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I. INTRODUCTION

Affirmative action at American law schools has been a failure. The percentage of minority students enrolled in law schools has stabilized or decreased after some early gains.[1] The initial hope of increasing minority representation to a level more suggestive of the group's role in the population is far from realized. Indeed, the culture of affirmative action itself has evolved into a system that can no longer offer very much hope of achieving more than the most modest goals.

Unfortunately, legal education's decision to actively seek greater minority participation in law school and the legal profession occurred concurrently with explosive growth in the number of law school applicants.[2] Although there are several ways that these increases might have benefitted new groups among law school aspirants, the increase in applications was matched by the law schools' adoption of a selection system standard based on test score and undergraduate backgrounds that few minority students could satisfy. Law schools which were not very selective before the boom years adopted the language, if not always the reality, of selectivity and elitism, which tended to make law admissions seem more daunting to minority students than was the case. Furthermore, the desire to admit minority students made law schools, competitive by nature, place a higher value on institutional success rather than focusing on an overall restructuring of the admissions process which might have improved minority enrollments. Indeed, the essential element of the present culture

1. In 1971-1972, the total minority enrollment was 5,568 out of 94,468. With enrollment at 123,277, minority enrollment is still just 12,550. There was little growth in the 1980s, from 11,134 to the present figures. Indeed, the enrollment of Black students fell from 6,051.5 to 5,894. *See A Review of Legal Education In the United States Fall, 1986 Law Schools and Bar Admission Requirements*, 1986 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO THE BAR 67-68.

2. Although there was some indication that the number of applicants would decline, the boom years seem to be continuing. *See Applicants Up: Who Are These People*, LAW SERVICE REP., Apr.-May 1988 at 1, col. 2.

of affirmative action which has led to the failure to improve minority admissions has been the peculiar notion that these programs had to conform with neat ideas about predictability. Despite the fact that the empirical data upon which these numerical certainties were based were always wrapped in uncertainties, it is difficult to imagine that a culture so enamored with a standardized test and the academic, if not economic, status of undergraduate schools could really hope to enroll large numbers of minority students.

II. History of Affirmative Action in Legal Education

Beginning with Benjamin Butler's pre-Civil War effort to found a law school at New York University[3] along the lines espoused by Jacksonian Democrats, access to legal education and the advancement of the status of law schools have remained ideas in conflict. Indeed, Butler and others failed to merge the issues of "quality" with democratic access to the profession. It was only when those interested in opening the profession to new immigrants and the poor went outside the emerging law school establishment and founded separate law schools that democratic access to the legal profession become a reality.[4]

Thus, there was in legal education a long tradition of separateness between the academically elite law schools and those which would admit large numbers of economically deprived ethnic students. Economically and largely ethnically restrictive institutions could retain selective and plainly restrictive admissions systems while new groups achieved, with some difficulty, access to the legal profession.

Prejudice against Catholics and Jews, as well as more subtle social obstacles could be overcome because these new immigrants founded their own law schools.[5] Indeed, one of the great triumphs of American democratic urges was the development of the urban Catholic law school under the auspices of the Society

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3. *See* The Law School Papers of Benjamin F. Butler (R. Brown ed. 1987).

4. Although much has been written on the issue, nothing surpasses Alfred Z. Reed's seminal work, Training for the Public Profession of the Law (1921). Reed, who was not a lawyer, saw and highlighted the connection between access to the profession and access to the democratic process. The debate about democracy in American legal education, it may be noted, occurred at the same time that many European political thinkers were disparaging the very concept of democracy as the extreme right was gaining strength.

5. For a general overview of the history of Catholic law schools see Nelson, *God and Man in the Catholic Law School*, 26 Cath. Law. 127 (1981).

of Jesus (the Jesuits) and the Congregation of the Mission (the Vincentians).[6] The inability of ethnic Catholics and Jews to be admitted or to afford full-time legal education at the then leading law schools created a market for schools of high quality which would not exclude students simply because of their religion and which would adapt their programs to allow their students to support themselves by working while in school.

Adding to the historic ecumenism of these early Catholic law schools was the fact that the religious communities, proficient in staffing liberal arts faculties, did not have the competence to conduct an American law school. As a result, there developed the somewhat anomalous situation in which Protestant law faculties were engaged to teach at Catholic law schools which, in turn, enrolled a large number of Jewish students.[7]

Access for black Americans to a legal education also began with a tradition of separateness, but with a very different and largely anti-democratic experience.[8] Although there had been separate black institutions, the established legal principle of the "separate but equal" law school was born after the U.S. Supreme Court's 1938 decision in *Missouri* ex rel. *Gains v. Canada*.[9] Thus, under the protection of the Supreme Court decision, southern states were able to found law schools for black students which were seriously under funded. As the *Brown v. Board of Education*[10] decision would show just a few years afterwards, the separate institutions could never be "equal" given the racial bias of the funding sources.

The founding of these separate law schools does not seem to have concerned the Association of American Law Schools (AALS), the guardians of quality in legal education. This was largely due to the fact that the AALS had coexisted with many law schools which advocated considerably more liberal admis-

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6. *See* Kelly, *De Paul University College of Law*, 6 CATH. LAW. 287 (1960); Lucey, *The Story of Georgetown Law School*, 3 CATH. LAW. 129 (1957); McKenny, *Santa Clara University College of Law*, 5 CATH. LAW. 61 (1959); Miller, *The Law School of the Catholic University of America*, 4 CATH. LAW. 333 (1958); Paple, *The Law School of Loyola University, New Orleans*, 5 CATH. LAW. 219 (1959); Seitz, *Marquette Law School—Fifty Years of Service in the Middle West*, 3 CATH. LAW. 331 (1957).

7. E. POWERS, A HISTORY OF CATHOLIC HIGHER EDUCATION IN THE UNITED STATES 249 (1958).

8. *See* Harris, *The New Members of the Law Teaching Profession in America*, 4 J. LEGAL EDUC. 436, 436 (1952).

9. 305 U.S. 337 (1938).

10. 349 U.S. 294 (1955).

sions policies.[11] Also, there was the example of the separate black schools, including Howard University Law School, which had excellent reputations.[12]

It was instead the incredible vote by the American Bar Association Board of Governors against integrating the ABA that prompted some members of the AALS to act. Led by several members of the Yale faculty, the AALS debated a non-discriminatory standard for law school admissions in 1950. The ABA's actions forced the AALS to look at the separateness solution. The AALS then began to reject the solution as propagating an intolerably segregated bar. In an interesting foreshadowing of the *Brown* decision, the AALS, unable to pass a stronger resolution, called for an end to segregation in legal education "at the earliest practical time."[13]

The debate continued at the AALS's 1951 meeting. After considerable discussion, the AALS resolved to make "[e]quality of opportunity in legal education without discrimination or segregation on the ground of race or color" an objective but not a standard of the association. The motion had widespread support. The only schools voting against it, except for Georgetown and George Washington, were from southern states.[14]

In 1953, the AALS decided upon a policy of exposing those schools not following (complying would be too strong a word) the association's articulated non-discriminatory goal. In one of the first indications that the law faculties of the southern law schools were actually in favor of some progress in this area, the motion easily passed on a voice vote.[15]

Several faculty members at these southern schools were very supportive of the 1955 attempt to amend the AALS constitution to require that "qualified" students be admitted to law schools regardless of race. The remainder of the faculty at these segregated schools asserted that the resolution could have little impact at many of their schools since they were operating under a series of constraints that would prohibit compliance even at

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11. See Professor Van Hecke's review of the "valiant efforts to provide separate but equal facilities" in Van Hecke, *Racial Desegregation in the Law Schools*, 9 J. LEGAL EDUC. 283, 286 (1956).

12. *See* 1939 A.A.L.S. PROC. 137-38 (admitting Howard University Law School to AALS membership).

13. 1950 A.A.L.S. PROC. 42.

14. 1951 A.A.L.S. PROC. 14-44.

15. 1953 A.A.L.S. PROC. 34.

the cost of association membership.[16] Some private schools like Baylor, Emory, Mercer, Richmond and Tulane had governing bodies which simply prohibited the admission of black students.[17]

More difficult, of course, were the legal obstacles to integration. In Georgia and South Carolina the legislatures made it illegal for any state supported school designated for whites to admit blacks. In both states, the legislation provided for the closing of any white college or university ordered integrated by a federal court. In South Carolina there was the added twist of closing the black law school as well.[18] As late as 1962, a private school, Emory, had to seek relief in the courts to declare a similar statute unconstitutional.[19]

Amid such staunch governmental and societal objections to the integration of legal education, it is not surprising that even with the support of its own constituency, the AALS decided to utilize more genteel forms of persuasion.[20] The formula decided upon took advantage of the support integration had among law faculties subject to trustee or state prohibitions against interracial student bodies. In December 1957, section 6-5 of the AALS's procedures dealing with admissions was amended to require that a "member School shall report to the Executive Committee any instance in which the school has denied admission to an applicant whom the school would have regarded as qualified for admissions but for race or color."[21]

The hope was that the AALS could act as a mediator between the law faculties and their governing bodies in such confrontations. However, when the University of Richmond's law faculty made just such a report, they were censured by the AALS.[22]

In a few other instances, like the Donna Moses case at Mississippi, the AALS attempted to use its still considerable powers

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16. 1955 A.A.L.S. PROC. 72.

17. *Report of the Committee on Racial Discrimination in Law Schools*, 1961 A.A.L.S. PROC. 218, 219.

18. Van Hecke, *supra* note 11, at 286.

19. Emory Univ. v. Nash, 218 Ga. 317, 127 S.E.2d 798 (1962).

20. *See Interim Report of the Special Committee on Racial Discrimination*, 1954 A.A.L.S. PROC. 183, 184.

21. *Report of the Committee on Racial Discrimination in Law Schools*, 1958 A.A.L.S. PROC. 252, 260-61.

22. 1958 A.A.L.S. PROC. 13. Richmond's censure was lifted in 1965. 1965 vol. II A.A.L.S. PROC. 53.

of persuasion to further integration.[23] Although the AALS was soundly behind those who wanted to integrate these schools in the South, its decision was to discredit, or more accurately expel, schools resisting integration sparingly. All the resistance to integration, even in the face of many federal marshals and the National Guard leads one to believe that a group of law professors from elite northern law schools would not have been more successful.

More troublesome, of course, is the fact that legal education was not as focused upon the de facto segregation existing at these same elite northern institutions. Schools were willing to accept minority students but, there was a sense that to be "qualified" a black student had to be truly outstanding.[24] Nor was there very much discussion about what access to the profession beyond integration meant. At a 1959 conference on the future of legal education, six years after the *Brown* decision, there was virtually no attention paid to the role legal education might play in promoting access to the legal profession.[25]

Obviously, the main thrust of the civil rights movement had been to break down basic legal barriers and there was not yet much public awareness about the almost total lack of blacks and other minorities in the legal profession.[26] Moreover, those most likely to support programs encouraging minority enrollments were still against gathering admissions or registration data based on race.[27] Questions regarding race on application forms had, of course, been the method of denying admission to blacks and other minorities by law schools in the past. Thus, the early models of integrated legal education were a wonderfully idealized color-blind meritocracy.[28]

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23. *See* 1964 vol. II A.A.L.S. PROC. 49. It should be noted that even after the AALS tried persuasion, Donna refused to re-apply.

24. There was a general consensus that black students admitted to formerly segregated law schools be "carefully selected negroes." *See* 1956 A.A.L.S. PROC. 86. Indeed it was thought important to note at the time that the editor-in-chief of the 1961-1963 law review at North Carolina was black. *See Report of the Committee on Racial Discrimination in Law Schools*, 1962 A.A.L.S. PROC. 195, 195.

25. *See* McGee, *Universities, Law Schools, Communities: Learning or Service or Learning and Service?*, 22 J. LEGAL EDUC. 37, 44 n.30 (1969) (noting that de facto segregation in the law schools was not addressed).

26. Katz, *Black Law Students in White Law School: Law in a Changing Society*, 1970 U. TOL. L. REV. 589, 602.

27. O'Neil, *Preferential Admissions: Equalizing Access to the Legal Education*, 1970 U. TOL. L. REV. 281, 287.

28. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*,

But once social scientists began to gather data on minority lawyers and the American Civil Liberties Union dropped its opposition to questions about an applicant's race, this simplistically idealized view was seriously challenged. The numbers were appalling. In 1970, 12% of the U.S. population were black but less than 1% of lawyers were black.[29] For other minority groups the situation was just as serious. In 1970 there were fewer than 100 Puerto Rican lawyers on the mainland[30] and only about 24 native American lawyers in the whole country![31] Regional deficiencies were more striking. In Georgia there were 34 black lawyers in a state with 1.2 million blacks.[32]

The data on legal education were particularly appalling. By 1965, 1.3% of law students were black compared with 5.5% of the undergraduate population. Even graduate schools, with lower visibility, had enrolment levels above 2%.[33] Law schools were motivated to do something that would not only break down the legal barriers to a law school but would also redress the alarming representational disparities between racial groups and the profession.[34]

Because of the earliest acknowledged results of integration, especially since *Brown*, had been that a separate system produced blacks who were educationally disadvantaged, the earliest culture of affirmative action was remedial education on the law school level. The AALS played an important role in several information exchanges in the fifties, highlighting such pioneering effort as the remedial English program at Texas Southern, begun in 1957.[35] These encounters, along with a lack of experience in having culturally diverse students, led to the widespread assumption that short term preparation programs would ade-

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1970 U. TOL. L. REV. 377, 388.

29. Fordham, *News of the Association 1963-1970: Eight Years of Challenge and Development in the Life of the Association of American Law Schools*, 24 J. LEGAL EDUC. 94, 96 (1973).

30. Cabranes, *Careers in the Law for Minorities: A Puerto Rican's Perspective on Recent Developments in Legal Education*, 24 J. LEGAL EDUC. 447, 451 (1973).

31. Christopher & Hart, *Indian Law Scholarship Program at the University of New Mexico*, 1970 U. TOL. L. REV. 691, 693.

32. O'Neil, *supra* note 27, at 295.

33. *Id.* at 300.

34. *See* 1963 vol. II A.A.L.S. PROC. 33 (address of AALS President Gelhorn).

35. *See* 1955 A.A.L.S. PROC. 74; Groves, *Help for the Semiliterate Law Student*, 10 J. LEGAL EDUC. 369, 370 (1958).

quately impact upon the stated goals of increased minority enrollments.[36]

A certain amount of innocence was to be expected. N.Y.U. administrators, reflecting the public's perceptions about the sectional nature of the civil rights movement, fully expected its new minority population to be from the South.[37] Indeed, although some southern blacks did come as early as 1965, admissions barriers seemed to have been as real in New York as some more southern locations. Once admissions officers were more sensitive to minority admissions, they found that most of their minority students came from their own geographic regions.[38]

Even though various tutorial programs for minority students had existed for several years,[39] none captured the attention of the public and legal educators like the 1966 Harvard Law School Summer Institute. Harvard's law school has, for better or worse, frequently been the model for the rest of legal education. Not surprisingly, the summer institute led the Office of Economic Opportunity to call a meeting that would eventually lead to the formation of Council on Legal Education Opportunities (CLEO) by several legal education organizations.[40] CLEO and the many other summer institutes which were conducted in the mid-sixties had a simple, though not necessarily simplistic, approach which made them very attractive.[41] The pre-curricular programs were very inexpensive for the law schools to conduct. There were substantial federal monies available and several ma-

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36. *See, e.g.*, Huff, *The Propriety of Preparatory Programs for Minority Students*, 1970 U. TOL. L. REV. 747, 748.

37. Hughes, McKay & Winograd, *The Disadvantaged Student and Preparation for Legal Education: The New York University Experience*, 1970 U. TOL. L. REV. 701, 709 (1970).

38. *Id.* (five out of eight black students were from the North).

39. Christopher & Hart, *Indian Law Scholarship Program at the University of New Mexico*, 1970 U. TOL. L. REV. 691; Rosen, *Equalizing Access to the Legal Education: Special Programs for Law Students Who Are Not Admissible By Traditional Criteria*, 1970 U. TOL. L. REV. 321, 349.

40. Fulop, *The 1969 CLEO Summer Institute Reports: A Summary*, 1970 U. TOL. L. REV. 633, 635.

41. A quote from a fictional account of a law schools's CLEO coordinator:

> All you have to do . . . is come to my school for a summer and see if you like the law. Don't worry about money; we'll supply that and a stipend as well. And don't worry about law school either; if you do well in the summer program any one of a number of law schools will accept you, and help with your expenses as well.

Panella & McPherson, *Do You See What I See? Two Writers Look at CLEO*, 1970 U. TOL. L. REV. 559, 571.

jor foundations, most notably the Ford Foundation, were willing to fund many law school activities designed to help bring minority students into law schools.[42] Moreover, these summer sessions were inexpensive in another important way because they made extensive use of volunteer faculty time. Obviously those who had shown the deepest commitment to integration were poised to do something at their home institutions. Law faculties had been involved in various direct ways in the civil rights movement and participation in these summer institutes was a visible way that law faculties, some of whom taught in areas of legal scholarship not related to the legal processes of the civil rights movement, could finally make a direct and very positive contribution to one of the major social issues of the day.[43]

These simple programs were embraced for another important reason. Because short term summer programs did not interfere with the course or content of the law school's first year curriculum, most of the curriculum could be preserved. Students from minority groups with academic deficiencies could be "integrated" into legal education without significantly challenging or changing the academic program.

Numerous local or regional summer programs, some designed for specific ethnic groups, might have formed a model for dramatically increasing black, hispanic or other minorities. However, the sense of national crisis which followed the April, 1968 assassination of Dr. King, along with widespread civil unrest,[44] altered the tone of affirmative action in a way which doomed these summer institutes to redundancy and failure. Many schools felt that it was vitally important to move directly into the area of minority enrollments. The sense of national urgency meant that many educational issues, like real academic deficiencies might be overlooked.

The original assumption about these summer programs was that the minority students were only slightly less prepared than

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42. CLEO was originally funded under section 232 of the Equal Opportunity Act for $493,530. This was increased and the Ford foundation was joined by the Rockefeller Brothers Fund, the American Bar Endowment and I.B.M. Corporation. *See* Fulop, *supra* note 40, at 640.

43. Law faculties had been looking for a "hands-on" program for some time. *See* Leflar, *Legal Education: Desegregation in the Law Schools*, 43 A.B.A. J. 145, 148 (1957).

44. As Professor Oleck of Cleveland State noted, "[a]n emergency situation requires (and justifies) emergency remedies." *See Problems In Legal Education 1971 (A Survey)*, 20 CLEV. ST. L. REV. 441, 447 (1971); *see also* Leonard, *Placement and the Minority Student: New Pressures and Old Hang-Ups*, 1970 U. TOL. L. REV. 583, 584.

the students regularly admitted to their programs.[45] There was some evidence that this was the case. The dramatic increase in the number of law school students and the improvement in academic quality had not yet occurred.[46]

But a less prestigious school like Drake found out soon after the traumatic events of 1968 that it was rather futile to ask weaker students to attend a summer program when they had already been admitted to a far more prestigious and well endowed institution.[47] Affirmative action ceased being a primarily academic program and became strictly an admissions program centered on recruiting more minority applications.[48] Academically elite schools like Boalt found that they could easily recruit and admit minority students with the same standards they had used for majority students as late as 1961: a "B" average from college.[49] Each school, in trying to recruit more minority students for itself, although based on the best of motivations, harmed the totality of affirmative action by making it a local problem instead of an urgent national task. As other pressures on law schools competing with each other mounted, it was easier to recruit minority students who were as much like an institution's majority students as possible.

In the 1970s, as the enrollment of minority students began to reach its present level, there was a significant increase in the enrollment levels of law schools.[50] The law school age population rose as the baby boomers left undergraduate school. In stark contrast to medical schools, legal education, much to its credit, expanded in almost every instance to take advantage of a favorable market. With more seats, and many new schools, there was a tremendous opportunity to expand the numbers, if not the percentage, of minority students enrolled in law school.

Instead, almost all of legal education embraced the liturgy of competitive admissions that had until the 1970s been restricted to a handful of elite law schools. The tool used to deter-

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45. For one school's experience, see Rappaport, *The Legal Educational Opportunity Program at UCLA: Eight Years of Experience*, 4 BLACK L.J. 506, 510 (1975).

46. *See supra* note 2 and accompanying text.

47. Griffin, *Admissions: A Time for Change*, 20 How. L.J. 128, 140 (1977).

48. Reynoso, Alvarez, Moreno, Olmos, Quintero & Soria, *La Raza, The Law and The Law Schools*, 1970 U. TOL. L. REV. 809, 839.

49. *Report on Special Admissions at Boalt Hall After* Bakke, 28 J. LEGAL EDUC. 363, 379 (1977).

50. For a discussion of this, see Vernon & Zimmer, *The Demand for Legal Education: 1984 and the Future*, 35 J. LEGAL EDUC. 261 (1985).

mine improved academic quality was the Law School Aptitude Test (LSAT).[51] Whatever rewards there might be for social, economic, or cultural diversity, none could compare with the accolades heaped on a dean or admissions dean who could cite ever higher LSAT medians.

Affirmative action programs were already seen to be a simple adjunct to the admissions operation without much attention being given to the needs of minority students once enrolled. Now the goals of affirmative action had to compete with the pressures admissions personnel were under to raise the numerical indices by which their schools and, more importantly, they themselves would be judged.[52]

Those who were most active in ethnic issues, particularly the Mexican Legal Education and Defense Fund, assisted by consumer activist groups, attempted to deflect the law schools preoccupation with the LSAT and the ordered rankings its numerical figure presented.[53] But, they could not offer an acceptable alternative to the examination or the other services provided by the Educational Testing Service (ETS) and, later, the Law School Admission Service (LSAS). And, although the Law School Admission Council (LSAC) research indicated that the test did not under-predict the success of minority students and that it may have predicted as well or better than it did for majority students, the controversy failed to highlight the inability of the test to predict very well for either group. This significant flaw was lost in the pressure to have some testing instrument.[54] Thus, at most institutions, minority students presented LSAT scores which ranked below the entering majority students. While minority students had LSAT scores similar to majority students nationally, individual law schools concluded that they were less prepared because those minority students they were able to attract tended to be perceived as less able than the majority students at many schools based upon their LSAT scores.[55]

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51. *See* Liacouras, *A Call to Action on Our Disaster Area, Law School Admissions*, 4 BLACK L.J. 480, 486 (1975).

52. The universal acclaim given the test was a departure from most of legal education's past practices. *See* Willey, *The Case For Preferential Admissions*, 21 HOW. L.J. 175, 218 (1978).

53. *See* S. BROWN & E. MORENO, LAW SCHOOL ADMISSIONS STUDY (1980).

54. Two works are particularly helpful in examining this development: A. STRENIO, THE TESTING TRAP (1981); A. NAIRN & ASSOC., THE REIGN OF ETS: THE CORPORATION THAT MAKES UP MINDS (1980).

55. Rosen, *supra* note 39, at 328.

It was difficult to argue against the element of the culture of affirmative action which encouraged an upwards shift in minority students to schools to which they might not otherwise have been admitted.[56] Law schools across the nation had long stretched certain admissions standards for children of faculty, generous donors and, at state schools, politically connected applicants.[57]

The problem the minority students had was that they were neither politically nor academically well connected. Already told through the media and fellow students that they were less able, they did not have the network or support of "preferentially" admitted majority students. Nor could the minority students, at most law schools, reach a critical mass that could provide its own support network. This was, in part, due to a most unfortunate, and certainly unfair by-product of the LSAT. Unknown to most applicants in the days before "Truth-In-Testing" legislation, undergraduate schools were being rank ordered and evaluated based upon the generalized LSAT results of their students.[58]

Although it does seem unfair, some schools even used the LSAT median, or LCM, as a factor in calculating an admissions index for an applicant.[59] Thus, students would be assigned a number over which they had no control.[60] The ability of a student's classmates to do well on a testing instrument with questionable predictive value was deemed a factor over which an applicant had control. Clearly, poor students do not have the luxury of selecting (or paying for) the academic achievements of their classmates.

Because the recruiting system which evolved during the 1970s was closely tied to the LSAT and common assumptions about academic elitism as a positive value in legal education, law school representatives rarely visited or paid much attention to schools on the lower edges of the LCM universe.[61] Minority stu-

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56. This phenomena was documented very early. *See 1971 Survey of Minority Group Students in Legal Education*, 24 J. LEGAL EDUC. 487 (1972).

57. *See* O'Neil, *Racial Preferences and Higher Education: The Larger Context*, 60 VA. L. REV. 925, 926 (1974).

58. Burns, *Truth In Testing: Arguments Examined*, 31 J. LEGAL EDUC. 256, 257 (1981).

59. For a description of the LCM, see LAW SCHOOL ADMISSION COUNCIL, 1987-88 LSAC/LSAS DESK BOOK 36 (1987).

60. A. NAIRN & ASSOC., *supra* note 54, at 247.

61. *See* Blumrosen, *Legal Education for Black Students: A Remedy for Class Dis-*

dents who were at the schools able to support a high LCM and its related status were certainly recruited by the law schools to comic proportion.[62] There were many "Minority Law Days" or other recruiting sessions where the law school representatives outnumbered the entire enrollment of minority students at that institution.

There was little imaginative recruiting at these less prestigious or unfamiliar institutions. Sometimes, law schools would hire, at minimal salary, a recent law school graduate to "recruit" minority schools. These well meaning amateurs did not have either the professional experience or resources to create and conduct a successful program over the period of time required to build an effective recruiting program.[63] The few law schools able to recruit the most able law students from the high LCM schools understandably devoted resources to such a program.[64]

Litigation directed against various affirmative action programs made matters worse. Interestingly, there are no cases that successfully challenged the peculiar structure of legal education's basic affirmative action programs. But the fears of litigation in admissions (the expenses of which could be quite high), really vestigial from the *DeFunis*[65] and *Bakke*[66] era, have led many law schools to practice defensive admissions which has not benefited aggressive affirmative action programs.[67]

Public attention was very centered on both the *Bakke* and *DeFunis* cases. With the obvious exception of Watergate, few domestic stories garnered as much public attention.[68] Both cases went to the heart of the mechanics of affirmative action, particularly as it was practiced in American law schools. The courts

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crimination, 1970 U. TOL. L. REV. 799, 801.

62. For a description of the pressure to recruit, see Cochran, *The Law Schools' Programmatic Approach to Black Students*, 17 HOW. L.J. 358, 363 (1972).

63. The "quick fix" syndrome was a danger from the very beginning. *See* Carl, *The Shortage of Negro Lawyers: Pluralistic Legal Education and Legal Services for the Poor*, 20 J. LEGAL EDUC. 21, 26 (1967).

64. Indeed, schools like Cornell, Columbia and Michigan were criticized by Ms. Curll, then of N.Y.U. and now dean of admissions at Harvard, for granting monies to minorities without a needs-based test. The Commentator, N.Y.U. School of Law, Sept. 16, 1986, at 1, col. 1.

65. DeFunis v. Odegaard, 416 U.S. 312 (1974).

66. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

67. Andersen, *The Admissions Process in Litigation*, 15 ARIZ. L. REV. 81, 115 (1973).

68. Smith, *Reflection on a Landmark: Some Preliminary Observations on the Development and Significance of* Regents of the University of California v. Allan Bakke, 21 HOW. L.J. 72, 77 (1978).

were asked to rule upon the appropriateness of admitting students with numerical credentials lower than the rest of the class and, eventually, on the constitutional aspects of a quota or other devices used to admit minority students.[69] The years of suspenseful litigation left a bitter legacy.[70]

Eventually, the *DeFunis* case was declared moot and the decision in the *Bakke* case was so narrow that neither should have had much negative influence upon the affirmative action programs at most law schools. Certainly quotas had to be abandoned, but goals could have remained without much difficulty. Moreover, the ABA's Section on Legal Education and Admissions to the Bar exacerbated the situation shortly after the *Bakke* decision. The ABA had waited through the many years of affirmative action litigation and appeals before amending its bylaws to reflect its renewed commitment to affirmative action and whatever restrictions the courts might have placed on the efforts at various law schools. The new admissions section of the bylaws was strongly supportive of affirmative action as a concept, but, at the same time, the document required an admissions test score, together with three years of acceptable college work in most circumstances.[71]

Once again the message to admissions personnel and law school deans was that ordered ranking of applicants was a factor in evaluating schools and that utilization of the LSAT, the then unmentioned test, would somehow prove more "constitutional" even if the scores for minority students were used more selectively.[72] The culture of affirmative action in American Law Schools, included in the accreditation process, was set.

The system seems to allocate, through recruitment and more generous funding, the most academically accomplished minority students into the most elite institutions. This is frequently true even when these students might be academically better suited for a whole range of other outstanding but less well endowed institutions. This element of mismatched students has led to what José Cabranes called the "shattered expectations"

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69. *See generally* A. SINDLER, BAKKE, DEFUNIS AND MINORITY ADMISSIONS: THE QUEST FOR EQUAL OPPORTUNITY (1978).

70. *See* Broderick, *Preferential Admissions and the Brown Heritage*, 8 N.C. CENTRAL L.J. 123, 176 (1977).

71. 1979 A.A.L.S. PROC. 79.

72. Gellhorn & Hornby, *Constitutional Limitations on Admissions Procedures and Standards—Beyond Affirmative Action*, 60 VA. L. REV. 975, 1003 (1974).

that should not be part of affirmative action because high risk admissions would be less likely had there been a more normal distribution system.[73]

Affirmative action at the law school level should not have been seen as a separate admissions problem. This is one of the truly extraordinary elements of the culture. Appropriate attention to support and retention issues, especially those not directly related to academic concerns, would have stemmed the discontent that must have been leading to a word of mouth sentiment working against law school recruiters anxiously seeking law students.

The recruiting element of the culture is particularly unfortunate. Most notably, as has already been explained, there is a preference to obtain minorities already cultured to the academic and economic aristocracy of the more competitive schools. These minority students, perhaps already members of the black middle class, represent such a small part of the minority community that a law school's minority enrollment can never reach the critical mass necessary to create the support network so available to majority students but largely disallowed to minority students.[74] The failure to recruit from the black and minority underclass is clear. The system which has emerged effectively recruits from a very small sample of minority students.

Another important component in the recruiting debacle is the personnel practices of many law schools. While recruiting must be a segment of any well constructed affirmative action plan, there is little reason to think that the revolving door nature of law school recruiting could have had a positive impact. It is, moreover, remarkable that law school deans and faculty thought a busy admissions dean could simply add his or her recruiting duties to a job description and think that it could be done. More remarkable was the common practice of using recent law school graduates (even those who had not yet passed the bar examination) or faculty interested in visiting a particular campus to "do some recruiting."[75]

The problem is that legal education can never accomplish its lofty goal regarding affirmative action if the personnel hired

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73. Cabranes, *supra* note 30, at 456.

74. Bell, *Law School Exams and Minority-Group Students*, 7 BLACK L.J. 304, 307 (1982); Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 U. TOL. L. REV. 539, 550.

75. *See supra* note 63 and accompanying text.

to execute these aims receive scant professional status and less than meaningful salaries. Schools which are serious about affirmative action will have to devote greater attention and resources to the people they invest with attempting to meet affirmative action goals.[76] Law faculties have been understandably concerned about their own status and salaries for the connection between academic quality and the excellence of the faculty is obvious. In terms of affirmative action, at least, a connection should have been made between the failure of affirmative action and the failure to establish a professional recruiting and admissions staff tradition at most law schools.

III. Suggested Directions for the Future

American law schools have to establish a new culture of affirmative action. The historical themes which produced the failures of the present system can be a basis for diagnostic studies and suggested directions for the future. If we review the history of affirmative action, particularly in light of the historical struggles between those supporting access to legal education and those who have argued for a more elite profession, what may be needed to attract more minority students is a new commitment to the democratization of the legal profession and a new culture of law school admissions. The present culture of admissions produces a student body which is very white and rather middle class. Indeed, Ronald M. Pipkin concluded that after controlling for LSAT score, undergraduate grade point average and type of college attended, enrollment at elite schools was less likely for children of the lower economic classes.[77]

The basic philosophic tenet of a new culture of affirmative action would be that legal education has the major responsibility to insure access to the profession for those least likely to have the traditional academic or economic advantages typical of modern law students. The two major legal education associations,

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76. From the onset of affirmative action the culture has never focused on the fact that the government is not going to be the sole funding source. *See* Sander, *Financial Aid*, 1970 U. Tol. L. Rev. 919, 927 (1970).

77. Pipkin, *The Effects of Social Origin in the Allocation of Law Students*, 34 J. Legal Educ. 385, 386 (1984). The use of expensive cram courses for the LSAT is also a factor which may inhibit minority enrollments. This need for a cram course is particularly important because the test is perceived as being "unconnected" to the college curriculum. The gap now seems to be growing between those who can afford a cram course and those who cannot. The LSAC has already recognized this problem and is developing test preparation materials which are within the financial reach of all students.

the AALS and the legal education contingent of the ABA, have very effectively made graduation from an approved law school the almost exclusive route to a legal career. Thus, to these two organizations belong the major responsibility of rewarding and celebrating access to the profession.

However, to overcome the flaws in the present system, the ABA and the AALS must do more than voice their concerns about the paucity of black and other minority lawyers. All this has done is to add affirmative action efforts, usually quite modest, to the authentically elitist admission program that remains the model for law school admissions.

This means, of course, that the ABA and the AALS must insist that the LSAC spend some of its considerable resources on devising a new testing instrument. The current LSAT examination score probably correlates more with income than it does with law school grades. As long as the present type of test is utilized, minority students and others deprived of basic educational preparation will continue to be the guest workers of legal education. And since it is unlikely that these students will score high enough in sufficient numbers to be distributed throughout the structure of legal education, students will continue to be horribly mismatched and, frequently, discontent. Aptitude tests, which have never been particularly predictive and which have been used to exclude whole groups of students should be eliminated.[78]

A successor Law School Admission Test should be one which is wholly achievement oriented and entirely cramable. Moveover, it should examine the competence in those subjects which legal education claims are important for legal studies.[79] If this means that the commercial test review industry expands even further, then this should be welcome. Minority and disadvantaged students will have to have basic skills in reading comprehension and a critically developed vocabulary. Legal education and higher education should let the private sector attempt to educate students in these basic areas, something many others in education have failed to do very well.

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78. As James Hathaway has indicated, "Quite simply, the tools to construct the meritocracy do not exist." Hathaway, *The Mythical Meritocracy Of Law School Admissions*, 34 J. LEGAL EDUC. 86, 95 (1984).

79. *See Quality in Higher Education: Hearing Before the Subcomm. on Education, Arts and Humanities of the Senate Comm. on Labor and Human Resources*, 99th Cong., 2d Sess. 8-16 (Jan. 28, 1986) (testimony of Secretary of Education William J. Bennett).

This implies, of course, that much of the liturgy of law school admissions testing be dismantled including the very prejudicial double jeopardy of recording, for all eternity, multiple test scores. All students, especially minority students, who improve their academic skills through organized or private study ought to be rewarded for that improvement.

In addition, the ABA and the AALS must insure that there are financial resources available for disadvantaged minority students. Legal education has already effectively protected its middle class constituencies at expensive private law schools through the LSAC's loan program, but, students from backgrounds without a tradition of consumer debt are not likely to take advantage of such loan programs.

Neither the ABA, AALS nor even the LSAC has the resources to establish the necessary grant-in-aid programs to help attract minority students, but these national organizations can make this happen. The ABA and AALS have effectively compelled law school and university expenditures in a wide range of activities including millions for new law school buildings and somewhat lesser amounts on faculty salaries. With such involvement in pecuniary matters in the past, establishing thresholds of financial aid does not seem so radical.

Moreover, various organizations can help law schools raise funds for this purpose. Fund raising is certainly an accepted activity for educational institutions and law schools which have engaged in capital campaigns in the past few years can adapt some of these experiences to student aid development campaigns.

Legal education will need professionals to reach these goals. This means that law schools must recognize, as undergraduate schools have, that the administrative and academic are not inimical to each other. Professional admissions persons, development offices and student counselors are simply indispensable to a new culture of affirmative action. For legal education in which librarians (as opposed to "the" librarian), clinical faculty and legal writing instructors are frequently seeking legitimacy, this is a tall order.

IV. Conclusion

Ultimately, law schools will have to organize themselves in a different manner if they want a culture of affirmative action at all. It is easy for legal educators to conduct conferences on af-

firmative action and to spin the wheels of bush league recruitment exercises in the name of greater minority enrollment. It was even easier to compel southern law schools to break down the legal barriers to integration because this cost most law schools, in dollars and cultural changes, very little.

A new culture of affirmative action which challenges the way law schools do business will be more expensive and culturally disruptive. It will be particularly disconcerting for those in legal education resistive to any change and, perhaps, the underlying principle of access to the profession which is at the heart of affirmative action's essential culture, old or new.

However, it would be substantially more painful to the nation's future not to embrace a new culture of affirmative action. American democracy relies to such an extent on the system of laws which the legal profession represents that it is hard to imagine legal education surviving without dramatic governmental interference if de facto segregation remains a hallmark of American legal education.