PREFERENTIAL ADMISSIONS: AN UNREAL SOLUTION TO A REAL PROBLEM

Clyde W. Summers*

Preferential admissions standards do not significantly increase the total number of minority students able to obtain a legal education. Because the admissions standards of law schools form a continuum of acceptable LSAT scores and undergraduate grade averages, moving down a sliding scale, a student preferentially admitted to a highly selective school would be admissible under the normal standards of a less selective school. The only possible gain is among those minority students not normally admissible by the minimum standards of the least selective schools. There has been no showing that it is necessary or desirable to reduce the admissions standards at the lower end of the scale. Preferential admissions, the author contends, do not increase the opportunities for legal education of minority students, but instead create handicaps to professional training. It has also led to a wasteful use of financial aid so as to reduce the total number of needy minority students who can go to law school. The author suggests a massive cooperative effort of all law schools to pool resources to meet more effectively the need for more minority lawyers.

I. INTRODUCTION

Two years ago, in a nationwide survey of all law schools to determine the number of minority students (defined as Negroes, Chicanos, Indians and Puerto Ricans) who were enrolled as law students, the question was asked, how many of the students, “in the judgment of the Admissions Officer or person completing the questionnaire . . . would probably not have been admitted had

* B.S., University of Illinois, 1939; J.D., University of Illinois, 1942; J.S.D., Columbia, 1952; LL.D., University of Louvain, 1966; Professor of Law, Yale Law School.
they not been members of a minority group?” According to the responses, forty percent of the first year minority law students, and a somewhat smaller percent of the second and third year minority students had not met the regular admission standards at these schools.¹ Professor Rosen, on the basis of his experience with the Council of Legal Educational Opportunities (CLEO) has stated that “many, perhaps a majority, of the black and brown students enrolled in predominantly white law schools were admitted on a preferential basis.”² It is this practice of preferential admissions with which I am here concerned.³

Preferential admission policies often have an elusive quality, for they are not always explicitly cast in racial or ethnic terms; on the contrary, they may be stated as general policies recognizing the need to apply different kinds of standards to the “disadvantaged” or “culturally deprived.” However, in practice, the terms “disadvantaged” and “culturally deprived” may become only euphemisms for members of minority groups, and the standards applied are not different kinds of standards, but only different levels of the regular standards. In selecting those minority students to be admitted on a preferential basis, most law schools use the student’s undergraduate grade record, Law School Admission Test (LSAT) score, letters of recommendation, and other collateral information gleaned from the application and interview, all in much the same manner as in selecting non-minority students. The significant difference is that the minimum acceptable grade average may be a grade level lower, and the minimum acceptable LSAT score may be 100 to 200 points lower for a minority student than for a non-minority student.

Although the preference is expressed in terms of favoring the “disadvantaged” and the “culturally deprived,” the

³ The term “minority” is used here to describe those racial and ethnic groups to whom preferential admission policies and supporting programs are applied. This generally includes Negroes, Chicanos, Indians and Puerto Ricans, but in some law schools may include Asian-Americans and other groups.
differential as applied is commonly not based on any objective inquiry into whether the particular applicant is in fact disadvantaged or culturally deprived. Thus, the son of a Georgia sharecropper will not get the benefit of the differential if he is white, but the son of a Boston lawyer will get the benefit of the differential if he is black. Little or no allowance is made for the student whose parents speak only Polish, but preference is given to the Spanish-American students whose parents speak English in the home. Some law schools, undoubtedly, do inquire into whether the individual is in fact disadvantaged, but the disadvantaged white student may still not be given the full benefit of the differential, and the advantaged minority student may still enjoy a substantial preference.

The practice of preferential admissions, whether open and explicit or disguised with euphemisms, is plainly and simply a preference based on membership in a racial or ethnic group. As such, it immediately raises the most fundamental issues as to its legality and its propriety, for racial preference is but the obverse side of racial discrimination. Both as a matter of constitutional law, and of social decency expressed in state and federal legislation, we have come to view all forms of discrimination based on race as not merely suspect, but at least presumptively intolerable.

I pass over these legal issues, however, for the ultimate question we must confront is not whether preferential admissions is constitutional, but the antecedent question of whether it is prudent. If we conclude that such a preference is fair and wise and necessary, then as Professor O'Neil has ably demonstrated, constitutional theories can be articulated to justify it. Judicial and public acceptance of those theories will be heavily encouraged by the felt pressure of a compelling social need. But if a preferential admission policy is imprudent, the construction of a constitutional theory to justify it, and even adoption of that

5. This is candidly acknowledged by both Professor Rosen, supra note 2, and Professor O'Neil, supra note 4, and squarely confronted as one of the basic elements of preferential admissions which must be justified.
theory by the courts, cannot add one grain of wisdom to the policy. The ultimate problem is one of social judgment—whether a policy of preference appropriately expresses, and reconciles basic social values, as well as fulfills desired social goals.

The task of probing the merits of preferential admissions is personally painful when one finds himself pressed by the facts to doubt the premises on which the policy of preference rests and driven by those doubts toward a negative conclusion. Anyone who is at all aware of our historic brutal discrimination against minority groups, and is sensitive to our continued pattern of deprivation, wants to believe in measures which promise to open doors of opportunity and to provide some recompense for past injustices. To raise questions about this program in which so many so deeply believe almost inevitably leads to misunderstanding, no matter how hard one tries to make himself understood. More troublesome, what one writes may be seized upon and used by those who seek excuses for doing nothing and thus preserving the present pattern of deprivation.

The task, however, must be done, for it seems to me that the failure to examine critically certain premises upon which the policy of preferential admissions has been based has resulted in a misstatement of the problem and a misuse of resources to the damage of those sought to be helped. The difficulty minority students have in adjusting to the law schools to which they have been admitted, the problems of designing summer institutes and special programs to give minority students an early start, and the obstacles to providing tutorial assistance or special academic programs—all of these are well-known and have been extensively discussed. These, however, may be, at least in part, results of aspects of the preference policy which have not been examined. By making explicit and examining critically some of the primary premises underlying preferential admissions, and by tracing some of the consequences of the preference, we may be able to at least restate the problem in more useful terms and hopefully point toward a better way to the same goal.

7. See, e.g., Bell, Black Students in White Schools: The Ordeal And The Opportunity, 1970 U. Tol. L. Rev. 539; Rosen, supra note 2.
II. THE SHORTAGE OF MINORITY LAWYERS
and
THE PREMISE THAT ADMISSIONS STANDARDS ARE RESPONSIBLE

The basic argument for preferential admissions is built upon the simple factual proposition that there is a drastic shortage of lawyers from minority groups which is being perpetuated by a nearly equally severe shortage of law students from minority groups. Although twelve percent of the national population is black, only one percent of the legal profession is black, and other minority groups have even a lower proportion of lawyers. This shortage, it is argued, is aggravated by the lack of minority lawyers where they are needed most. Half of the black population lives in the South, but only seventeen percent of all black lawyers practice in the South; in the ghettos of the Northern cities these lawyers serve only a small segment of the population.

Minority group enrollment in law schools is not making up this shortage. In 1965, black students accounted for only 1.3% of the total law school enrollment. Even after extensive efforts to recruit minority group law students by the American Bar Association, the Association of American Law Schools and a number of individual law schools, the number of such students enrolled in law schools does not exceed 3% of total law school enrollment.

These hard and ugly facts of the disproportionately small number of minority group lawyers and law students impose on the law schools, it is argued, an obligation to give preference in admission to minority group students so as to increase significantly their numbers in the student body and ultimately in the profession. The shortage of minority group lawyers is, indeed, disgraceful; and the only way to correct that shortage is, of course, to increase the number of minority group law students. However, the conclusion that in order to increase the number of

8. This factual base has been fully described and documented in Gellhorn, The Law Schools And The Negro, 1968 DUKE L.J. 1069, and O'Neil, supra note 4, at 295. There is no need here to define exactly what constitutes a "shortage," or to discuss the question whether the number of minority lawyers should be exactly proportionate to the minority population. The number of minority lawyers is now so small that there is a shortage by any definition, and we are obviously years from having to confront the question whether the shortage no longer exists.
minority group law students it is necessary to give them preference in admissions, assumes the premise that admission standards block competent and interested minority group students from obtaining a legal education. This is one of the primary premises which must be critically examined.

There are more than 145 accredited law schools in the United States admitting each year more than 30,000 first year students. Although the admissions standards of almost all law schools are based largely on the applicant’s undergraduate grade record and his LSAT score, the levels of those standards vary from school to school, up and down a wide scale. In many schools, the grade record and test score required to get admitted are not fixed but depend on the level of those who apply, with the school selecting from the best applicants. Other schools, however, may establish a minimum standard and admit practically all applicants who meet that minimum.9

Where competition for admission is especially keen, such as at Harvard or Yale, an applicant’s chances of getting admitted are severely reduced if his grade record is less than “B+” (3.50) and his test score is less than 650. At other schools, such as Duke and Pennsylvania, the level below which admission is unlikely is a “B” (3.00) grade record and a 600 test score; and at schools such as Boston University, Pittsburgh, Vanderbilt and Virginia, this lower level for admission is “C+” (2.50) grade record and 550 test score. These levels represent the more selective schools, for the great majority of law schools have admission levels below these, and a substantial number admit on the basis of minimum standard of a “C” (2.00) average and a 350 or 400 test score.10

Although entry into law schools at the upper end of the scale is extremely restrictive, admission into schools at the lower end of the scale is quite open. Out of sixty-five law schools for which data are available, twenty-seven of those schools have ten percent or more of their students with test scores below 450, and a dozen

---


10. The profiles of the entering classes in sixty-five law schools are described in the 69/70 Pre-Law Handbook, Appendix B-2. The profile shows for each school the percentage of students in each of seven test score ranges and seven undergraduate grade average ranges.
have a quarter or more of their students with test scores below that level. A number of schools will admit applicants who have a "C" average and even less than a 350 test score. 11

This outline of the structure of law school admissions standards makes quite plain that although many students are denied admission to the law school of their choice, very few are unable to get admitted to some accredited law school, particularly if they meet the minimum standards of a "C" undergraduate grade record and a 350 test score. Legal education is not like medical education where the total number of places is strictly limited; almost any student who meets the minimum standards can find a school where he can get the education to enter the legal profession.

As pointed out above, one of the primary premises on which the argument for preferential admissions rests is that law school admission standards block minority students from obtaining a legal education. Critical examination of the structure of admissions standards as a whole substantially undermines that premise. Granted, that because a large proportion of minority students are victims of poverty, poor schools and cultural deprivation, relatively few obtain top rank test scores and college grades. 12 This means that few can meet the normal standards for admission to the highly competitive law schools; but it does not mean that substantial numbers of minority students who seek to become lawyers are unable to meet the normal standards for admission to other accredited law schools. There has been no evidence presented, indeed, no explicit claim made, that there is a shortage of minority students able to meet at least the minimum standards of those schools where admission is relatively open.

Nor are those law schools to which minority students can gain admission without the benefit of any preference so geographically remote as to be practically inaccessible. Quite the

11. No specific data is available as to how many schools will accept students with test scores of less than 350 or how factors such as undergraduate grades and recommendations will be weighted to offset low test scores.

12. The distribution pattern of test scores for minority groups is not available, partly because inquiries as to the race or ethnic origin of persons taking the test would raise serious objections, legal and otherwise. Law school admission officers, on the basis of the applications they receive, generally agree that the distribution pattern of applicants in the four minority groups involved is generally lower than other applicants, but there seems to be no agreement as to the amount of the differential.
contrary, for the majority of those schools are in the South and in the large urban centers where minority students are most heavily concentrated. In addition, many of those schools are a part of state universities or other tax-supported institutions where tuition costs are low and living costs moderate. In simplest terms, law school admission standards are not a substantial bar to the legal profession except for those who have less than a "C" average and a 350 test score.

The operational effect within the total admissions structure of giving preference to minority students should now be clear. If Harvard or Yale, for example, admit minority students with test scores 100 to 150 points below that normally required for a non-minority student to get admitted, the total number of minority students able to obtain a legal education is not increased thereby. The minority students given such preference would meet the normal admissions standards at Illinois, Rutgers or Texas. Similarly, minority students given preference at Pennsylvania would meet normal standards at Pittsburgh; those given preference at Duke would meet normal standards at North Carolina, and those given preference at Vanderbilt would meet normal standards at Kentucky, Mississippi and West Virginia. Thus, each law school, by its preferential admission, simply takes minority students away from other schools whose admission standards are further down the scale. Any net gain in the total number of minority students admitted must come, if it comes at all, because those schools whose admission standards are at the bottom of the scale take students whom they would not otherwise take. Because these schools have relatively open admissions for all who meet minimum standards, this would require their lowering those standards for minority students. In sum, the policy of preferential admission has a pervasive shifting effect, causing large numbers of minority students to attend law schools whose normal admission standards they do not meet, instead of attending other law schools whose normal standards they do meet. But preferential admission does not add substantially to the total number of minority law students, except to the extent it results in the admission of students who have less than a "C" average and a 350 test score.

These conclusions, even if they are only substantially correct, carry two important implications as to how we should
direct our resources to overcome the shortage of minority lawyers and law students. First, preferential admission adds enormously to the costs of helping minority students adjust to law study. The special social and psychological problems which many minority students have when cast into the law school environment are acute even under the best of circumstances. Those problems are multiplied if the student is not prepared to compete academically on even terms with other students because society has cheated him in his educational and cultural opportunities. Experience has demonstrated that preferential admission must be accompanied with extra educational support in the form of special courses, tutorial assistance, or summer institutes to help the minority student bridge the academic gap. There is no need here to review the nearly insoluble difficulties of such compensatory programs and the heavy drain they place on limited resources; nor is it necessary to underline the intense anxiety and threat to the student's self-esteem which comes with his awareness or suspicion that he has been admitted to a disparate standard. Professor Rosen and others have amply performed that task. What needs to be remembered is that these costs are incurred whenever a student is admitted to a school whose normal standards he does not meet, even though he does meet the normal standards of other schools. These costs are incurred for all students given preference, even though there is little or no increase in the total number of minority students admitted to the study of law. These are costs which would be avoided by admitting minority students to schools whose normal standards they were able to meet; these costs represent resources which could be redirected to more constructive use in aiding minority students to get a legal education.

The second important implication which follows from the structure of law school admissions is that we should focus our attention on the lower end of the admission scale. The barrier to access to the legal profession is measured by the level of the minimum standards required by schools with relatively open admissions. The relevant question is whether that minimum standard is unnecessarily high for effective legal education to produce competent lawyers, and is so high as to prevent minority groups from having adequate representation in the legal profession. At the present time, whether the minimum standard
is, in any absolute terms, unnecessarily high or not, there has been no showing that there is a shortage of minority college graduates able to meet this minimum standard.¹³

The hard fact of the disproportionately small numbers of minority lawyers and law students, however, still remains. The conclusion that this is not caused by law school admissions standards only raises the next question—What is the cause? There are undoubtedly many subtle forces which discourage minority group members from entering the legal profession but there are several more obvious causes which are particularly relevant.

Past discrimination in law school admissions has certainly contributed to the present shortage of minority lawyers, particularly in the South. Even though discriminatory admission policies have been largely abandoned, past discrimination undoubtedly has a continuing effect of discouraging minority students from applying, particularly when discriminatory practices are prevalent in housing, employment and other areas.¹⁴ The historical image of a law school as an all white institution cannot be quickly and easily changed. The image can be changed only by strong affirmative efforts to recruit minority students, and after a substantial number of minority students in fact enter.¹⁵

More important, the practice of law seems to have been less attractive than other professions to minority college graduates.¹⁶ This is due, in part, to the historical discriminatory patterns in the legal profession, and perhaps, in part, to the fact that minorities generally tend to look upon lawyers and legal institutions as alien and hostile. It is due much more, however, to

¹³. If factual studies show that, even after vigorous recruitment efforts, there is a shortage of minority students who can meet the minimum standard required to get admitted to an available accredited law school, attention must then be directed toward helping those who fall below that minimum. That help may take the form of supplementary programs to help discover and develop their potential and then getting them admitted to schools with relatively open admissions. If the minimum standards in these schools are unnecessarily high, then the standards in those schools should be lowered or new schools should be established which are open to all who have reasonable prospects of becoming competent lawyers.

¹⁴. See Bell, supra note 7 at 540-541; Gellhorn, supra note 8 at 1073.

¹⁵. See Rosen, supra note 2 at 324.

¹⁶. The reasons for this unattractiveness have been vividly described in detail and fully documented by both Bell, supra note 7, and Gellhorn, supra note 8.
the fact that minority lawyers in the past have had limited prospects for professional success. Few predominately white firms would employ them and few white clients would retain them. There were not enough minority group clients who had substantial business interests or transactions to provide the basis for a remunerative practice, and many of those who did sought out white lawyers to handle their legal problems. The poor, of which the minority groups have far more than their share, have the need for legal services, but the poor tend not to look to lawyers for help, and even when they do, they lack the means to pay for the services they need. This picture has been rapidly changing, with increased hiring of minority lawyers and the establishment of publicly supported legal services for the poor. But this change has occurred only during the last five or six years; minority college students may still be discouraged by the historical unattractiveness of the profession.

The most important reason for the small number of minority law students is the lack of personal financial resources; too few minority students have the money to manage through four years of undergraduate work, much less three more years of law school. Less than half as many minority college graduates go on to do graduate work as do non-minority students, and law has even less scholarship and loan funds available than many other fields of graduate study.

These reasons for the disproportionately small number of minority law students immediately emphasize two basic points of attack, both already well-known, for correcting that shortage. First, there must be a continuous and massive recruiting effort among minority college students. The function of that effort must be more than to discover potential legal talent; it must be to persuade competent minority students that a legal education will open a wide range of opportunities for them to fulfill their personal goals, and that there are available law schools to which they can get admitted and obtain a good legal education. The historical image of the legal profession as inaccessible and

17. Bell asserts that, "there are now more jobs for black lawyers today than there are black lawyers," see supra note 7 at 541. Gellhorn, however, points out that there is still pervasive discrimination in law firms outside of a few large firms in the Northern metropolitan areas. See supra note 8 at 1093.
unattractive must be reversed. The Council on Legal Education Opportunity has been engaged in such a recruitment effort during the past three years, but its resources for that effort have been pitifully small.

Many law schools have also actively recruited minority students, and have thereby contributed significantly to the increase in minority enrollments in law schools. However, much of that effort has been at best wasteful, and some of it has been counterproductive. The law schools, acting individually, have sent a parade of recruiters to a small number of black colleges, duplicating effort and competing for the same students, but they have largely failed to reach minority students scattered through the hundreds of smaller predominantly white colleges throughout the country. Individual law schools, particularly those with the higher admission standards, have competed with each other for the better prospects, at times bidding against each other with scholarship funds. In the process they have encouraged large numbers of minority students to apply who lack the grades and test scores to meet even the lowered standard for preferential admission. The result is to raise expectations which cannot be realized and to reinforce the image of law schools which recruitment should reverse. It is past time for law schools to abandon pursuit of their individual interests and to combine their resources to maintain a recruitment effort which will reach all potential minority applicants and focus single-mindedly on getting the maximum number into law schools for which they are qualified.

The second basic point of attack must be a manifold increase in financial aid available to students who would be foreclosed from obtaining a legal education without such aid. Not only must the total amount of available aid be increased, but its distribution must be carefully husbanded and directed so as to maximize the number of students who can be given the necessary help. This problem, which is extremely complex and raises a range of other issues, will be discussed at a later point.

Experience has demonstrated that vigorous recruitment efforts will greatly enlarge the pool of minority applicants to law school, and increases in financial aid will further enlarge that pool.¹⁹ Not all of those attracted are necessarily qualified, but

¹⁹. See O'Neil, supra note 4 at 301.
enlarging the pool has in fact greatly increased the number of highly qualified applicants; indeed, making legal education more attractive may encourage a larger proportion of the most promising minority students to go into law rather than into business or some other profession. This, in turn, reduces the risk that there will be a shortage of minority students able to meet the normal standards for admission to accredited law schools. The resources now being used to implement the policy of preferential admissions would seem to be much more wisely spent for expanding recruitment, and particularly for providing more minority students with financial aid. Such redirection of resources would make a major contribution toward reducing the shortage of minority law students, the problem to which preferential admission is addressed but which it, at most, only minimally helps to solve.

III. THE PREMISE THAT ADMISSION STANDARDS MISMEASURE MINORITIES

The second, and perhaps most commonly articulated, premise for preferential admissions is that the normal admission standards cannot appropriately be applied to minority applicants. Often the argument is stated, not in terms of preference, but in terms of equal opportunity. Educational disadvantage, cultural deprivation and economic hardship substantially handicap minority students in obtaining high test scores and good college grades; therefore, a differential should be applied in using these standards to compare minority with non-minority standards. The hiatus in this argument is that the handicaps, like the grades and test scores, relate to particular individuals, but the differential is sought to be applied to all members of a group. Not all minority students labor under these handicaps, and not all non-minority students are free from those handicaps. Equal treatment would require that the differential be applied according to the individual's background regardless of his race or ethnic origin. These elementary observations might be considered enough to dispose of this particular argument for

20. The argument has been forcefully stated by both Professors O'Neil and Rosen in their contributions to this symposium, even though they do not ultimately rely entirely on the equal opportunity argument.
giving preference to students who are members of minority groups. However, the challenge to admission standards raises questions which need to be discussed.

The principal attack is on the heavy weight given to the LSAT score. This test, it is charged, is "culturally biased," accentuating linguistic and logical skills extracted from the predominantly white middle class culture. As such, the test measures the individual's educational and cultural background more than his ultimate potential. These tests, therefore, are not a fair test of the innate ability of many minority students or their capacity to master legal studies and become competent lawyers. However true all these assertions may be, they do not disprove the validity of the test as a guide for determining whether a particular student is suited for admission to a particular law school.

At the outset, the limited but crucial function of the LSAT must be clearly understood. It is a specially designed tool to predict the student's relative likelihood of success in the first year of law school. It is not designed to measure his innate intellectual capacity, nor even to measure his ultimate potential as a lawyer. Instead, it seeks to measure his present ability to pursue law studies. Rightly or wrongly, this is one of the most immediate concerns of law schools in determining whom to admit—will the student be able to keep pace in mastering the substance and skills required for the study of law? Success during the first year is not only necessary for survival, but the level of success during that year is largely determinative of success during the following two years. The LSAT has proven itself a reasonably effective predictor of success in law study, about equal in reliability to undergraduate grades. The combination of grades and test scores provides a much more reliable predictor than either separately.

But again, the prediction is of academic performance in the law school.

The test is clearly, and indeed necessarily, oriented toward

---

21. See Consalus, The Law School Admission Test And The Minority Student, 1970 U. Tol. L. Rev. 511. The test score is, of course, not a precise measure and cannot measure other factors such as industry, study habits, self-discipline or motivation which affect success in law study. It is only a tool, but a very useful tool, to aid in making predictions of success in the law school.

22. Id. at 520.
our dominant social culture, for law is an integral part of that culture, both shaping and being shaped by it. Legal problems cannot be understood except in the context of the culture in which they exist, legal institutions can be examined only from the perspective of the culture of which they are a part, and legal reasoning and legal concepts are inevitably linked with that culture. A student's academic performance, and the lawyer's professional performance, requires knowledge of the society, its structure and its values in order to see legal problems and institutions in their context. It is not necessary that the student or lawyer be in the mainstream of that society or share its values; but it is necessary that he have a working knowledge of that society. The test places heavy emphasis on linguistic and logical skills, the skills which educational disadvantage and cultural deprivation may leave undeveloped. But these are skills which are basic to the study of law, and the student who lacks them, whether from lack of innate ability or lack of development, has poor prospects of academic success in law school. From the limited data available, LSAT test scores are at least as reliable predictors for minority students as for non-minority students.23 The fact that the test scores of minority students as a group average below those of non-minority students does not make it unfair as a predictor of academic success in law school; rather it reveals the disadvantage which society has imposed on them in achieving that success.

Much of the same criticism, though less sharp, is levelled at the use of undergraduate grades (usually of the junior and senior year) as an admission standard. The minority student's poor showing in college, it is argued, may be the result of his earlier educational disadvantage and cultural deprivation. They do not measure fairly his innate ability or ultimate potential, particularly when they are compared with the grades of white middle class students. However true this may be, the central concern in law school admissions is the likelihood of success in law study; and undergraduate grades have proven to be effective

23. Schrader & Pitcher, The Interpretation of Law School Admission Test Scores for Culturally Deprived and Non-White Candidates, LAW SCHOOL ADMISSION TEST COUNCIL ANNUAL REPORT, 1965-66. For a description of this study, its tentative conclusions, and further efforts to determine the validity of the test to minority students, see Consalus, supra note 21, at 520-523.
predictors, particularly when combined with test scores. The same factors which handicapped the student in his college work, if not overcome before he enters law school, will handicap him in his study of law. It is further argued that many minority students must work to support themselves in college and as a result their grades suffer. Individual grade records must, of course, be evaluated and allowance made for such factors, but this allowance is made because the individual worked, not because he belonged to a minority group.

Test scores and undergraduate grades are helpful in measuring the relative ability of students to proceed with law studies, that is, the pace with which the student can master the skills and materials, particularly during the first year. Students with "B+" averages and 650 test scores will generally learn to analyze cases more quickly, grasp legal concepts more readily, and probe difficult problems more immediately than students with "C+" averages and test scores of 500. Similarly, students who have "C" averages and score at 350, but who have the potential, will likely need extended practice and intensive training in analyzing cases; their grasp of legal concepts will be built gradually only after careful and repeated explaining; and they must focus first attention on relatively simple problems. Although after the first year, the differences in academic performance between students in the different grade and test score ranges tends to narrow, students in the lower ranges may not be able in the two remaining years to catch up with those in the upper ranges. The factors which led to their lower test scores will still be reflected in their academic performance, even though they may succeed sufficiently to make fully competent lawyers.

The usefulness of test scores and of undergraduate grades for indicating the pace with which the student will be able to proceed is of crucial importance in predicting academic success for another reason. In a class composed largely of "B+" students with scores of 650 or above, the level of class discussion, and the speed with which the focus moves from basic concepts to

24. Any teacher who has taught first year courses in several law schools where the admissions standards are substantially different is well aware how much the level and pace of discussion differs depending on the admission standard, and this is particularly true during the first semester. As the year progresses, the difference becomes less marked, though still substantial.
subtle refinements and; more difficult problems may leave a "C+" student with a 500 test score confused, floundering and unable to keep up. He may ultimately fail in such a class when he would have succeeded in a class which moved at a somewhat slower pace. Similarly, a "C" student with a 350 test score may not have time to develop his potential if he is placed in a class where most of the students have above 500 test scores. The likelihood of this result is reinforced by the nearly inescapable pressure on the teacher to conduct a class, for the most part, at that level which meets the needs of and at the same time challenges the major portion of the class. Thus, the student's academic success, whether measured in terms of failing, achieving a particular grade average, or benefiting from the educational process, is likely to be as much dependent on the student's relative grade and test score, compared with those of other students in the class, as on the absolute level of those grades and scores.

The argument that normal admission standards ought not be applied to minority applicants often includes the implicit, and sometimes not so implicit, assertion that legal education, as it is presently conducted, is not relevant to the experience and needs of minority students. Professor Gellhorn, in commenting on the study showing that the LSAT was as adequate a prediction of law school success for culturally deprived and non-white students as for advantaged white students, remarked: "But any other result would have been startling. The admissions test is a mirror image of the law school. Thus, the cultural bias, if any, is not inherent in the test, rather in the law schools and in their teaching and testing methods." 25

The cultural bias of legal education is self-evident. It is heavily weighted in favor of the substantive areas and skills which produce fees for practicing lawyers; the legal problems of the poor who can pay nothing, and the legal obstacles to needed social reforms are given little more than token attention. Course contents need to be reexaminzed, new teaching and learning methods tried, and new devices for measuring achievement developed. But abandoning present admission standards will give us no guidance in redesigning legal education, and we can

25. Gellhorn, supra note 8 at 1089.
scarcely establish new standards before we know what the new educational process will entail. In the meantime, it would be irresponsible, if not cruel, not to use the best indications we have as to whether an applicant is likely to succeed academically in the law school admitting him.

IV. The Premise of Educational Benefit from Preferential Admissions

The third premise implicitly or explicitly relied upon to support preferential admissions is that, apart from the assumed increase in the number of minority students who gain entry to law school, it is educationally beneficial to both minority and non-minority students. Minority students are benefited by being admitted to law schools for which they could not otherwise qualify; non-minority students are benefited by having in their classes minority students who can provide different and illuminating perspectives to legal rules and institutions.

Clearly, the policy of preferential admissions enables a minority student to get admitted to law schools whose admission standards are two or three levels above the schools which would admit him under normal standards. Although this shifting effect might be characterized as getting him into a "better" school, this does not mean that he will get a better legal education.

The difference in the quality of the educational process and the end product after three years is not nearly as great among law schools as the difference in their admission standards suggest.® The educational process during the first year is vastly different, but after that, the gap rapidly narrows. In schools at the lower end of the admission scale, the work during the first year is paced and much of the teaching is focused to help students prove their potential. Those who lack the potential or fail to prove themselves are eliminated, and in many schools this attrition rate is fifteen to twenty-five percent, and may go above forty percent.® The educational process during the next two years

26. Nor, I submit, as much as the "better" schools like to believe or the "poorer" schools inwardly fear.

27. 69/70 Pre-Law Handbook, Appendix B-1. The figures given are the percent of first year students "who were asked not to return." This understates the attrition due to failure to meet academic standards, for many students withdraw, sometimes with official encouragement, before they are formally excluded.

HeinOnline -- 2 U. Tol. L. Rev. 392 1970
becomes increasingly like that in schools with higher admission standards, and the quality of the legal education a student obtains will, except perhaps for the very best students, depend on what he brings to it in ability and energy. There is no evidence, and little reason for believing, that a minority student will, through preferential admission to a "better" school, get a better education than he will in a school which would admit him under normal standards.

On the contrary, the preference given to a minority student seriously jeopardizes his chances of getting a good legal education. He is thrust into first year classes with students with much greater verbal facility and much more highly developed skills in manipulating ideas. He is denied the time necessary for him to perfect the process of case analysis or to learn to work through legal problems, for the educational process is not geared for his needs but for those of students who make up the large portion of the class and who are prepared for the faster pace. This comes at a time when he must adjust to a new social environment and find a new sense of identity, a process which is particularly difficult and painful for a minority student in a predominantly white law school. The situation almost insures a sense of lostness and defeat.28

Add to this the student's awareness that he has not met the standards of competence required of others, his self-confidence is further undermined and the fear of failure becomes almost overwhelming. This makes him even less able to make the most of his potential. The offer of tutorial assistance, reduced load, or special programs are resented and rejected as expression of the school's lack of confidence, further destroying the student's self-esteem. Those students who overcome this traumatic experience are often left with a weak foundation for their further legal education because they are not solidly grounded in basic concepts and skills.

Some students, however, seek escape from the intolerable situation. Absenteeism becomes chronic because classes are painful experiences; basic law courses are dismissed as unnecessary and irrelevant to help justify the failure to master

28. The special problems confronted by minority students during the first year, and the kinds of responses which those problems evoke have been widely described in Bell, supra note 7 at 550-553.
them; and energies are directed toward community activities which provide a needed sense of success. The result may be academic failure and total loss of the opportunity for a legal education. Probably more often, the faculty, out of a sense of responsibility for having admitted them, becomes reluctant to fail them and consciously or unconsciously lowers grading standards to permit such students to continue. After a term or two, such students may redirect their efforts toward the study of law, but they can never wholly recover the loss in their legal education.

It must be emphasized that the problems experienced by minority students in adjusting to law school are severe at best, and the tensions which that adjustment causes will manifest themselves in attitudes and conduct which interfere with the learning process in any case. But as Derrick Bell has emphasized, the lack of self-confidence and fear of failure are at the roots of the problem. Preferential admissions tend to undermine self-confidence and to magnify the fear of failure, often to the severe damage to the student's legal education; admission under normal standards places the minority student on an equal footing with non-minority students, giving him a greatly increased chance of academic success and a better legal education.

In contrast to the substantial educational loss which many minority students suffer from preferential admissions, a few non-minority students may enjoy a small net gain. It is true that for every minority student moved up to a "better" school, a non-minority student is moved down to a "poorer" school. But he is moved down only one level, and instead of being one of the bottom applicants in one school, he becomes an average applicant in the other school; the injury, if any, is to his hopes of getting admitted to the "better" school. On the other hand, there are substantial educational values in having minority students in law classes if they participate freely in discussions. They come from different backgrounds, may be sensitive to different social values, and focus on different social problems. They can enrich the class discussion by giving a different perspective to legal rules and institutions. The policy of preferential admission, however, makes at most a limited contribution because its operational

29. Id. at 546-549.
effect is only to move minority students into different schools. At most, this increases the number of minority students in the schools at the very top level of admission standards who might otherwise have few, if any, minority students. In short, this is an educational benefit primarily to the non-minority students in a small number of the so-called elite schools.

There is a fundamental, though less tangible, educational loss shared by both minority and non-minority students alike. That loss is in contradicting, by official action of the law school, the teaching that all people should be treated equally regardless of race or color. The policy of preferential admissions is plainly a policy of discriminating on the basis of race and ethnic origin. The use of euphemisms such as "disadvantaged" and "culturally deprived" do not disguise what we are doing; on the contrary, these euphemisms emphasize that the policy feeds the very roots of racial prejudice and discrimination. The favorite rationalization for preferential admissions is that the majority of minority students are educationally disadvantaged and culturally deprived; therefore, all minority students should be treated as educationally disadvantaged and culturally deprived. This is measuring men by stereotype, judging a man not on his individual qualities but on supposed general qualities of his racial or ethnic group.

This negative lesson, taught by our actions, is not overcome by our good intentions of promoting a worthy end, for the stereotype we use carries derogatory overtones. The image encouraged is that of minority students as poorly educated and uncultured, strangers to our society. More than that, we devise a program to reinforce that stereotype. We place minority students in classes where many cannot compete on equal terms and where the risk of failure is multiplied, rather than in classes where they can compete and succeed, and where they have a chance to excel with the same frequency as other students. There is a danger, which we cannot count small, that we shall produce a generation of law students who will carry from law school into the profession, consciously or unconsciously, the monstrous misteaching that minority lawyers are generally less competent than other lawyers.
V. PREFERENTIAL ADMISSION AND FINANCIAL AID

As emphasized earlier, the most serious obstacle to increasing the number of minority law students is financial, for a large proportion of them lack the means for three more years of advanced education. Rapidly rising tuition fees and living costs have made the barrier insuperable for an increasing number of students.

Practically all programs of preferential admissions have been accompanied, and necessarily so, by programs of increased financial support for minority students. Existing scholarship and loan funds have been heavily drawn upon and the pressures of increased need have spurred the discovery and development of new sources, but the acute shortage of funds to meet the needs of students without means remains. This has led to a particularly distressing, though nearly inevitable, kind of discrimination. Students granted preferential admission are commonly given priority in financial support, as scholarship and loan funds are allocated specially to that program. The result is to deny financial support to a needy non-minority student who meets the normal admission standards in favor of a minority student whose financial need is no greater, who does not meet those admission standards, and whose likelihood of academic success is substantially less. The effect of this is not merely to require the non-minority student to go to a lesser school, but may be to deprive him entirely of an opportunity for a legal education. This, alone, ought to give us pause to reexamine what we are doing.

However, even if there were no preference in admissions, the need for financial support of minority students would remain. The same number of students would need support, but only in different law schools. The critical problem to be solved, apart from the obvious one of greatly increasing the total amount of financial support for needy students, is making the most effective use of the limited resources available. We are not now doing that and it is necessary to see clearly why this is so.

The given goal is to maximize the number of minority students who can be given adequate financial support to obtain a legal education. There are two basic sources of support—direct financial aid in the form of scholarships and loans to pay tuition
and living costs, and indirect financial aid in the form of tax-supported schools where public funds pay most of the tuition and sometimes indirectly subsidize housing and other living costs. At the present time, the available direct financial aid is unevenly distributed among law schools, and this leads to serious distortions. In 1968-69, for example, Harvard awarded a total of $1,150,000 in scholarships and loans to law students, Yale awarded $840,000, Pennsylvania awarded $573,000, and Columbia awarded $515,000. During the same year, Boston College had only $75,000 in scholarships and loans for law students, Fordham had $66,000, Temple had $50,000, Detroit University had $31,000 and Capital had only $18,000.\footnote{All of these figures are taken from the tables of statistical data on law schools in the United States in Appendix B-1, 69/70 Pre-Law Handbook.} The general pattern is that resources for direct financial aid are concentrated largely in those private schools which have high admission standards, and only a meager portion is spread thinly among private schools with low admission standards. Most tax-supported schools, at all admissions levels, have little or no scholarship or loan funds.

This pattern of distribution induces, if not compels, minority students to seek admission into schools with high admission standards, even though they might otherwise choose to go to a school where they could be admitted without any preference. Indeed, the policy of preferential admissions seems to be primarily a device for getting minority students into the schools where the scholarship and loan funds are, rather than for removing obstacles to entry into the profession attributed to admission standards. The policy of preference has somewhat increased the number of minority law students because it has resulted in a much larger share of the scholarship and loan funds being channelled to meet the financial needs of minority students. But this is achieved only at the cost of drawing minority students into schools whose normal standards they do not meet, where they are placed under substantial academic hardships, and where their likelihood of success is substantially reduced.

The concentration of financial aid also leads to uneconomic use of the limited resources, for the schools which have the large
amounts of scholarships and loans tend to be the high-cost schools. Funds used there will educate fewer minority lawyers than the same amount used at other schools, particularly at tax-supported schools where a base of financial support is already built in. For example, in 1968-69, the estimated minimum costs for tuition, room and board, and books at schools such as Harvard, Yale, Columbia and Pennsylvania ranged from $3,300 to $3,800. The same costs at state universities ranged from $1,200 to $2,100. For every student given full support at one of the four high-cost schools, two who were state residents could have been given full support at Berkeley, North Carolina, Ohio State and Virginia; while two and a half could have been given full support at Illinois, Indiana, Kentucky and Missouri; and three could have been given full support at Mississippi. If allowances are made for the amount the student may contribute through summer employment or other sources, the multiples will be significantly increased.

It becomes painfully self-evident that if our goal is to maximize the legal educational opportunities of minority students, we are misdirecting the students and misallocating the available resources. The solution is also painfully self-evident. A major portion of the scholarship and loan funds presently devoted to aiding minority students should be pooled and administered through a central clearing agency which would distribute the funds to individual students by balancing three general principles—enable the maximum number of minority students to get a legal education, enable minority students to attend the best law schools for which they meet the normal standards of admission, and enable minority students to attend law schools of their choice. Determining exactly how to distribute the funds would, of course, be complex and pose difficult problems involving personal and policy judgments. Many questions and objections can, of course, be raised and elaborated to any plan for pooling or central clearing. But no matter how we resolve the problems, we can scarcely do worse than what we are now doing. The real resistance, however, is the

31. Id.
32. For example, if each student can contribute $800 toward his school expenses from summer employment, the amount necessary to provide the remainder of support for one student at Yale would support four students at Illinois.
reluctance of individual institutions to surrender their autonomous control over the scholarship and loan funds in their possession. The reluctance is quite understandable; the law schools who gave up the most in scholarship and loan funds would get the least in return, for they would probably end up with substantially fewer minority students. The ultimate acceptability of such a proposal probably depends on whether, when put to the test, the law schools' primary concern is with the social goal of increasing the number of minority lawyers or the institutional interest of having an "appropriate" racial and ethnic mix.

This is not a full solution, for no matter how wisely we use our private funds, they will never be adequate to the needs—needs which ultimately are not those of minority students alone. Rising costs of college and law school education build higher and higher barriers for all students who bear the burden of financial need, regardless of their racial or ethnic origin. Those barriers can be substantially lowered or removed for all students who lack the means only by the use of public funds. For professional education, such as law, those funds might appropriately be in the form of loans which were interest-free during the period of education and repaid out of the earnings from the professional training. The public investment and subsidy need not be great but it must be enough to open the profession to all students without regard to economic condition. When that is achieved, the problem of the shortage of minority lawyers will be largely solved.

VI. Conclusions

The policy of preferential admissions focuses on a real problem—the drastic shortage of minority lawyers and law students. Each law school, by adopting a practice of preference, individually expresses its desire to contribute to the solution of that problem, and the number of minority students a school admits gives it a visible measure of its participation. Unfortunately, because of the shifting or "moving up" effect, each school's perceived contribution far outruns its actual contribution; each school can have a large sense of individual satisfaction even though there is little overall real achievement.
This is not to say that the widespread adoption of preferential admissions has made no contribution. Determined to increase substantially the number of minority students, many law schools have mounted major recruitment drives, visiting schools never visited before and publicizing to minority students the opportunities for a legal education. The number of minority students entering law school has been increased directly by these efforts, and the image of law schools and the legal profession has been improved in the eyes of minority students. More important, the recruitment efforts necessarily included promises of financial aid and enabled more minority students to overcome the economic barriers to legal education.

These contributions cannot be lightly dismissed, nor should awareness of the hidden limitations or sensitivity to the costs and dangers in preferential admissions cause these contributions to be overlooked. Though giving preference in admissions is an inadequate and unreal solution, it should not be abandoned without adopting other and more effective means to the same end. Otherwise, we might simply turn our back on the problem rather than redirecting our efforts toward a better solution.

Outlines of the solution have already been suggested, and there is little value in restating or summarizing those suggestions here. No attempt has been made to present a fully developed proposal with the elaborating detail, partly because space does not permit, and partly because it would add little of value. There are many different ways of implementing the essentially simple guiding principles—encouraging minority students to apply and getting them admitted to schools where they meet the normal admissions standards; redirecting the financial aid to maximize the number of students who can be given the necessary support; and energetically recruiting minority students in all colleges with the assurances that they will be admitted to schools where they will have high likelihood of academic success and will have enough financial support to see them through.