

A CALL TO ACTION ON OUR DISASTER AREA, LAW SCHOOL ADMISSIONS

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Several millenia ago Socrates told of the philosopher's struggle to climb out from the shadow world of the cave and into the real world, there to contemplate the Good. Socrates told also of the philosopher's painful descent back down into the cave. I welcome you to the cave of Law School Admissions. I suggest that we may not have attuned our philosophic sense of justice to the shadowy realities of our imperfect society.

I. "NORMAL ADMISSIONS" RATHER THAN "PREFERENTIAL ADMISSIONS" POLICIES SHOULD BE OUR PRIMARY FOCUS IN ADMISSIONS DISCUSSION IF WE SERIOUSLY SEEK THE "EQUAL PROTECTION OF THE LAW"

The beginning of wisdom is that while "all policy is not law, all law is policy" in the fundamental, social goals sense. Although we may know this, we sometimes prefer to hide behind neutral-sounding phrases and absolutist rules or principles. So it is with Law School Admissions. Anyone reasonably familiar with law as a living process knows that our rules and principles are in fact ambiguous, run in pairs of opposites, and are incapable of interpretation and application without the intervention of a human's decision, and that this is the controlling social context.

With this in mind, I will address myself to the problem of preferential admissions in *context*. Contextual legal analysis requires, of course, much more than rephrasing words found in appellate opinions and constitutions. It requires more than saying that "race may not be taken into account in preferential admissions policies." It means much more than relying on "plain meanings" because there is usually more than one. If one begins dogmatically with the major premise that all racial classifications are *per se* unlawful, one will end with the same conclusion. We must not beg the very question that we should be discussing in detail.

A legal technician, when asked to prove that position A is invidiously discriminatory, usually proceeds as follows: He or she will concentrate exclusively on relating position A to position B, which latter position he will *assume* to be valid. He will then compare unfavorably those features of position A (sometimes through techniques of distortion) which are inconsistent with position B. One would expect, however, that a *law professor* would immediately see the fallacy in this approach. Unless the *assumption* of position B's validity is true, these comparisons are meaningless.

In the analysis of those who are opposed to taking race into account in "preferential admissions," position A is preferential racial admissions; position B is the normal admission standard. The latter, it is assumed or implied, measures individual merit. The former then, by definition, prefers the less

meritorious to the more meritorious. The result of this comparison then becomes, to such analysts, inescapable; preferential admissions are anti-merit and unconstitutional.

Such critics do not question, however—indeed, they specifically eschew questioning—whether the *normal admissions criteria* actually do rank applicants according to their merit. Even worse, they do not pause to question whether these criteria, although seemingly neutral, operate to discriminate against racial minorities. If, in fact they conducted this analysis, they might find that these criteria (1) were not merit-related, and (2) had the predictable effect of excluding racial minorities. I take it that were this the case, they would then conclude that these criteria denied equal protection of the laws to minority applicants. A preferential admissions policy designed to counter-balance this result would hardly deny equal protection to anyone; on the contrary, it would, if properly conducted, guarantee equal treatment to those who would otherwise be the victims of discrimination.

I take seriously the injunction that “preferential treatment for some racial or ethnic groups is what the words of the U.S. Constitution, given their plainest meaning seem to prohibit.” The admissions policies which these critics would apparently ask us to apply color-blindly, would and do result in *preferential treatment for majority-group members to the detriment of minority-group members*. In other words, these critics *selectively* impose color-blindness in the admissions process. That is not enough.

Quite simply, the problem is this: despite the selectivity, convenient sense of relevance and major omissions in admission discussion, *every* admission standard and procedure is policy-laden, subsumes social goals, results in preference for some persons and groups over other persons and groups when compared with an alternative admission standard or procedure. Analytical positivism to the contrary notwithstanding: no admission standard or principle or rule or law or constitutional prescription is anything but fully intertwined with policy. We all recognize that the GPA, LSAT and WA were not inherited from a divine or omniscient creature, but were established by very mortal human beings who had some social ends in mind. To equate the LSAT, WA and GPA with merit or equal protection of the law or justice or fairness or *Brown*—without a full, candid and explicitly policy-oriented discussion—is inexcusable . . . unless you happen to like the results or are an analytical positivist. Some would apparently prefer the exclusionary effect of the “neutral standards.” I do not. I prefer that, as my colleague Robert J. Reinstein has said, we finally—100 years late—apply the Thirteenth and Fourteenth Amendments including the equal protection of the law and integrate our society . . . on the basis of merit. I genuinely prefer a neutral admissions policy because I believe that an integrated Bar is essential for minimal human dignity in this society. In the “Report of the Philadelphia Bar Association Special Committee on Pennsylvania Bar Admission Procedures—Racial Discrimination in Administration of the Pennsylvania Bar Examination” (the so-called *Liacouras Committee Report*) in 1970, we stated this preferred goal this way:

Historically and traditionally, lawyers are the most effective leaders in any peaceful community. Every new lawyer potentially services an ad-

ditional group in society whose rights are thereby better understood and protected. That group is usually one from which he sprung. Since law and lawyers act not only in "peace-keeping" functions but also in creative roles in the shaping and sharing of better health, jobs, education, respect and leisure for clients, the abundance or lack of abundance of lawyers in any community is a mirror of its realization of these ends. The scarcity of Black lawyers in Pennsylvania—just 130 for a Black population of nearly 1,000,000 persons— is scandalous to a Commonwealth professing to serve all its people. This shortage of Black lawyers has undeniably decreased the effectiveness of the Black community in seeking to achieve equality of opportunity through traditional legal channels. And while the Black community is principally harmed by what has amounted to an exclusion of Blacks from the Pennsylvania Bar, the entire Commonwealth and nation suffer irreparable harm. (44 *Temple Law Quarterly* 141 at 162 (1971)).

By choosing to write only about race within the application of preferential admission policy—rather than on the larger issues—one therefore has made a clear-cut policy decision to support the exclusion of minorities in professional schools. That is a mischief of analytical positivists: their goals (social policy) are implicitly subsumed by their decisions to analyze only part of the relevant context, and then they hide behind ostensibly neutral-sounding or absolutist principles.

II. LAW SCHOOL ADMISSIONS IN CONTEXT

Properly understood, "law school admissions" is an issue which raises a series of policy judgments: who, from what groups in society, and to achieve what kind of legal profession and larger society, will be given the opportunity to enter the legal profession and become our future community leaders?

1. *Law school admissions: a national disaster area*

At practically every law school in the United States, deans and faculties are asked to justify an admission process which produces results which many fair-minded people cannot accept. Alumni who had no trouble being admitted to law school a decade or two ago now see highly qualified children and friends rejected at the same school. Racial minorities and women, understandably, view the legal profession as the historical and exclusive preserve of white males, and continue to ask what law schools are doing to change this. Those law schools which do take steps to remedy historical race and sex imbalances are frequently accused of discriminating in reverse. Then, there are the lawyers, judges and even law professors who complain that law school graduates of today, while bright, aware and book-learned, lack hard common sense, motivation and tenacity to the same degree possessed by their predecessors, and blame the law school admissions process for this. And finally, there are members of the Bar who are concerned, not that qualified applicants are being rejected, but that too many are being accepted and graduated into a tight employment market. Apparently, the only consensus that appears is that no one likes the present system. The admissions process to law school has become a national disaster area.

2. *The numbers crunch*

The most fundamental cause of our present distress is simply numbers. It was not long ago that someone interested in going to law school, even if turned down by several schools, could gain admission to at least one of the 150 approved law schools in the United States. A minimally qualified citizen of Pennsylvania was almost assured of a seat in one of the region's law schools; the weeding-out process took place after admission—during law school studies and more particularly through the first-year exams. But times have definitely changed. Nationally this fall only 1 in 3 applicants will find a seat in one of the 150 approved law schools, while only about 5 percent of those admitted will be dropped for academic reasons, compared to as many as 25 percent some 20 years ago.

This phenomenal increase in the demand for legal education over the past half decade shows that our most basic concern should have been the development of fair admissions standards across the board. The raging controversy over minority admissions tends, unfortunately, to obscure this larger and more fundamental issue. Blacks and Puerto Ricans are too often made the scapegoats for the greatly increased pressure for law school seats. Yet, with all the talk about special admissions, *all* racial minorities constitute less than 8 percent of the students in approved law schools in this country, and their numbers at my school, I am sorry to report, are low despite our vigorous and prudent recruiting efforts. Even if every single minority person were excluded from law school, and that would be unthinkable, illegal and unconscionable, the overwhelming majority of whites rejected from law school would still be rejected.

If more statistics are needed to convince you of this, consider the following: more than 50,000 applicants were not accepted to any approved law school last year, while a total of only about 3,000 minorities entered law school last fall.*

3. *The LSAT and law school admissions*

Regrettably, law schools were not prepared for the phenomenal increase in application. Although remarkably little thought had been given historically to admissions standards, one would think that by now law schools and educational experts would have devised standards for accurately measuring a person's *potential for being a good lawyer*. They have not. In fact, this question has too seldom been asked. Rather, as the wave of standardized testing swept the country in the 1950's, law schools enthusiastically adopted a standardized test—the LSAT.

The LSAT became the centerpiece of the admissions standards to law schools. Standardized tests like the LSAT have some attractive features: (1) they are ostensibly uniform and seemingly objective; (2) they appear fair in

* Parenthetically, while less than 8% of all present law students are members of racial minorities, some 16% of all law students now are women. In fact, in Temple's entering class in 1974, about 35% are women, which compares with only 2% ten years ago and some 5% in 1969 from this group which heretofore was virtually absent from the legal profession. Racial minorities should not, I repeat, be made the scapegoats for the numbers and admissions crunch. Neither should women.

that they apparently eliminate the potential for subjective abuses; (3) they are easy to administer and grade; and (4) they produce a number, purportedly measuring qualifications, behind which an admissions officer can fend off pressure from alumni, politicians, donors and others who would like to influence the admissions process.

Furthermore, use of the LSAT developed a momentum of its own. In fact, it became self-reinforcing. It was not only considered prestigious for a law school dean to announce that the median LSAT score of an entering class was 650, but also to proclaim that standards of excellence actually required such LSAT scores of all applicants. Ironically, as the numbers of applicants increased, so did reliance upon the LSAT; for this standardized test had yet another attraction: administered and evaluated by ETS, the LSAT spared law schools the burden of carefully reviewing the total profile of the applicants. Even law firms interviewing senior law students for jobs began asking the student who completed three years of law school with academic honors, what score he or she received on the LSAT which was taken *before* entering law school!

Unquestionably, use of standardized tests is cheap. The LSAT also has the appearance of fairness. It has, however, two drawbacks: the LSAT is too narrow and over-reliance on it borders on the irrational; and it is discriminatory.

The LSAT is too narrow as a lawyering aptitude test

The LSAT does not measure—and indeed was not designed to measure—a person's capacity for being a good lawyer or community leader. The LSAT was designed *solely* to predict performance in the first year examinations of law school. It purports to measure narrow analytical skills. The analytic skills it is primarily aimed at are *syntactic* (like a closed language system such as mathematics) and *semantic* (referents to the real world of the tester) rather than *pragmatic* (the "so what") skills.

Even the LSAT's admittedly limited objective of predicting first year exam grades, is not achieved with the precision that its sponsors and backers would have us believe. As Justice Douglas observed in the *De Funis* case, "most of those scoring in the bottom 20% on the test do better than that in law school—indeed six of every 100 of them will be in the top 20% of their law school classes." When one observes the performance of those who score in the top half of the test, its utility as a ranking device for those persons appears to be marginal or insignificant.

To the extent that it is a demonstrably useful measuring rod, we should continue to use the LSAT, but where it fails to perform our necessary goals, we must modify or eliminate it.

Fundamentally, the LSAT asks the wrong questions. And because the LSAT asks the wrong questions, law schools have not been asking the right question: *is this applicant more likely than another applicant to become a good lawyer and community leader?*

No one would claim that the LSAT measures motivation, judgment, practicality, idealism, tenacity, character and maturity, integrity, patience,

preparation, oral skills, perseverance, client-handling, organizational ability and leadership—in sum, the lawyering process.

Too many gifted applicants with great potential for lawyering and community leadership, are being rejected from law schools because, for unfathomable reasons, they did not do well on this single, multiple-choice, four-hour test. Too many law schools for too long have surrendered admissions criteria to psychologists at the Educational Testing Service; they seem to have forgotten that law school admission is the critical first step in admission to the legal profession.

To this day there has not been a single reported validation study of the LSAT in relation to lawyering performance, just as I doubt whether there has been a good systematic study validating law school grades with lawyering performance—that is, which students will become the best lawyers—and by this I mean more than the apocryphal story that “A” students become the professors, “B” students the judges, and “C” students make all the money. These basic questions have been ignored or simply flirted with in the law school and testing worlds.

The LSAT is discriminatory

It is also in this LSAT setting that the question of minority admissions should be considered. The social history of the late 1960's called into question one of the features that had recommended the LSAT—its apparent fairness and freedom from bias. As reliance on the LSAT increased, the number of black law students decreased. The LSAT was excluding minority applicants disproportionately.

By 1967, only two of some 500 Temple law students were black, and Temple's experience was typical: racial minorities constituted two percent of the total number of all American law students in 1967. Minority applicants—Blacks, Puerto Ricans, Chicanos, American Indians, Asian-Americans,—were telling us that the LSAT was culturally loaded against them and they were right. No one can ignore the fact that racial minorities have been historically excluded from the legal profession. In 1970, of the 12,300 lawyers in Pennsylvania, about 130 were black and none was Puerto Rican. By 1974, this ratio was only slightly improved. Temple graduated the first Puerto Rican lawyer in Pennsylvania only two years ago. This exclusion was perpetuated, unintentionally to be sure, by reliance on standardized tests such as the LSAT.

4. Special admissions programs to counter the LSAT

Special admissions standards and procedures draw their necessity not from abstract notions of “compensatory justice” but from the legal and moral duty to correct discriminatory consequences of the standard admissions process. Race must, therefore, be used as a factor in the admissions process to insure the equal protection of the laws.

There are to be sure, real difficulties in structuring proper criteria in a special admissions program. One beats a dead horse when he inveighs against the use of race as the *only* factor in admissions. No one whom I know argues

that unqualified minorities should be admitted to law school. Nor do I know of anyone who argues openly for a lily-white Bar. We must produce minority lawyers, and they must be competent. It is therefore entirely appropriate and necessary, as Justice Douglas stated in *De Funis*, initially to consider separately minority applicants and then to scrutinize their backgrounds and qualifications with special care. It is only through this process that we can discount the discriminatory impact of the normal admissions standard. We must never forget that the overriding purpose of the Civil War Amendments was to eliminate discrimination against racial minorities.*

I believe that a healthy by-product of special admissions programs has been, and will increasingly become a re-evaluation of the traditional admissions criteria for majority applicants. The first step has already been taken by some law schools. We have recognized that there are white applicants with backgrounds for whom the traditional criteria are invalid. For these persons, inclusion in the special admissions process is both necessary and proper.

The second step, although much more difficult, is just as imperative. We must develop standards for admission for all of our applicants which are fair and rational. The standards should go beyond predicting first-year averages in law school. Instead, we must identify attributes of good lawyering and community leadership and then devise admissions standards related to those attributes.

A call on the A.A.L.S. and the law schools to act

As a practical matter, no law school can go it alone in this process.

We can, at most, take the lead in supporting national efforts at devising alternative tests to the present L.S.A.T. Such a national admissions group as the Law School Admissions Council, and such a nationally administered test as the L.S.A.T. have cornered our attention and the admissions market.

Recognizing this, I requested the Law School Admissions Council (L.S.A.C.) at the last Annual Meeting of Admissions Directors in June 1974, to push forward as its urgent and highest priority item, the development of answers to this second step which could be subsumed within the second, third and fourth phases in the research proposal of Carlson & Evans, entitled "The Becoming of a Competent Lawyer."

My request was overwhelmingly rejected at the Annual Meeting.

Today, I appeal to the A.A.L.S. and to the law schools themselves.

I think we agree that we have a crisis in admissions. My contacts lead me to believe that the perception of informed middle-class Americans have of

* In the first case to construe the equal protection clause, The Supreme Court stated:

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. . . .

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

The Slaughter-House Cases, 16 Wall. 36, 21 L.Ed. 394 (1873).

legal education is that we have abdicated our responsibility to insure equal access by fair and rational standards.

We must do better than the L.S.A.C.'s six year time-table for elementary results in the Carlson & Evans study. An issue of this magnitude and urgency should be fully funded and rapidly accelerated in completion date.

Law School Admissions Council President Hart has indicated to me that he thought it would take in excess of one million dollars to complete such a study in two years.

We owe this to the public and the profession.

For the purpose of underlining the total commitment that Temple Law School has in assisting a meaningful, timely, and practical study of the lawyering process and test or tests which would reasonably measure such actual and predictable skills at the admissions and in law school stages, I make the following suggestion:

Every approved law school should make available a sum of \$10.00 per student enrolled in the J.D. Program during the 1974-75 academic year (e.g. about \$11,750 for Temple) to be applied to the type of "The Becoming a Competent Lawyer" study. This would insure a sum in excess of one million dollars for the proposal which will then permit rapid acceleration.

Law schools have abdicated, albeit unintentionally, their responsibilities in developing fairer and more rational admissions standards—standards that are rationally related to good lawyering and community leadership. By financially supporting such a study as this, the law schools would be contributing immediately and effectively to meaningful reform in law school admissions, and would further insure our interest and follow-up.

We stand ready to support any program which is substantially equivalent to the Carlson-Evans proposal and to the issues raised in my earlier remarks.

We do not want to waste time or divert attention from the real admissions issues by supporting the same generation of validation studies of law school and bar examination grades.

I would hope that as we adjust to our life in the cave we can contribute to the real issues in Law School Admissions. Whether or not I have contributed remains to be seen.