adverse impact on Hispanic Americans and other ethnic groups.[15]
- The use by employers of arrest records as an absolute bar to employment. Many members of minority groups, particularly those who have grown up in ghetto environments where crime rates are high and people are often arrested on "suspicion," are adversely affected by such requirements despite the fact that they would be honest and reliable employees.[16]
- The tendency of some unions and employees to favor relatives of current employees for new positions. Such policies in the construction trades, whether or not racially motivated, have operated to perpetuate the effects of past exclusion of minority workers.[17]
- The relocation of industrial plants from central cities to suburban locations where minority workers have difficulty in obtaining access to housing.[18]

The courts have placed some limitations upon the use of an "effects test" to bar practices that disadvantage minorities or women.[19] In 1977 the Supreme Court held that Title VII does not authorize the invalidation of employers' disability pay programs that exclude pregnancy from among the disabilities to be compensated for, despite the obvious adverse effect upon women employees.[20]

The Court has also ruled recently that seniority systems that are otherwise neutral and legitimate do not become unlawful under Title VII simply because they perpetuate the effect of discrimination that occurred before passage of the law.[21] While this decision is a setback to efforts to obtain full redress for wrongs suffered by minority workers before 1964, it does not appear to impair the *Griggs* principle, since in the Court's view the holding was dictated by section 703(h) of Title VII, a special provision designed to protect "bona fide" seniority systems that were not adopted with an intention to discriminate. Moreover, the Court made it clear that seniority systems must be modified to provide redress (in the form of retroactive seniority) to employees who had been discriminated against after 1964 and that the people entitled to relief include not only employees whose applications were denied, but those who were deterred from applying by the employer's known policy of discrimination.[22]

The concrete remedies that have flowed from the application of the principle of the *Griggs* case form a significant component of affirmative action. They include orders that:

- employers substitute for their old systems of word of mouth recruiting specifically designed programs to recruit minorities; e.g., visits to black colleges and universities, recruitment

[14] See, e.g., Parham v. Southwestern Bell Telephone Company, 433 F.2d 421 (8th Cir. 1970).

[15] See Dothard v. Rawlinson, 45 U.S. L.W. 4888 (1977), where the Supreme Court struck down as violative of the rights of women under Title VII an Alabama statute establishing minimum height and weight requirements for correctional jobs.

[16] *See, e.g.*, Gregory v. Litton Systems, 316 F. Supp. 401 (C.D. Calif. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972).

[17] *See, e.g.*, Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[18] While this issue has not been addressed definitively in the courts, it has been suggested that employers, though not barred from relocating for economic reasons, are required under Title VII to make efforts to remove barriers to minority employment that may stem from the move. *See* EEOC Memorandum, General Counsel to Chairman, July 7, 1971; Blumrosen, "The Duty to Plan for Fair Employment: Plant Location in White Suburbia," 25 Rutgers L.R. 383 (1971).

[19] The 14th amendment to the Constitution does not of itself require the invalidation of official acts solely because they have a racially disproportionate impact. *See* Washington v. Davis, 426 U.S. 229 (1976). But the Constitution does afford wide latitude to Congress and States to provide redress for racial inequity whether intentionally caused or not. See discussion below pp. 5–7, 8–11.

[20] Gilbert v. General Electric Company, 97 S. Ct. 401 (1977). The obvious disadvantage that this ruling imposes upon women in the job market has led to a strong movement to amend Title VII to require that pregnancy be covered in disability plans.

[21] International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843 (1977).

[22] *Id.*; Franks v. Bowman Transportation Company, Inc., 424 U.S. 747 (1976).

through minority organizations and media with a minority audience, use of minority employees to recruit others.[23]

- eligibility lists based on unvalidated tests be discarded and that the tests and other standards such as the possession of a high school diploma be replaced by nondiscriminatory standards.[24]
- that employers and unions institute training programs for minority applicants and employees where minorities have been excluded from training opportunities in the past.[25]

An understanding of the underlying basis of decisions that practices resulting in disadvantage to minorities are unlawful under equal employment statutes even though not racially motivated is important to an appreciation of the rationale for broader affirmative action. In *Griggs,* the decision was based in part on the fact that the Duke Power Company had previously intentionally excluded minority applicants from its work force. To permit exclusionary practices to be replaced by a "neutral" device that adversely affected minorities would simply have resulted in the perpetuation of past discrimination. But the decision was also based upon a recognition that, wholly apart from the employer's past practices or current intentions, the tests being used had a discriminatory impact upon minorities. This was so because the disproportionate failure rate of minorities on tests of the kind used by the Duke Power Company is traceable to discrimination by other institutions in our society. As the Supreme Court said in a later decision:

> *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the rest of their lives.[26]

A narrow view would focus exclusively on the question of fault, absolving employers and unions who are not badly motivated even at the cost of marring for life the opportunities of those who have suffered discrimination. Fortunately, in interpreting equal employment statutes, the Supreme Court has rejected that approach in favor of one that permits practical intervention at points where it is possible to create opportunities that have been denied in the past.[27] While respecting the rights of employers to insist on qualified workers, the Court has applied equal employment law to require that the methods by which employees are selected do not compound deprivation that minorities have faced in the past.

It is important as well to assess the impact on minorities and others of decisions removing institutional barriers to employment opportunity. The discarding of tests or high school diplomas as requirements for employment or promotion, the requirement that employers go beyond word-of-mouth recruiting, and other similar decisions undoubtedly adversely affect the interests of white employees. All of these steps broaden the field of competition for job opportunities and decrease the prospects for success that whites had previously enjoyed. In some cases the disappointment of expectations can be quite concrete, as when white applicants for employment or promotion find that eligibility lists on which they may rank high are discarded because the tests on which the lists were based were unvalidated and disproportionately excluded minorities. Indeed, in some instances what is at stake for white male workers is not simply the disappointment of expectations but a diminution of status or benefits they had already achieved. This is so, for example, when courts order that individual victims of discrimination be given relief that restores them to the place they would have occupied but for the discrimination. When black employees who were denied positions are granted priority consideration for vacancies and full seniority retroactive to the date of denial, white employees who have committed no wrong suffer the hardship of a relative loss of status or benefits.

An acknowledgement that the removal of institutional barriers to employment and pursuit of affirmative action policies may have adverse effects upon the expectations and status of white employees

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[23] U.S. v. Georgia Power Co., 474 F.2d 906, 925–926 (5th Cir. 1973); Franks v. Bowman Transportation Co., 495 F.2d 398, 420 (5th Cir. 1974), rev'd and remanded on other grounds, 424 U.S. 747 (1976).

[24] U.S. v. Georgia Power Co., 474 F.2d , at 917–919.

[25] *See, e.g.,* Leisner v. New York Telephone Co., 358 F. Supp. 359 (S.D.N.Y. 1973); U.S. v. Local 86 Ironworkers, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd,* 443 F.2d 544 (9th Cir. 1971), *cert. denied,* 404 U.S. 984 (1971).

[26] McDonnell Douglas v. Green, 411 U.S. 792, 806 (1973).

[27] In another field, the Supreme Court has refused to permit the reinstatement of literacy tests as a qualification for voting because, even though administered impartially, the tests would disadvantage black adults who had previously attended segregated schools. Gaston County v. United States, 395 U.S. 285 (1969).

does not mean that courts and other agencies are insensitive to the interests of these employees. In fact, the Supreme Court has held explicitly that white employees are protected from discrimination on the basis of race both by Title VII and by the civil rights laws enacted during Reconstruction.[28] Rather, cases based on the *Griggs* principle in essence hold that protection of the interests of white employees, however innocent of any wrongdoing they may be, cannot be purchased at the expense of a continuing denial of opportunity to members of groups that have been subjected to discrimination.[29]

Viewed from the perspective of minority workers, the principal beneficiaries of decisions suspending tests or other institutional obstacles to equal opportunity are people who have suffered discrimination either at the hands of the particular employer or elsewhere in the system. It is true, however, that some minority workers who do not fall into these categories may obtain benefits from the decision. A minority applicant who has never experienced discrimination in the educational system and whose inability to pass a test is unrelated to discrimination may, nonetheless, gain from a decision to substitute other criteria for hiring for unvalidated tests. The reason is that in this situation it would be extraordinarily difficult to fashion a remedy by proceeding on an individual or case-by-case basis. As the Department of Justice has pointed out in a related context:

> Decades of discrimination by public bodies and private persons may have far-reaching effects that make it difficult for minority applicants to compete . . . on an equal basis. The consequences of discrimination are too complex to dissect case-by-case; the effects on aspirations alone may raise for minority applicants a hurdle that does not face white applicants . . . and a [school or employer] dealing with imponderables of this sort ought not to be confined to the choice of either ignoring the problem or attempting the Sisyphean task of discerning its importance on an individual basis.[30]

[28] *See* McDonald v. Santa Fe Trail Construction Co., 427 U.S. 273 (1976). The Court held that a white employee victimized by discrimination could invoke the Civil Rights Act of 1866, 42 U.S.C. § 1981, in addition to Title VII.

[29] In situations where white employees suffer direct injury, e.g., a relative loss of seniority status, as a result of action to redress discrimination, they may be entitled to some form of compensation. See discussion below, p. 8.

[30] Brief for the United States as *amicus curiae* at 56, Regents of the University of California v. Bakke, No. 76-811 (U.S. *cert. granted* February 1977).

In short, the task of screening out the few persons not entitled to benefit on the basis of past discrimination could be accomplished only at the cost of administrative disruption and of further delaying redress for those who have suffered from discrimination. That cost is simply too large.

Part II. Numerically-Based Remedies

The principles governing decisions to remove institutional obstacles to equal employment opportunity are also helpful in analyzing another important and controversial aspect of affirmative action: the use of numbers, either as goals or, in some instances, as requirements in fashioning remedies for discrimination. Numerically-based remedies have been used by Federal agencies seeking to implement laws and Executive orders requiring equal employment opportunity and by Federal courts seeking to devise appropriate remedies for proven discrimination. They have also been used in conjunction with other affirmative action tools by public and private institutions such as colleges and universities undertaking voluntarily to improve opportunities for minorities. An understanding of how numerically-based remedies came to be used as an affirmative action tool and how they have been applied in specific contexts is important to any effort to judge their necessity or propriety.

Contract Compliance

Since the issuance of an Executive order by President Franklin D. Roosevelt on the eve of the Second World War, the Federal Government has pursued a policy of prohibiting racial discrimination in the employment practices of businesses that hold contracts with the government.

A significant strengthening of the policy came in 1961 when President Kennedy issued a new Executive order establishing an obligation on the part of Federal contractors not only to refrain from discrimination but to undertake "affirmative action" to ensure that equal employment principles are followed in all company facilities.[31]

[31] In its current form, the provision found in Executive Order No. 11246, II, sec. 203, 30 Fed. Reg. 12319, as amended by Executive Order No. 11375, 32 Fed. Reg. 14303, which extended coverage to women.

This order was the first articulation of the concept of affirmative action as a guide to Federal equal employment policy. It constituted a recognition that a simple termination of overt practices of discrimination might have little impact on the token representation of minority workers in the labor force of many contractors. The Executive order also reflected implicitly a view that, to the extent that employers were prepared to cooperate, the time and resources of the contract compliance program would be better spent in the development of new channels of opportunity for minorities than in efforts to assess culpability for discrimination that had occurred in the past. Accordingly, in implementing the order, Federal officials emphasized specific affirmative steps—e.g., visits to black colleges, contacts with minority organizations and media—that employers would take to increase the participation of minority workers.

As the program has evolved, the Office of Federal Contract Compliance Programs, the agency that supervises implementation of the Executive order, requires contractors to undertake an evaluation of their patterns of employment of minorities and women in all job categories [41 C.F.R. 60–211(a)]. Once this self-analysis is complete, the employer is required to identify obstacles to the full utilization of minorities and women that may account for their representation in small numbers in particular categories and then to develop an affirmative action plan to overcome the obstacles [41 C.F.R. 60–1:40]. The affirmative action plan may include measures for improved recruiting, new training programs, revisions in the criteria for hiring and promotion, and other steps.

While progress was made during the 1960s, it became clear that companies that lacked a strong will to change existing practices might go through the litany of affirmative action steps in a very perfunctory way without securing any significant changes in the actual employment and assignment of minority and women workers. Out of this experience grew the concept of "goals and timetables." Employers are asked to compare their utilization of minorities and women with the proportion of minorities and women in the available and relevant labor pool, a determination that may vary with the industry of the contractor and the location of the facility or institution. The contractor is then required to develop goals and timetables for achieving a fuller utilization of minorities and women [41 C.F.R. 60–2:10 (1974)].[32]

The goals arrived at are generally expressed in a flexible range (e.g., 12 to 16 percent) rather than in a fixed number. They reflect assessments of the availability of minorities and women for employment, the need for training programs, and the duration of such programs. The goals are not properly considered fixed quotas, since determinations of compliance are not made solely on the question of whether the goals are actually reached, but on the contractor's good faith effort to implement and fulfill the total affirmative action plan [41 C.F.R. 60–214 (1974)]. The employer is not compelled to hire unqualified persons or to compromise genuinely valid standards to meet the established goal. If goals are not met, no sanctions are imposed, so long as the contractor can demonstrate that he made good faith efforts to reach them.

The validity of the contract compliance program, including its provisions for goals and timetables, has been repeatedly upheld by the courts.[33] This has occurred in the face of challenges that the program involves a constitutionally impermissible use of race and conflicts with the congressional policy against requiring an employer to grant preferential treatment simply because of racial imbalances that exist in the work force.[34]

Although "goals and timetables" provisions, like other legal requirements, are capable of misinterpretation and abuse in individual cases, there is very little evidence that such abuse has occurred. Experience shows that they have not been treated as fixed quotas requiring the hiring of minorities and women regardless of qualification and circum-

[32] These requirements are embodied in Revised Order No. 4, which applies only to nonconstruction contractors. A parallel set of requirements has been developed for the construction industry. Where construction contractors fail to arrive at goals and timetables of their own in consultation with unions, the OFCCP may impose a plan. Before imposing a plan, the OFCCP holds public hearings to determine the degree of underutilization of minorities, their availability for construction work, and projected construction job opportunities. See U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. V, *To Eliminate Employment Discrimination* (1975) p. 352.

[33] *See* Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973); Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2d 68 (6th Cir. 1972); Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971).

[34] The congressional policy is embodied in sec. 703(g) of Title VII.

stances, but rather as tools to remove institutional obstacles to equal employment opportunity. Indeed, the problem may be one not of overzealousness but of a lack of sufficient vigor. Since 1975 in the construction industry, only three "hometown" (voluntary) affirmative action plans have met or exceeded the goals set. Of 29 plans on which the OFCCP was able to furnish data, 17 had met less than half the goal; and in 7 of these, less than 20 percent of the goal was attained.[35]

Lastly, it should be noted that goals and timetables can provide a means for simplifying the remedial process and easing the administrative burden of supervision that would otherwise rest on the government and employers. In many situations, an appropriate remedy for discrimination will permit a good deal of subjective judgment to enter into the hiring and promotion process. Safeguarding the rights of minorities would ordinarily require careful checks upon the exercise of such judgment through detailed reporting and close supervision by top management and by government.[36] Goals and timetables can ease that burden by serving as a valuable standard for determining whether the system is providing the relief envisaged.

Court Orders

Although goals and timetables are essentially flexible targets, after making specific findings of discrimination, Federal courts have sometimes determined that an effective remedy dictates the establishment of fixed requirements for hiring. Typically, a court may require that a specified percentage of all new hires be members of the minority group discriminated against until a specific goal of minority participation in the work force is reached. As with goals and timetables, the ultimate goal is set with reference to the proportion of minority workers in the available and relevant labor pool. Once the goal of minority participation is achieved, past discrimination may be deemed to have been remedied and the employer or union is no longer subject to fixed hiring requirements.[37]

In *Carter v. Gallagher*,[38] for example, a Federal court, having found that the Minneapolis Fire Department had engaged in discrimination against minorities, ordered the department to hire one minority person of every three who qualified until at least 20 minority workers were on the staff.[39] In situations where the major element of discrimination was the use of unvalidated tests that adversely affected minorities, courts may order as an interim remedy that separate lists be established for white and minority eligibles and that hiring take place from the top of each list in a proportion established by the court.[40]

As in the cases considered in Part I, it should be noted that the minority applicants benefited by orders involving numerical requirements may not be the same people against whom the employer or union discriminated in the past, although they are quite likely to have suffered discrimination in segregated schools or through other public action. As the court stated in the *Rios* case: [41]

> [W]here the burden is directly caused by past discriminatory practices it is readily apparent that if the rights of minority members had not been violated many more of them would enjoy those rights than presently do so and that the ratio of minority members enjoying such rights would be higher. The effects of such past violations of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative ac-

[35] Data from the Office of Federal Contract Compliance Programs (1977).

[36] See Cooper, Rabb, and Rubin, *Fair Employment Litigation* (West Publishing Co.: 1975), pp. 449–50.

[37] The temporary character of the remedy is viewed by courts as important to its validity. In Rios v. Steamfitters Local 638, 501 F.2d 622 (2nd Cir. 1974), the court said that the numerical requirement was properly viewed as a racial "goal" not a "quota" because quotas imply permanence. It should also be noted that the remedy does not require an employer to hire unqualified minority applicants, but restrains him from filling a specified proportion of vacancies with white applicants until he is able to recruit qualified minorities.

[38] 452 F.2d 315 (8th Cir. 1971), *modified en banc*, 452 F.2d 327, *cert. denied*, 406 U.S. 950 (1972).

[39] This represented a modification of the district court's order under which the first 20 new jobs were to be reserved for minorities. Other cases imposing similar requirements include Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 482 F.2d 1333, 1340–41 (2nd Cir. 1973); Vulcan Society of the New York City Fire Department v. Civil Service Commission, 490 F.2d 387, 398–99 (2nd Cir. 1973); U.S. v. Wood, Wire and Metal Lathers International Union Local 46, 471 F.2d 408, 412–13 (2nd Cir. 1973); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Local 53, International Ass'n of Heat and Frost Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); NAACP v. Beecher, 371 F. Supp. 407 (D. Mass. 1974).

[40] See U.S. v. City of Chicago, 411 F. Supp. 218 (N.D. Ill. 1976). A longer term remedy may involve "differential" validation of the test for minorities and nonminorities. Such validation may demonstrate that success on the job may be expected for minority applicants who achieve a certain score, notwithstanding the fact that the score is lower than that at which success may be predicted for whites. See Albermarle Paper Company v. Moody, 422 U.S. 405 (1975).

[41] Rios v. Steamfitters Local 638, 501 F.2d at 631–32.

tion is essential . . . to place eligible minority members in the position which the minority would have enjoyed if it had not been the victim of discrimination.

While efforts to identify the "rightful place" that members of minority groups would occupy if discrimination had not occurred are necessarily speculative, the most appropriate guide may be found in the Supreme Court's suggestion that absent discrimination, it is to be expected that work forces will be "more or less representative of the population in the community from which employees are hired." [42] On a practical as well as a legal level, decisions setting numerical requirements are also justified by the fact that they may provide the only meaningful point at which the law can intervene to provide opportunity for individuals who have been discriminated against by other institutions in the past.

Although the decisions are fairly uniform in sustaining the setting of numerical requirements for hiring workers after discrimination has been found, the courts have had more difficulty in dealing with situations where numerical requirements would impinge on the status that nonminority workers have already attained. So, for example, in one case a court of appeals, while sustaining a numerical requirement for new hiring, barred a similar requirement for promotions on grounds that it would interfere with the established career expectancies of current employees.[43] In addition, in the current state of the law, it appears that the results of affirmative action programs (including those embodying numerical requirements) may be undone when an employer followed an established seniority system in deciding which employees to lay off.[44] In part, these decisions may stem from the special solicitude manifested in Title VII for protecting seniority systems not tainted with illegal racial intent. In practical terms, the cases have presented special difficulties for courts because (a) it is not merely the expectations of white workers but their vested status that courts are being asked to impinge upon, and (b) the interference is sought not necessarily on behalf of a clearly identified individual who himself was discriminated against, but instead it is on behalf of individual members of a class—minority citizens—that have, as a whole, suffered discrimination.

Nevertheless, the outcome of the layoff cases is troubling because it suggests that opportunities laboriously created through the development of affirmative action over a period of years may be destroyed in a moment when hard times come. Among the legal remedies that have been suggested but not yet fully explored are money damages for the loss of accrued seniority or an order to employers to retain incumbent employees who otherwise would be laid off.[45] Other public policy initiatives, such as work sharing through reduction of hours or rotation of layoffs, have been proposed to preserve opportunities created through affirmative action while according fair treatment to senior white workers.[46]

Affirmative Action by Professional Schools

The most intense controversy about affirmative action has centered about the efforts of colleges and universities to increase the enrollment of minority students. Beginning in the late 1960s and early 1970s, many institutions of higher education, including medical and law schools, initiated programs designed to alter the extraordinarily low rate of minority participation.[47]

The admissions process for most law and medical schools is a complex affair. In an effort to reduce

[42] International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843, 1856–57 n.20 (1977). "Community is a concept that may have varying applications. Many colleges and universities recruit their students and teachers from a national "community." Many employers seek workers only from the region in which their facilities are located.

[43] Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973). *But see,* NOW v. Bank of Calif., 347 F. Supp. 247 (N.D. Cal. 1973); Leisner v. New York Telephone Co., 358 F. Supp. 359 (S.D. N.Y. 1973).

[44] *See* Watkins v. United Steelworkers Local 2369, 516 F.2d 41 (5th Cir. 1975); Jersey Central Power and Light Co. v. IBEW, 508 F.2d 687 (3rd Cir. 1975), *vacated* 96 S. Ct. 2196 (1976).

[45] *See* Watkins v. United Steelworkers Local 2369, 369 F. Supp. 1221 (E.D. La. 1974), *rev'd on other grounds,* 516 F.2d 41 (5th Cir. 1975). An order to retain incumbents would levy the costs of a remedy on the culpable party, not innocent white or black workers. In McAleer v. AT&T, 416 F. Supp. 435 (D.D.C. Cir.1976) a male employee who was passed over for a promotion in favor of a less senior female employee was held to be entitled to monetary compensation but not the promotion. The company had acted pursuant to a consent judgment in which it bound itself to take affirmative action to redress past sex discrimination.

[46] See, e.g., U.S., Commission on Civil Rights, *Last Hired, First Fired: Layoffs and Civil Rights* (1977).

[47] While these programs have been undertaken voluntarily, most institutions receive Federal grants and are bound by Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*), which prohibits discrimination in the operation of federally-assisted programs. Regulations issued by the Department of Health, Education, and Welfare pursuant to Title VI authorize affirmative action to correct conditions that limit the participation of minorities even in the absence of prior discrimination. 45 C.F.R. 80.3(b)(6)(ii).

the amount of subjective judgment to be exercised in determining qualifications, the schools accord significant weight to the college grade point averages of applicants and to their performance on professionally developed aptitude tests. These figures, taken together as a combined score, are deemed a reasonable prediction of the likely performance of the applicant in his or her first year of professional schools. Nonetheless, a great deal of subjective judgment enters into the admissions process. The motivation and experience and other personal qualities of applicants are deemed important factors that cannot easily be quantified, but only assessed through personal interviews and references. Other policies of professional schools such as a desire to achieve geographical diversity or (for practical reasons) to accord a preference to the children of alumni or contributors militate against the use of test and grade performance as the sole determinants for admissions.

The form of affirmative admissions programs varies in important respects from institution to institution,[48] but what is common to virtually all programs is a decision to use race as one of the relevant factors in determining admissions. Universities continue to insist that all applicants selected be qualified, and the programs have not resulted in the selection of minority applicants deemed unlikely to succeed in school or in the practice of the professions.[49] From a pool of qualified applicants ordinarily far larger than the number of places available, the professional school selects some minority applicants whose combined scores (grade point average and aptitude test) are lower than those of some nonminority applicants who are not accepted. Invariably, because of other factors weighed in the admissions process, some white applicants are also accepted whose scores are lower than those of applicants who are rejected.

The challenge to special admissions programs is based on a belief, often strongly held, that it is both improper and violative of the equal protection clause of the 14th amendment for a public body to make distinctions based upon race. The harm perceived is the exclusion of applicants who are not members of the specially admitted group for reasons having nothing to do with their qualifications and the casting of a shadow on the credentials of all minority admittees whether their admission was attributable to a preference or not.

Unquestionably, our jurisprudence requires that courts view racial classifications made by governmental laws and policies with suspicion and correctly so, for on careful examination it has been found that most such classifications inflict harm upon people without justification.[50] It is not accurate, however, to conclude that all racial distinctions are groundless or unconstitutional. Contemporaneously with passage of the 14th amendment, Congress enacted a law authorizing the Freedmen's Bureau to extend special education aid and other benefits to black citizens. The law was enacted over the veto of President Andrew Johnson and after debates in which many of the opponents posed arguments similar to those being raised currently against affirmative action programs.[51] Through the years, and particularly in recent times, Congress has enacted laws extending certain types of assistance to designated racial groups on findings that these groups had special needs. Very recently, for example, Congress provided in the Public Works Employment Act of 1977 that a specified portion of public works grants

[48] In some medical schools, for example, percentage goals have been established for minority students in entering classes; in some a separate group, usually including minority faculty or students, has been created to review the applications of minority or disadvantaged students; in others, race is considered as a factor without the setting of specific goals of the creation of a separate admissions group. See, Charles E. Odegaard, *Minorities in Medicine* (New York: Macy Foundation, 1977), p. 11, citing Wellington and Gyorffry, *Draft Report of Survey and Evaluation of Equal Educational Opportunity in Health Profession Schools* (1975), table VIII.

[49] While courts have differed in their views of the constitutionality of affirmative admissions programs, none has found reason to dispute the representation of the professional schools that the minority students admitted were qualified. See, DeFunis v. Odegaard, 82 Wash.2d 11, 507 P.2d 1169 (1973), *vacated*, 416 U.S. 312 (1974); Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537 (1976); Bakke v. The Regents of the University of California, 18 Cal.3d 34, 553 P.2d 1152 132 Cal. Rptr. 680 (1976).

[50] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[51] President Johnson argued in his veto message that such legislation would establish a "favored class of citizens" and would promote public conflict, *Messages and Papers of the Presidents*, Vol. VII (1974), pp. 3620, 3623. Several Congressmen and Senators claimed that the bill was unfair to whites who had similar needs and that the bill would ultimately harm black people by increasing their dependence. Prior to passage of the 14th amendment, Congress had passed a substantially similar bill that was vetoed by President Johnson, and the veto was sustained partly because of doubts about whether the Constitution authorized such legislation. A useful summary of the congressional debates is contained in the *amicus curiae* brief of the NAACP Legal Defense and Educational Fund, Inc., in Regents of the University of California v. Bakke (U.S. S. Ct., Oct. term, 1977 No. 76–811).

must be set aside for minority business enterprises.[52]

The issue, then, in assessing the soundness and constitutionality of affirmative action admissions programs is whether they meet the burden of special justification that generally falls upon public actions that make racial distinctions.[53] A careful and reasoned consideration of this question in the courts has been impeded by the reluctance of most professional schools to spread on the public record information on two subjects of great relevance: the past exclusionary practices of their own and other professional schools and the discriminatory activities of other public agencies in their own States. Since affirmative action admissions programs have been undertaken voluntarily, university officials have not deemed it wise or prudent to make public admissions of the culpability of the government of which they are a part. Instead, they have offered a variety of other justifications for the affirmative consideration of race in the admissions process, among them: (a) the absence of minorities in any numbers in the profession; (b) the benefits to students and the profession of achieving diversity in the student body and the profession through the admission of minority applicants; (c) the need to train professionals who may serve as role models for younger minority people; (d) the need to train professionals who would serve the needs of the poor in minority communities by working in those communities and encouraging other nonminority professionals to do so; and (e) the need to give special consideration to minority applicants because, as a result of poor education and economic burdens, their numerical scores do not necessarily reflect their abilities.[54] While all of these are factors with some degree of persuasive force, their strength as a justification for affirmative action admissions programs may be partly contingent upon the circumstances that gave rise to the absence of minority professionals in the first place, and a history of racial exclusion and discrimination may be far more persuasive than other factors taken individually or collectively.

There is no doubt about the history of racial exclusion in the professional schools. In 1948, one-third of the approved medical schools had official policies of denying black applicants admission solely on the basis of race.[55] Even after official policies of racial exclusion were abandoned, the number of black medical students remained very small. In 1969–70, black students were only 2.6 percent of the total enrollment of medical schools. Hispanics, during this same period, were 0.5 percent of medical school enrollment.[56] Law schools have a similar history, many not having abandoned overt exclusion until after the Second World War. Most then moved to tokenism.[57] Women have suffered from similar policies. Schools have increased their minority and female enrollments only recently under the spur of governmental policy and affirmative action admissions programs.

Nor is it in serious dispute that a very substantial portion of minority students applying for professional schools today have suffered racial discrimination at the hands of school systems and other government agencies. For example, in California, site of the *Bakke* case and generally regarded as a relatively progressive State in race relations, public school systems serving a majority of the State's children have been found during the last decade to have deliberately segregated students because of their race in violation of the Federal or State constitutions or Federal civil rights statutes.[58] Other discriminatory practices have included the failure to offer lan-

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[52] Pub. L. 95–28. A compilation of such race-conscious laws and programs is contained in appendix A of the brief of the United States as *amicus curiae* in the Bakke case.

[53] Some have argued that because affirmative action admissions programs are remedial in nature the burden of justification should be no more stringent than the "rational purpose" test applied in judging the constitutionality of most economic and social legislation. Without expressing a view on this legal question, we assume for purposes of this discussion that public actions making racial distinctions of any kind must meet a stricter standard.

[54] *See, e.g.,* Bakke v. Regents of the Univeristy of Cal., 18 Cal. 3d 680, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

[55] See Johnson, "History of the Education of Negro Physicians," 42 Journal of Medical Education, 439, 441 (1967).

[56] James L. Curtis, *Blacks, Medical Schools and Society* (Ann Arbor: University of Michigan Press, 1971), pp. 34, 41. Only with the initiation of affirmative action admissions programs did the entry of black students into medical schools increase substantially, reaching 6.2 percent in 1975–76, Odegaard, *Minorities in Medicine,* p. 31.

[57] *See,* Sweatt v. Painter, 339 U.S. 629 (1950); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Gellhorn, the Law School and the Negro, 1968 Duke L.J. 1068, 1069–72, 1093 (1968).

[58] Among the districts that have been adjudged by courts to have discriminated are Los Angeles, San Francisco, San Diego, Pasadena, and Oxnard. Others have been found by HEW to have violated Title VI of the Civil Rights of 1964. *See* Brown v. Weinberger, 417 F. Supp. 1215 (D.D.C. 1976). See also Center for National Policy Review, *Justice Delayed and Denied,* (1974), p. 108; and U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974,* Vol. III, *To Ensure Equal Educational Opportunity* (1975); and *A Generation Deprived: School Desegregation in Los Angeles* (1977).

guage instruction to Chinese American and Hispanic American children who are not fluent in English, a failure that denies them the opportunity to participate meaningfully in the educational process in violation of the Civil Rights Act of 1964.[59]

In sum, whether or not university officials choose to articulate it, the fundamental justification for affirmative action admissions programs in professional schools is identical to that which has led courts to uphold affirmative action, including numerically-based remedies, in employment.[60] Such programs are designed to provide redress, however belated, for past practices of racial exclusion of the professional schools themselves. Equally as important, the programs are intended to provide opportunities that were denied to many applicants earlier in their lives and that may be foreclosed forever if affirmative action is not permitted to intervene.[61]

In their impact on nonminorities, the programs of professional schools are similar to the affirmative redress that has been provided in employment cases involving *new hiring,* in that the effect is not on benefits already accrued by nonminorities but upon their expectations. Although the disappointment of expectations ought not to be discounted, it may weigh less heavily than an actual loss of benefits and the reasonableness of the expectations must be examined. It is said that race-conscious admissions programs may have a particularly detrimental effect on the prospects for admission of members of other ethnic groups who have had to overcome adverse socioeconomic circumstances to qualify for professional careers.[62] But professional schools have purported for several years to take into account in the admissions process the potential shown by those who have attained academic success in the face of conditions of poverty or other difficult circumstances. To the extent that they have failed to do so adequately, the remedy lies not in eliminating programs to redress governmentally-fostered discrimination, but in increased sensitivity (and financial aid) to applicants who have overcome other forms of adversity.

Nor is there evidence that the reasonable expectations of white applicants have been disappointed in other ways. Professional schools have never held out the promise that admission would be extended automatically to those with the highest grades and test scores in disregard of all other factors. Moreover, during the period when affirmative action admissions programs have been in operation, governments have expanded the number of places in professional schools dramatically. The great bulk of these new opportunities has gone to white applicants.[63] The practical effect of affirmative action admissions programs has been to assure that minority applicants, long foreclosed by racial discrimination from all but token participation, would receive a share of these new opportunities.

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[59] *See* Lau v. Nichols, 414 U.S. 563 (1974) involving Chinese-speaking children in San Francisco whose families had recently immigrated to the United States and sustaining a finding of a violation of Title VI of the 1964 act. In addition, a substantial number of young people in California were born in Southern States and attended public schools at a time when the racially dual systems had not been dismantled.

[60] The legal issues in the two sets of cases, while not identical, are closely parallel. It is true that the results in employment cases are undergirded in part by the approval that Congress has given in Title VII and elsewhere to the concept of affirmative action and that Congress has authority under the Constitution to expand definitions of the right to equal treatment. *See, e.g.,* South Carolina v. Katzenbach, 383 U.S. 301 (1966). But it is equally true that the Supreme Court has given broad scope to the States in taking voluntary action to promote equality, even when the action is race conscious and is not explicitly designed to remedy a constitutional wrong. *See, e.g.,* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), where the Court said that State officials may choose to balance racially public schools even where such schools have not been deliberately segregated. And it would be ironic in the extreme if the deference accorded to States during the many years when they countenanced the denial of rights of racial minorities were to be withdrawn now that some States are seeking to redress their past failures.

[61] It is true, as in employment, that some members of the minority groups benefited by the program may not have suffered discrimination. But as the Justice Department has noted, it would be an extraordinarily difficult task to require professional schools to substitute for their present programs a case-by-case examination of the impact of discrimination on each minority applicant. Of course, some minority applicants now gain entry to professional schools without the assistance of affirmative admissions programs.

[62] The distinction drawn in most programs is between groups that historically were explicitly held by government to be second-class citizens and that have continued to suffer discrimination at the hands of government (blacks, Hispanic Americans, Asian Americans, and American Indians) and other groups (e.g., Americans of Eastern European descent) that have suffered other forms of discrimination. A brief summary of officially imposed racism against Indians, Hispanic Americans, and Asian Americans is contained in Derrick A. Bell, *Race, Racism and American Law* (Boston: Little, Brown, 1973), pp. 59–82.

[63] While the enrollment of black students in first-year medical classes increased 180 percent from 1968 to 1976, the actual number of new students is quite small, since blacks were only 2.7 percent of first-year students in 1968. White enrollment during this period increased 49 percent, representing a much greater number of students. See *New York Times,* Sept. 12, 1977, p. 32.

Part III. Conclusion

The aspiration of the American people is for a "colorblind" society, one that "neither knows nor tolerates classes among citizens." [64] But color consciousness is unavoidable while the effects persist of decades of governmentally-imposed racial wrongs. A society that, in the name of the ideal, foreclosed racially-conscious remedies would not be truly colorblind but morally blind.

The concept of affirmative action has arisen from this inescapable conclusion. The justification for affirmative action to secure equal access to the job market lies in the need to overcome the effects of past discrimination by the employers, unions, colleges, and universities who are asked to undertake such action. It rests also in the practical need to assure that young people whose lives have been marred by discrimination in public education and other institutions are not forever barred from the opportunity to realize their potential and to become useful and productive citizens. The test of affirmative action programs is whether they are well calculated to achieve these objectives and whether or not they do so in a way that deals fairly with the rights and interests of all citizens. While care must be taken to safeguard against abuses, we believe that affirmative action as applied in the variety of contexts examined in this statement, including those where numerically-based remedies have been employed, meets this fundamental standard.

Affirmative action programs have been in effect in most instances for less than a decade, an eyeblink in history when compared with the centuries of oppression that preceded them. The gains secured thus far have been modest and fragile. Yet it is now contended that the civil rights laws of the 1960s and the gains that flowed to some individuals render affirmative action of the kind now undertaken unjustified as "special favoritism." In this challenge there are echoes of a Supreme Court decision almost a century old:

> When man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some state in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws.[65]

The Supreme Court's decision in 1883 that that "state of progress" had been reached heralded the end of efforts to deal with the consequences of slavery and helped usher in the era of enforced segregation and discrimination that has persisted throughout most of this century.

A new decision implying that in 1977 this nation has reached a state of progress sufficient to justify the abandonment of any significant component of affirmative action programs would have similarly disastrous consequences. Such a decision could only be reached by ignoring the crushing burden of unemployment, poverty, and discrimination facing black people and others whose skins are dark. The abandonment of affirmative action programs, of which numerical goals are an integral part, would shut out many thousands of minority students and minority and women workers from opportunities that have only recently become available to them.[66]

The short history of affirmative action programs has shown such programs to be promising instruments in obtaining equality of opportunity. Many thousands of people have been afforded opportunities to develop their talents fully—opportunities that would not have been available without affirmative action. The emerging cadre of able minority and women lawyers, doctors, construction workers, and office managers is testimony to the fact that when opportunities are provided they will be used to the fullest.

While the effort often poses hard choices, courts and public agencies have shown themselves to be sensitive to the need to protect the legitimate interests and expectations of white workers and students and the interests of employers and universities in preserving systems based on merit. While all problems have not been resolved, the means are at hand to create employment and education systems that are fair to all people.

It would be a tragedy if this nation repeated the error that was made a century ago. If we do not lose our nerve and commitment and if we call upon the reservoir of good will that exists in this nation, affirmative action programs will help us to reach the day when our society is truly colorblind and nonsexist because all people will have an equal opportunity to develop their full potential and to share in the effort and the rewards that such development brings.

[64] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting).

[65] Civil Rights Cases, 109 U.S. 3, 25 (1883).

[66] As to minorities in law school admissions, see *Law School Admission Research : Applications and Aamission to ABA Accerited Law Schools: An Analysis of National Data for the Class Entering in the Fall of 1976* (Franklin R. Evans, Educational Testing Service, for the Law School Admission Council 1977), pp. 44 and 102, table F4.

Appendix B

THE RELEVANCE OF RACE IN ADMISSIONS

A SUMMARY OF THE POSITION OF THE CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION AS REPORTED IN "SELECTIVE ADMISSIONS IN HIGHER EDUCATION: PUBLIC POLICY AND ACADEMIC POLICY"

CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION
2150 Shattuck Avenue, Berkeley, California 94704
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PROLOGUE

The case of *Bakke* vs. *The Regents of the University of California* has given rise to an unprecedented flood of comment and debate in the public press, in legal circles, and in the academic world. Some of it has been dispassionate but much has been deeply charged with emotion.

The legal interest in *Bakke* is clear. The basis of the case is the charge by Allan Bakke, a white man, that he was discriminated against because of his race when he was denied admission to the Medical School of the University of California at Davis while minority students with lesser credentials in the form of grades and test scores were admitted under a quota system. The Supreme Court will decide whether or not the special admissions program at Davis violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution.

The acute interest of academic institutions is equally clear. The case is widely seen as a test of their right to pursue policies of affirmative action in general and specifically to give consideration to a person's race in their admissions policies and procedures. Those admissions policies and procedures exert a powerful and often controlling influence on who may enter certain critical occupations and practice certain professions in this country. Thus they control access to positions of influence and of high economic and social reward. The broad interest of the whole society is powerfully affected.

It was not the Council's purpose to address the constitutional issue in *Bakke*. Rather, we considered the questions of public policy and of academic policy that are at issue and have outlined broad boundaries within which we believe lie many acceptable courses of action for institutions of higher education. We believe these courses of action meet the tests of constitutionality, respect individual rights, and fully recognize pressing societal obligations to put an end to racial discrimination. We also believe they will promote the institutions' educational ends. We have sought a "golden mean" that draws on several American ideals, rather than on one alone; that rejects no basic American ideal in its entirety in the name of some other. We have not discovered a panacea, nor do we favor a single approach to the complex matter of admissions policy: quite the contrary, as we will try to make clear.

This paper summarizes the major conclusions expressed by the Council in a book (*Selective Admissions in Higher Education*) forthcoming from Jossey-Bass, San Francisco. The first part of the full report contains the Carnegie Council's comments and recommendations. The second and third parts of the report were prepared by Winton H. Manning and by Warren Willingham and Hunter Breland, all of Educational Testing Service, who were asked by the Council to prepare an analysis of critical issues and a summary of essential facts in admissions today.

POSITION OF THE CARNEGIE COUNCIL

To address the principal issue immediately: the position of the Carnegie Council is that *the racial experience of an academically admissible applicant —one who meets the impartial academic standards required for successful completion of college or university work—is among the criteria relevant to admissions decisions. In speaking of racial experience, we would include not*

only the experience of members of racial groups, but also that of persons raised in non-English-speaking homes. Race not only may but should be considered in the final selection where, in the case of an individual, his or her racial identity reflects prior adverse circumstances, a promise to contribute to the educational experience of other students or to the diversity of services to be provided to society.

THE RELEVANCE OF RACE IN ADMISSIONS

Admissions policy for selective schools has long been a concern within higher education. The problem is particularly acute in the case of schools that serve as virtually the sole avenue of entry into such professions as medicine and law, and that collectively turn away more students than they admit. We are concerned here with what is good public policy and what is good academic policy governing such admissions, and how the two may best be reconciled if their requirements diverge.

A. Public Policy

The public has a clear interest in access to higher education. This interest begins with the creation of places for students. Historically, direct and indirect support from the public purse has made possible the American system of colleges, universities, and professional schools and maintains that system today. One reason for this investment of public funds is to train people for professional and other specialized positions vital to the well-being of the entire society. The public thus has a special interest in the criteria used in filling the selective places; in particular, in assuring that they be filled on the basis of fair and reasonable institutional policies and procedures, and that no one is subject to discrimination on the basis of race or sex or religion or ethnic origin.

The public interest has another dimension. Schools which largely determine, through their admissions practices, the composition of the professions, and thus the services available to society, should not knowingly admit—and should never confer degrees upon—persons who they believe will be incompetent in practicing the profession; otherwise the consumers of their services may be injured. These schools should also make every effort to admit and to graduate persons who will meet the diversified needs of a heterogeneous, pluralistic nation. Individuals with potential talent from all segments of society should have a fair chance to rise to positions of leadership both in simple justice to them and in service of the need for leaders, models of ad-

vancement, and mentors for those in comparable life circumstances who aspire to similar education and careers. The need is especially urgent within those groups deprived of such opportunities in the past.

Higher education carries a great affirmative responsibility to advance this dimension of the general welfare. The professional schools that yield many of our community, regional, and national leaders stand in a very special position today to make effective in practice the most fundamental principles of the American nation while at the same time meeting the individual's claims to equal protection.

B. Academic Policy

The admissions policies of institutions of higher education are varied and complex. In one way or another, perhaps 60 percent of all admissions are selective. Combining the degree of selectivity and the choice of the weighting of considerations, the possible admissions policies are almost infinite in number. For selective institutions the composition of their student bodies is of great, sometimes dominating, importance, and is the major source of their contributions to society.

The United States prides itself on the great diversity of its colleges, on the lack of conformity among them. This diversity offers students a wide range of choices while providing to society graduates with a broad range of training and academic experience. Consequently, colleges should have, and historically have had, very substantial autonomy in setting their own admissions policies. Restraints should be imposed on that autonomy only when there exists a substantial public interest that cannot be served in other ways.

In their admissions practices, selective institutions variously take into account prior scholastic grades, test scores, special abilities (peer group leadership, athletic ability, etc.), special personal characteristics (such as proven ability to rise above obstacles, including language barriers, poor prior schooling, or physical handicaps), potential contributions to a profession (shown, for example, by interest in serving in a neglected area or specialty). Such institutions also look at characteristics that will contribute to the diversity of the student body—for example, by state or nation of origin, by parental occupation or income, by cultural background. They often choose to build academic and social communities through their admissions policies. Because students learn from each other, these communities are themselves educational mechanisms.

Grades and test scores, taken together, have a predictive value greater than grades alone or tests alone. A considerable body of evidence indicates that test scores are equally predictive for minority and majority students. While grades and scores are sufficiently predictive to be very useful in selective admissions, they are not, however, sufficient as a sole basis for decision. They are best at identifying at one end of the spectrum those applicants who are likely to distinguish themselves academically and at the other end those likely to fail—and failure is costly to the student and to the institution. They are insufficient particularly for determining the admission of a great many persons found between these extremes.

The selective professional schools must exercise particular care not to admit students who lack the ability to practice the professions with compe-

tency and integrity. They must also be conscious of the need to supply graduates who will meet the varied needs of the profession. These schools therefore have a quite legitimate interest in special persons with special characteristics—for example, those who have shown a strong interest in community service, or those who have shown they can face adversity and conquer it through the force of their own personalities—for these characteristics relate directly to potential service within the profession. Different professional schools will, of course, look for different things, related to the emphasis in their own instructional programs. The complex and sensitive decision process calls for judgment. It does not lend itself to easy mechanical solutions.

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Public and academic policy could diverge if, for example, public policy were to lead to a lowering of academic standards, or if it interfered too greatly with professional judgments; or if academic policy obstructed affirmative action or was not otherwise fair and reasonable. But they need not diverge. The challenges are to apply public policy without undue interference with academic judgments and concerns, and for institutions to satisfy public policy without loss of academic standards.

C. Recommendations for Public Policy and for Academic Policy

We turn now to our specific suggestions for policy affecting admissions to selective schools at both the undergraduate and graduate levels:

1. These schools should adhere to a policy of affirmative action in educational practices:
   (a) No policies or practices may discriminate against members of groups subject to discrimination
   (b) Special efforts should be made to recruit members of these groups
   (c) Compensatory education should be available to such persons when necessary
   (d) Special financial assistance and counseling should be provided when needed, and
   (e) Goals may be set against which progress can be measured.

2. Race or background in a non-English-language home should be eligible for consideration *in individual cases* where it (a) reflects prior adverse discrimination, or (b) contributes to prior educational disadvantage, or (c) involves direct knowledge of special cultural patterns and experiences, or (d) indicates, along with other evidence, the probability of subsequent provisions of specially needed services to society. The first and second considerations (a and b) are based on the principles of equality of treatment and equality of opportunity, the third (c) on institutional interest in diversity in the student community, and the fourth (d) on the needs of society for service.

   We emphasize racial experience, not race *per se;* and experience in a non-English-language home, not heritage or surname *per se.* Thus we say *in individual cases.* Most persons with a minority racial background or raised in a non-English-language home now have special characteristics which we believe warrant consideration; not all do—some have not expe-

rienced prior adverse social discrimination, have not been educationally disadvantaged, have had little or no contact with a minority culture, and have no interest in special services to society.

Race or other minority status should be only one of several dimensions considered as aspects of prior disadvantage or adverse discrimination, as one of several indicators of prospective contributions to the diversity and quality of the academic experience for other students, and as one of several intimations of intention to serve society in neglected areas. Thus individuals from the majority group may also warrant special consideration depending upon their background circumstances.

3. No student should be admitted who cannot meet the general academic standards set for all students, through assessment of prior grades and test scores, as the minimum level at which there is a reasonable chance of success in completing the course work without reduction in academic or professional standards. Race, or other minority status, or sex, or age is clearly not a consideration here.
4. No numerical quota for any component should be set, but rather goals should be established that may change over time as conditions change and may be exceeded or remain unmet depending on the composition of the body of applicants in any one year.
5. Financial aid should be provided to students from low-income families to attract them in sufficient numbers into the "pool" of applicants within which choices will be made.
6. All applicants should be processed through the same set of procedures to assure that they are looked at together and not separately, that an effective student body is being assembled and not separate quotas being met, and that each person is being evaluated on his or her own merits.
7. Procedures should call for the application of professional judgment by members of the faculty. In the absence of fully objective criteria, application of professional judgment is the best available approach.
8. Schools should be given maximum latitude in exercising their judgments about the admission of individual students with respect for the professional expertise involved in the judgments, for the complexity of the characteristics desired in the students, for the detailed and changing needs for graduates of the programs in different localities served, and in consideration of the wisdom of encouraging diversity among the schools.
9. The judgment of courts, or legislatures, or government officials should not replace professional judgment except when clearly required by the public interest. Rigid and simplistic formulas externally imposed should, in any event, be avoided. Student bodies should be chosen on a multidimensional basis and not as the result of a unidimensional contest to be won or lost on the basis of a single (and imprecise) measure.

We are suggesting, then, a two-stage model of the admissions process. Selective graduate and professional schools, like many selective colleges, not only have many more applicants than they can admit, but they have many more *qualified* applicants than they can enroll. Accordingly, many selective institutions make an effort, first, to eliminate from consideration those appli-

cants who do not meet some minimal standard of admissibility and then to focus their efforts on the difficult task of selecting a class from the still large pool of qualified applicants. The distinction between these two decisions—*admissibility* and *selection*—is an important one, especially in the context of *Bakke*.

Our contention is that minimal standards should be set no higher than is necessary to make decisions concerning *admissibility,* and should be applied uniformly to all applicants. Considerations of race, sex, ethnicity, or other categorical indexes have no place in admissibility decisions; however, such considerations are appropriate in the second stage of the admissions process —selection.

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The central social and educational issue of the *Bakke* case is the problem of balancing consideration of individual and group equity—a problem which turns upon difficult value choices. Not all individuals and not all institutions will agree about them. In this circumstance, the public must have access to the policies to be followed by an institution and must have confidence in the process by which decisions are made. The selective professional schools in particular must be prepared to face public scrutiny of their processes and their policies; and both the processes and the policies should conform to their own missions and to the demands of public policy, and should be fair as among individuals similarly situated. Above all, these schools must be concerned with making optimal use of their facilities to develop human resources for service to society. In the effort to reach this goal, *racial experience is relevant* within the admissions process because important educational and professional objectives will not be attainable unless, as colleges and universities go about the task of making admissions decisions, consideration is given to the minority status of individual applicants.

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