FOREWORD

John R. Kramer*

Tulane is proud and delighted that its Black law students are responsible for editing this first issue of the NATIONAL BLACK LAW JOURNAL to emanate from the South. Tulane is proud and delighted that it has a sufficient number of energetic, enthusiastic, and highly-qualified Black law students to undertake that task successfully. If we had attempted to prepare this *Journal* twenty-five years ago, we would have had no one to turn to. It was only twenty-four years ago this coming fall that we, confronted with the prospect of a court order, opened our doors to our first Black student.

Twenty-four years is a long long time ago. Today we have 150 minority students enrolled at Tulane, 84 of them Black. That is slightly more than one out of every five members of our student body. We have the ninth largest complement of Black law students of any law school in the country other than those schools that have traditionally had predominately Black bodies. Becoming a lawyer is the most direct avenue to wielding political and economic power in the United States. We are thus en route to redressing the historical exclusion, but we have by no means arrived. We - and all the other non-minority law schools in this country - still have a long way to progress towards opening up our profession.

Every individual and every group is entitled to a reasonable opportunity to attain a legal education. Tens of thousands of Blacks (and other non-Asian American minorities), are foreclosed from entering law schools by overreliance on "objective" test scores or chilled from even thinking about the law as a career by the high cost of attending law school, the fear of failing, concern about passing the Bar, and uncertainty about acquiring a meaningful job and cracking the big firm-partnership barrier after graduation.

What are the solutions? We know some; others remain to be devised and implemented. Start with the Law School Admission Test. If law schools are serious about obtaining a diverse student body, they have no choice but to go beyond the simple arithmetic compounds of LSAT scores and undergraduate grade point averages. At best, those numbers, predict success only in the first year. They do not foretell a person's standing at the end of three years or his or her ability to become a capable lawyer. Indeed, strict application of current median scores at most law schools to practicing attorneys who graduated from law school twenty years ago would render most of them ineligible for admission.

If LSAT scores remain the sole or the principal consideration in the admissions process, very few minorities other than Asian Americans would ever be invited to any law school. In the fall of 1989, 42,860 students comprised the first-year class. The mean score for the approximately 61,829 Whites who took the LSAT in the 1987-88 testing cycle was 32.9 out of a maximum of 48.

---

* Dean and Professor of Law, Tulane Law School, B.A., L.L.B., Harvard University.

Over 30,000 Whites taking the LSAT (48.6 percent of Whites tested) scored 34 or better. Most of them went on to law school. Only 515 of the nearly 5,731 Black candidates (9.0 percent) did that well. The Black median was 22.9, ten points below the White median. The median for Hispanics was 28.2, for Mexican Americans, 27.6, for Puerto Ricans, 20.1. Native Americans averaged 27.7, while Asian Americans achieved 31.4. Only 701 non-Asian American minority candidates obtained a score 34 or above. Had 34 been the cut-off for admission to any law school, the law schools would have still filled most of their seats, but only 515 Blacks, not 2,463 currently enrolled would have been among that saintly number.

The LSAT rigorously applied would be a major obstacle to minority entrance into legal education. In the fall of 1986, 88,120,694 individuals enrolled in the J.D. program in accredited law schools. That 6,321 Blacks (5.2 percent), 4,342 Hispanic Americans, (4.0 percent), and 499 American Indians (.04 percent) were among that number, is because many law schools, sought some diversity. The solution is not quotas. The solution is to develop a complex admissions decisional process that takes into account a variety of sophisticated factors in addition to raw numbers, such as the ability to communicate, motivation, diligence, imagination, and drive to succeed. These qualities can be determined by reviewing the applicants résume, personal statements, and recommendations.[1] All it takes is a lot of will and a lot of work.

To alter the focus of the admissions process will not however, change the minds of those who have sworn off considering law school early on, having been scared away by the lethal combination of price tag, attrition, and employment discrimination. All three are real fears. But there are fruitful approaches to allaying each of them.

When the Law School Admission Council sought to spend $1.2 million on minority enrollment challenge grants in 1982, Professor Derrick Bell, then Dean at Oregon, fought to have the $1.2 million translated into direct grants to minority students as the most meaningful method for boosting minority attendance. Unfortunately, $200 a head would not have made much difference, not given the current average cost of going to law school, which for 1987-88 was approximately $8,900 in 74 public schools (for state residents), and $15,500 in 100 private schools. The resulting debt is a heavy burden for many and intolerable for minorities.

There is a way out, but it may prove highly unpalatable to many, and it raises some tricky constitutional questions. What if all law schools were to decide to devote the lion's share of their scholarship monies (by way of tuition rebate or university funds and through endowments, if the terms permit) exclusively for grants to persons of color? There is clear statistical evidence that minorities are the one group of law school graduates, who cannot expect to secure high-paying jobs in large law firms in their proper proportion. In the 247 of the top 250 firms that responded to a 1987 *National Law Journal* survey, 1.7% of the partners were minorities,[2] while 4.7% of the associates were

1. For an example of a law school which has successfully employed these methods see Regents of the University of California v. Bakke, 438 U.S. 265, 316-318, 321-24 (1978) where Justice Powell praised the noble tradition of the Harvard College Program.

2. The breakdown was as follows: 0.81% Black; 0.4% Hispanic and 0.5% Asian.

minorities.[3] Even in Washington, D.C., only 2.9% of the lawyers in the six biggest firms were Black. Without a high paying job, large debt is untenable.

Is it possible to justify an 80 or 90 or 100% set aside of private or public scholarship monies for prospective minority law students? The fact that minorities are the major group that usually, by definition, cannot hope to pay back even reasonable loans, suggests that there is a strong basis for such a program. However, in 1976, one district court failed to recognize the logic of such reasoning.

In 1972, The Georgetown Law Center faculty decided that its low minority admission rate (5%), despite significant recruitment efforts led by a Black dean of admissions, was attributable to a relatively low level of financial assistance. Accordingly, the faculty voted to make 60% of all scholarship funds available solely to "minority" students, a category that included not only discernible ethnic and racial groups, but also persons with social, educational, cultural, and/or financial disadvantages, such as Appalachian Whites. Mr. Flanagan, a Caucasian student, applied for aid and was rejected ostensibly because he was not a minority. The non-minority 40% of aid had been exhausted, and the remaining funds were reserved for minority students no needier than he (and even in some instances, less needy). Flanagan sued and won. The district court, in *Flanagan v. President and Directors of Georgetown College*,[4] held that the plaintiff had a good Title VI cause of action because Georgetown had implemented an unjustified race-based preference in the form of reverse discrimination. *Flanagan* is many years of affirmative action litigation behind us, but it stands unreversed and unqualified. Without engaging in prolonged constitutional exegesis, it is fair to suggest that, bolstered by the proper factual showing of the inability of minority lawyers to handle debt burdens because of their disparate treatment in the big-time job market, the case could be made under *Regents of the University of California v. Bakke*,[5] *Johnson v. Santa Clara Transport Agency*,[6] and even, with more hard work, under *City of Richmond v. Crosen*[7] that neither the fourteenth amendment nor Title VI should stand in the way of a voluntary affirmative action plan to benefit minorities by promoting diversity within the legal profession through overcoming racially-related barriers to entry.

Proof of the past discrimination would not be necessary, only a showing that, to assure reasonable access to law school in the future, voluntary racial preference in obtaining one particular benefit, however stringent that preference, is essential. The present imbalance in the high-paying sector of the profession will result in a more serious imbalance in the profession in the future unless voluntary remedial action is implemented now. Race has to be taken into account or the presence of minorities in the legal profession will remain *de minimus*. The case is not easy nor the decision to overturn *Flanagan* certain. But to not try is to condone economic exclusion that will lead to the same result that the state achieved prior to the Supreme Court's comdemnation of purposeful segregation in law school in *Sweatt v. Painter*,[8] and *Sipuel v.*

3. 2.1% Black, 1.1% Hispanic, and 1.5% Asian.
4. 417 F. Supp. 377 (D.D.C. 1976).
5. 438 U.S. 265.
6. 480 U.S. 616 (1987).
7. 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989).
8. 331 U.S. 629 (1950).

Board of Regents.[9] Consequently, what law did in the early 1950's, economics can do in the early 1990's.

Admissions policies that place the LSAT in context and race-conscious financial aid policies in and of themselves are necessary, but not sufficient to induce the broadest possible racial cross-section of college students to attend law school. A series of racial discrimination cases has to be carefully developed against law firms that are oblivious to the enactment of Title VII in order to prove that the walls can come tumbling down. More law schools than the current forty-nine of 174 responding to the Law School Admission Council have to offer tutorial programs and special legal writing programs to enable insecure, test-shy Black students to overcome. Most of all, deans and faculty have to care about the complexion of the profession and commit themselves to altering it by every legal, feasible means. Cheap? No. Easy? No. Inevitable? No. Vital to the continued legitimacy of our profession? Yes.

9. 332 U.S. 631 (1948).