Buffalo Law Review

Volume 20 | Number 2 Article 9

1-1-1971

Increasing Minority Admissions in Law Schools—Reverse Discrimination?

Clarence J. Sundram

COMMENTS

INCREASING MINORITY ADMISSIONS IN LAW SCHOOLS — REVERSE DISCRIMINATION?

This comment will examine the constitutional questions involved in affirmative attempts to remedy the shortage of minority lawyers by increasing the enrollment of minority students at a state law school. The problem will be examined within the framework of a hypothetical fact situation.

The Faculty of a state law school, recognizing the need for more minority lawyers, decided to take affirmative action toward fulfilling this need. They created a Minority Students Program (MSP) at the law school not only to encourage more minority students[1] to apply for admission, but also to facilitate the admission of those that did apply.

Normally, applicants are admitted to the law school solely on the basis of their college grades and performance on the Law School Admission Test (LSAT). Students with the highest combined scores are accepted in descending order until all available seats at the law school are filled. With the inception of the MSP, however, exceptions are made for minority students.[2] The normal admissions criteria are waived. The applicants are required to take the LSAT but the scores are not as critical as in the case of white students. College grade requirements are not strictly adhered to either, and in some instances, if the applicant has successfully completed 96 credit hours of undergraduate work, the bachelor's degree requirement is waived as well.

The decision to admit a minority student is made on the basis of personal and faculty recommendations, attitude, and also on the basis of the recruiter's determination of the applicant's motivation to study law *as a means of helping his community.* The school helps to finance the student's education through loans, scholarships and work-study grants. There are no quotas for minority students, but as a practical matter, the number of minority students is limited by the availability of space, facilities, and money.[3]

Thirty-five minority students were accepted by the school in September, 1970. Since the number of entering freshmen is limited by the availability of classroom space and other facilities, it is apparent that 35 otherwise qualified non-minority students were rejected by the school. It is clear that

1. For purposes of this comment, a minority student is defined as a student from an identifiably disadvantaged segment of society.

2. The MSP does not include "qualified" minority students admitted under the normal standards, and these students are excluded from present consideration.

3. There are other inherent limitations in the MSP. The number of minority students that can be properly educated and trained may depend on the availability of tutors, etc.

had the school applied its normal admissions standards with an even hand, none of the students in the MSP would have been admitted, and in that event the 35 seats would have been filled by qualified non-minority students.

The situation that this comment will concern itself with can be stated as follows: The qualified non-minority students displaced by the MSP bring a Civil Rights Action in federal court pursuant to Title 42 United States Code section 1983[4] and Title 28 United States Code section 1343 (3),[5] alleging that the law school admissions policy promotes unconstitutional discrimination on the basis of race and ethnic background and thus deprives them of an equal educational opportunity in violation of the fourteenth amendment to the Constitution. Alleging irreparable harm if the denial of their educational opportunity goes unchecked, they petition the court for declaratory and injunctive relief and such other relief as the court may deem appropriate.[6]

4. 42 U.S.C. § 1983 (1965). "Civil action for deprivation of rights.—Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. 28 U.S.C. § 1343 (1969). "Civil rights and elective franchise.—The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States of by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

6. Among the remedies available under § 1983 are:

(1) Injunctive relief. Hague v. CIO, 307 U.S. 496 (1939); Woods v. Wright, 334 F.2d 369 (5th Cir. 1964); Abernathy v. Patterson, 295 F.2d 452 (5th Cir.), *cert. denied*, 368 U.S. 986 (1961); Burt v. New York, 156 F.2d 791 (2d Cir. 1946). Only manifest oppression justifies federal courts' interference with state administrative officers acting under color of office in good faith effort to perform their duties, and there must be exceptional circumstances and a clear showing of necessity for the protection of constitutional rights by injunction. NAACP v. Gallion, 290 F.2d 337 (5th Cir.), *vacated on other grounds*, 368 U.S. 16 (1961). *See Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1061-63 (1965).

(2) Damages. Basista v. Weir, 340 F.2d 74 (3d Cir. 1965); Washington v. Official Court Stenographer, 251 F. Supp. 945 (E.D. Pa. 1966). Both damages and equitable relief are available. The only argument against granting both is that an award of damages may be a drastic and unduly burdensome remedy. The reason for this is that § 1983 actions often seek substantive changes in constitutional law and create new standards of conduct. To apply the new standards retroactively to the conduct in question by awarding damages for failure to comply with the new standards would be irrational as the actor could not possibly have known that he was acting unconstitutionally. *See* Note, *Section 1983: A Civil Remedy For The Protection of Federal Rights*, 39 N.Y.U.L. REV. 839, 846-49 (1964).

(3) Declaratory Judgment. Adams v. Park Ridge, 293 F.2d 585 (7th Cir. 1961); Glancy v. Parole Board of Michigan, 287 F. Supp. 34 (W.D. Mich. 1968). *See generally* 15 AM. JUR. 2d, *Civil Rights* § 70 (1964); Annot., 171 A.L.R. 920 (1947).

The initial question before the federal court is one of jurisdiction. Since the alleged deprivation of constitutional rights is sanctioned by a state law school, the action meets the "color of law" requirement of § 1983. As the complex question of exhaustion of remedies is beyond the scope of this comment, it will be assumed that the petitioners have exhausted all available state administrative and judicial remedies.[7]

The standing of the petitioners to bring this action is apparent; they are the parties directly interested and affected by the policy under attack. Their interest is personal and direct.[8]

The issue before the court is whether an admissions policy adopted by a state law school which classifies applicants on the basis of race and ethnic background, applying one set of admissions standards to white students generally and another less stringent set of standards to non-whites, denies the better qualified white students who have been refused admission, an equal educational opportunity in violation of the equal protection clause of the fourteenth amendment to the Constitution.

A constitutional evaluation of the MSP cannot be properly made without reference to the problems it was designed to remedy. Black lawyers[9] represent less than one and one-half percent of the total number of lawyers in the United States[10] while blacks comprise 12 percent of the total population.[11] The shortage of black lawyers is particularly severe in the South

---

7. The ordinary requirements of exhaustion of remedies do not apply to some civil rights cases, but they have not been eliminated for all civil rights cases. United States *ex rel.* Wakeley v. Commissioner of Pa., 247 F. Supp. 7 (D.C. Pa. 1965). Cases holding that exhaustion of remedies is *not* required include: Houghton v. Scranton, 392 U.S. 639 (1968); McNeese v. Bd. of Educ., 373 U.S. 668 (1963); Powell v. Workmen's Compensation Board, 327 F.2d 131, 135 (2d Cir. 1964).

On the other hand, the following cases hold that exhaustion is required: Parham v. Dove, 271 F.2d 132 (8th Cir. 1959); Baron v. O'Sullivan, 258 F.2d 336 (3d Cir. 1958); Madera v. Board of Education, 267 F. Supp. 356 (S.D.N.Y.), *rev'd on other grounds,* 386 F.2d 778 (2d Cir. 1967), *cert. denied,* 390 U.S. 1028 (1968).

See generally Note, 82 HARV. L. REV. 1486 (1969); Comment, *Exhaustion of State Remedies Under The Civil Rights Act,* 68 COLUM. L. REV. 1201 (1968).

8. For a recent discussion of the problems of standing, *see* Lee v. Nyquist, 39 U.S.L.W. 2212 (W.D.N.Y. Sept. 30, 1970).

9. Although the MSP includes among others Puerto Ricans, Mexican Americans, American Indians and Appalachian whites, this comment will discuss the issues primarily in terms of black Americans. This is not because the interests of the other groups are in any way less worthy of concern but because, first, the students in the MSP are predominantly black and second, as a practical matter, the arguments concerning black students are generally equally valid for other minority groups.

10. Comment, *Current Legal Education of Minorities: A Survey,* 19 BUFFALO L. REV. 639, 640 (1969).

11. This figure was obtained in a telephone conversation between the writer and governmental personnel in the U.S. Department of Interior at Wash., D.C., on Oct. 20, 1970.

and Southwest.[12] In Alabama, for example, there is one black lawyer for every 41,700 black people as opposed to one white lawyer for every 670 white people.[13] However, the shortage of black lawyers is not a phenomenon limited to the South. For instance, in New York State, while there is roughly one white lawyer for every 334 white people, there is one black lawyer for every 2,180 black people.[14]

The need for black lawyers is immediate and apparent.[15] Lawyers in America have traditionally been leaders and have been dominant in societal power structures.[16] Black lawyers operating in this tradition can play an important role in the march of their people towards ultimate equality. They can help their people by performing functions that white lawyers are either unwilling or unable to perform. For example, most white attorneys in Alabama would refuse to handle a Civil Rights case.[17] In the growing area of Neighborhood Legal Services (NLS), black lawyers who have the advantage of identification with a large percentage of the clientele can communicate with them on a level that is often impossible for a white "outsider" to attain.[18] Moreover, the inspiriting effect of "people's lawyers" fighting for the redress of grievances and the vindication of legal rights cannot be over-estimated.[19]

Black people generally have not had a high regard for the black lawyer, at least until recent times, and consequently interest in the legal profession

---

12. ". . . [T]here are fewer than three hundred forty lawyers to serve over thirteen million Negroes in the South and Southwest. . . ." Carl, *The Shortage of Negro Lawyers: Pluralistic Legal Education And Legal Services For The Poor,* 20 J. LEGAL ED. 21 (1967) (footnotes omitted).

13. *See* Comment, *supra* note 10, at 640.

14. 116 CONG. REC. E 7996 (daily ed. Sept. 2, 1970).

15. Carl, *supra* note 12, at 30-31. "We must encourage Negroes to become lawyers and, thus, enable them to have a larger voice in their own and their people's destiny; to share the obligations as well as the privileges of citizenship; and to achieve self-fulfillment as individual members of society." Gosset, *Bar Must Encourage More Negro Lawyers,* TRIAL, April/May, 1970, at 24. At the time his article appeared, Mr. Gosset was president-elect of the ABA.

16. Tollett, *Making It Together — Texas Southern University School of Law,* 53 JUDICATURE 366 (1970).

17. Comment, *Negro Members of the Alabama Bar,* 21 ALABAMA L. REV. 306, 331 (1969).

18. Carl, *supra* note 12, at 30-31.

19. There must be more Negro lawyers if the Negro is to have enlightened, effective and responsive leadership during these difficult and turbulent days as the Negro struggles to attain his full stature as a first-class citizen of our country. There must be more Negro lawyers if the Negro is to find his way into the mainstream educationally, economically, politically and socially: more Negro lawyers who are aware of, and sensitive to, the specific legal problems of low income groups; Negro lawyers who can make such phrases as 'law and order,' 'Due process of law,' and 'The American Dream' meaningful in the life of the Negro and in the life of the Negro community.

Id. at 21-22.

has been minimal.[20] Those who were attracted to the profession found their path strewn with almost insurmountable financial and educational obstacles.[21] It has been argued that these obstacles must be overcome by both blacks and whites alike and therefore are not discriminatory.[22] Since discrimination, however, can be defined as an "adverse effect" on educational opportunities based on race, creed, sex or national origin, the only way in which one can determine if a policy of *equal* treatment of black and white is discriminatory is to examine its operational consequences.[23] Such an examination reveals that the policy applied has resulted in a disproportionately small number of black lawyers.[24]

One cannot afford to overlook the role of the law school in permitting the shortage of black lawyers to continue undiminished. Law schools generally have operated on the premise that the brightest students make the best lawyers; they have attempted to cater exclusively to the intellectual elite. However, there are no tests and no real means of ensuring that bright students are not excluded from law school. The LSAT, for example, may

20. Carl and Callahan, *Negroes And The Law,* 17 J. LEGAL ED. 250, 254 (1965). Blacks distrust the law in practice. They see it in terms of white police and white judges using white law against blacks. TIME, Jan. 5, 1970, at 32.

21. The principle obstacle is money. *See* Comment, *supra* note 17, at 319 n.42. Proportionately fewer blacks are middle class and consequently fewer can afford the high cost of a legal education. TIME, Jan. 5, 1970, at 32. In addition, our society is obsessed with the idea of testing children for any and every conceivable reason. School children are administered evaluative tests once a year on an average. Because these tests are usually validated against white middle class control groups, they fail to accurately measure the skills of any other people. In so far as racial categories correspond to cultural categories, these tests are racially biased. The cumulative effects of such testing on the educational progress of a black child are devastating. He scores poorly on his first test and is placed in a slower and less challenging group. Consequently he falls further behind and his chances of ever catching up rapidly disappear. The next test proves this. This process continues unchecked throughout his education. If he does somehow make it through high school, he is once again confronted with the testing barrier—the Scholastic Aptitude Test (SAT) which is required by most colleges. Like the other tests, the SAT reflects a middle class cultural bias and, not surprisingly, the black student scores poorly. If, however, he survives this test and makes his way through college, he once again runs into the testing barrier—the LSAT. This test has its own unique deficiences. The LSAT HANDBOOK, Educational Testing Service (1964) at 44 indicates that LSAT scores are not completely accurate predictors of grades. *See generally* Note, 68 COLUM. L. REV. 691 (1968); Ruch and Ash, *Psychological Testing,* 69 COLUM. L. REV. 608 (1969); Murray, *The Tryout System,* 21 J. LEGAL ED. 317 (1969); Scoles, *Challenge and Response in Legal Education,* 48 OREGON L. REV. 129, 135 (1968).

22. Kaplan, *Equal Justice In An Unequal World: Equality For The Negro—The Problem of Special Treatment,* 61 NW. U. L. REV. 363 (1966).

23. Blumrosen, *The Duty of Fair Recruitment Under The Civil Rights Act of 1964,* 22 RUTGERS L. REV. 465, 482 (1968).

24. "Only those who would blind themselves to the reality of the first 300 years of American history can doubt that the stark imbalance in things like college enrollment is the result of *racial discrimination.*" Askin, *The Case For Compensatory Treatment,* 24 RUTGERS L. REV. 65, 79 (1969).

validly predict the success or failure of a white middle class student in law school, but when the applicant is one whose cultural orientation deviates from the white middle class norm, the validity of any prediction is open to question.[25] The premise itself would be valid only if the sole concern of the law schools was to produce a standard commodity—a colorless, color blind, generalist with uniform proficiency in all areas of law. As this is neither desirable nor possible, law schools must be concerned with meeting the strong need in the legal profession for socially motivated lawyers and especially black lawyers who can fulfill the particular needs of the black community.[26] The fact that there are only 1,285 black law students in the United States at present[27] is eloquent testimony that the need is not being fully met.

With the advent of such community projects as NLS and Legal Aid which have a large minority clientele, there is an acute need for socially motivated black lawyers—lawyers who can gain the trust of their clients; lawyers who can empathize with their clients; lawyers whose skin color will not erect insurmountable barriers between themselves and their clients —in a word, lawyers who will be "people's lawyers."[28]

Given the fact that there is a severe shortage of black lawyers, the court must decide whether the use of racial classifications for the purpose of increasing the number of black students admitted to law school is a reasonable means of rectifying the shortage.

Implicit in this question is the threshold question of whether a state law school[29] can create racial classifications or whether it must be neutral and color-blind in its approach.

---

25. *See* note 21 *supra* and note 53 *infra.*

26. *See* note 19 *supra.*

27. TIME, Jan. 5, 1970, at 32.

28. 15 STUDENT L.J. 13 (1969).

> There are reasons why a special effort should be made to attract Negro students to study law. In the effort to provide equal rights and opportunities for Negro citizens, there are heavy responsibilities and burdens for lawyers to carry. These can best be met by a Bar which includes Negro lawyers in significant numbers, for it is those lawyers who most clearly understand the problems and difficulties faced by members of the Negro community. In bringing legal counsel to the poor, in administering criminal justice, as well as in the struggle for civil rights, an increased number of Negro lawyers can make a great contribution.

Toepfer, *Harvard's Special Summer Program,* 18 J. LEGAL ED. 443 (1966).

29. Private universities may also be bound by the same restrictions applicable to state universities. Comment, 20 SYRACUSE L. REV. 911 (1969). *See generally* 15 AM. JUR. 2d, *Civil Rights* § 49 (1964); *id.* § 8 (Supp. 1970); Annot., 87 A.L.R. 2d 167 (1963). *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), where the court held that the power invested in Congress to enforce the thirteenth amendment by appropriate legislation includes the power to enact laws, direct and primary, operating on the acts of individuals, whether sanctioned by state legislation or not.

Racial classifications are generally suspect because they tend to stigmatize and single out blacks for hostile treatment.[30] However, where the purpose of the state school, as evidenced by its actions, is clearly not hostile and where the group normally the victim of discrimination is being benefitted, the need for suspicion would appear to be absent.[31] Racial classifications were not foreclosed by the Supreme Court decisions in *Brown v. Board of Education*[32] and *Bolling v. Sharpe*,[33] and the broad terms of the equal protection clause may permit the state to classify on the basis of race in an appropriate case.

> Where its [racial classification] use is to insure against, rather than to promote deprivation of equal educational opportunity, we cannot conceive that our courts would find that the state denied equal protection to either race by requiring its school boards to act with awareness of the problem.[34]

The equal protection clause does not proscribe classifications based on need[35] and in some circumstances race may indeed be a relevant indicator of individual need.[36]

---

30. Hunter v. Erickson, 393 U.S. 385 (1969); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944). In *our* society legislation favoring Negroes, however, would not stigmatize whites. Wright, *The Role of the Supreme Court In A Democratic Society,—Judicial Activism or Restraint?* 54 CORNELL L.Q. 1, 17 (1968).

31. Askin, *supra* note 24, at 73.

32. 347 U.S. 483 (1954).

33. 347 U.S. 497 (1954).

34. Offermann v. Nitkowski, 378 F.2d 22, 24 (2d Cir. 1967).

> It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation, on the ground that this interference with the status quo would involve 'consideration of race.' When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions—especially conditions that have been judicially condemned—their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the 'consideration of race' which the Constitution discountenances.

Wanner v. County School Board of Arlington County, Va., 357 F.2d 452, 454 (4th Cir. 1966). *See* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Virginia Board of Elections v. Hamm, 379 U.S. 19 (1964), *aff'g* 230 F. Supp. 156 (E.D. Va.); United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967); Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Porcelli v. Titus, 302 F. Supp. 726 (D.N.J. 1969); Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S. 2d 281, *cert. denied*, 379 U.S. 881 (1964).

35. *E.g.*, no fourteenth amendment stricture is violated by restricting welfare payments to the needy.

36. "[I]n appraising individuals for many purposes race cannot be ignored if the approach is to bear a realistic relation to the person's circumstances; in some instances race may be the only criterion that will provide satisfactory correlation with a desired goal." *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1113 (1969)

> . . . [T]he decisions of the Supreme Court do not establish a rigid principle of constitutional color blindness. Rather, the opinions although not yeilding a clear neutral principle, suggest that in appropriate circumstances—usually described in terms of 'justification'—the state and national governments may classify by race.[37]

Where the avowed purpose of the school is to provide more minority lawyers for the minority community, race and other minority characteristics are indeed valid criteria for classification.[38] Racial classifications, then, may be permissible so long as they are "benign" and do not tend to stigmatize members of the class.

Determining whether a classification is benign in a given case may not be a simple task, especially given the diversity of opinion within the class itself on this question.[39] In an extremely sensitive area such as race relations, what appears to be benign today may well be exposed as invidious tomorrow,[40] and in departing from the easily applied tests under principles of color blindness a court decision upholding a benign classification may well become precedent for future hostile classification.[41] It could be argued that the risk of such actions in the future may be too great to be undertaken, especially when in practical terms the actual benefit to the class through preferential treatment in the allocation of educational resources would, in all probability, be grossly inadequate.[42] The fact that this risk does exist warrants caution on the part of the court in scrutinizing both the reasonableness of the racial classification and the permissibility of its possible purposes.

In the present case, the risk of hostile classification is minimal[43] and the importance of the long range goal of the MSP is too great to permit it to be subverted by nebulous and conjectural fears. The obvious purpose of the racial classification is to achieve the goal of producing more minority lawyers to meet the needs of the minority community. The question to which the court must now address itself is whether the purpose is a per-

---

(hereinafter cited as *Developments*). "[I]f the state's objective is to achieve racial desegregation, race is necessarily the criterion for distinction at some stage of the program—either in establishing new school districts on the basis of racial proportions or in determining which students should be bused on the basis of race." *Id.* at 1109.

37. Vieira, *Racial Imbalance, Black Separatism, And Permissible Classification By Race*, 67 MICH. L. REV. 1553, 1604-05 (1969). *See also* Carter, *Equal Educational Opportunity For Negroes—Abstraction or Reality*, 1968 U. ILL. L.F. 160, 186; United States v. Jefferson County Board of Education, 372 F.2d 836, 876-77 (5th Cir. 1966).

38. Hughes, *Reparations For Blacks?*, 43 N.Y.U.L. REV. 1063, 1067 (1968).

39. *See generally Developments* at 1113-15.

40. Vieira, *supra* note 37, at 1610.

41. Kaplan, *supra* note 22, at 382.

42. *Id.* at 379.

43. The risk of hostile classification is diminished considerably here as the student body and especially the minority students have had a voice in shaping the MSP.

missible one, and, if so, whether the means of implementation are rationally related to the purpose.

If the law school has not actively discriminated against minority students in the past, whether it has a duty to remedy the racial inequities in admissions policies is a question not easily resolved.[44] Prior to the decision in *Briggs v. Elliott*[45] it would have appeared to follow from the Supreme Court decision in *Brown* that there was a duty to remedy the inherently unequal effects of separation and exclusion of black students from schools. However, on remand from the Supreme Court following reversal, the District Court in *Briggs* made the following distinction: "The Constitution . . . does not require integration. It merely forbids discrimination."[46]

The Court of Appeals for the Fifth Circuit in *United States v. Jefferson County Board of Education*[47] rejected this distinction:

> The defendants contend . . . that school boards have no affirmative duty to integrate. . . . *This argument rests on nothing that the United States Supreme Court held or said in Brown or any other case.* . . . The portion of the [*Briggs*] opinion quoted is pure dictum.[48]

The question is still an open one as the Supreme Court has not dealt definitively with the issue.[49]

For present purposes, however, what is important is not whether there is a *duty* to take affirmative action to remedy racial inequity, but whether it is permissible to voluntarily take such action. In the analogous

---

44. In the analogous area of school desegregation, the lower federal courts are divided. Cases holding that there is no affirmative duty to integrate include: Offermann v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir.), *cert. denied,* 380 U.S. 914 (1964); Avery v. Wichita Falls Independent School District, 241 F.2d 230, 233 (5th Cir. 1957); Rippy v. Borders, 250 F.2d 690, 692-93 (5th Cir. 1957); Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955); and Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind.) *aff'd,* 324 F.2d 209 (7th Cir. 1963).

On the other hand, the following cases have held that there is an affirmative duty to integrate: United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing,* 380 F.2d 385 (1967); Blocker v. Board of Education of Manhasset, N.Y., 226 F. Supp. 208 (E.D.N.Y. 1964); Branche v. Board of Education of Town of Hempstead, 204 F. Supp. 150 (E.D.N.Y. 1962). *See also* Taylor v. Board of Education of City of New Rochelle, 294 F.2d 36 (2d Cir.), *cert. denied,* 368 U.S. 940 (1961).

45. 132 F. Supp. 776 (E.D.S.C. 1955).

46. *Id.* at 777.

47. 372 F.2d 836 (5th Cir. 1966).

48. *Id.* at 861-62.

49. The question may be settled by the Supreme Court this term. Wall Street Journal, Oct. 12, 1970, at 4, col. 2. If the Court decides that there is an affirmative duty to remedy racial imbalance in schools, it would be interesting to consider the status of black students who have graduated from "inherently unequal" schools. Obviously, remedies aimed at the school level alone cannot be expected to assist them in any way. If "reparations" are to be made, the remedial measures would have to be directed to higher educational levels as well.

area of school desegregation, the decisions are uniform in holding that there is no mandate precluding voluntary integration.[50]

Once it is clear that the law school does have the power to voluntarily take affirmative action to remedy racial inequities in admissions policies, the only question left to decide is whether the measures taken are arbitrary, capricious or unreasonable.[51] If the measures adopted fulfill an important societal need without destroying a prior *valid* means of accomplishing the objective, this mitigates in favor of an finding of non-arbitrariness.

The admissions tests used by law schools do not measure essential attributes for potential lawyers such as attitude, motivation and ability to empathize; thus serious doubts about their validity are raised.[52] More fundamentally, however, the tests do not measure for blacks what they are supposed to measure—aptitude for legal work.[53] The white applicants cannot insist that invalid tests be applied to exclude black students from law school. Abandoning application of these questionable tests for black appli-

---

50. Offermann v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Wanner v. County School Board of Arlington, 357 F.2d 452, 455 (4th Cir. 1966); Deal v. Cincinnati Board of Education, 369 F.2d 55, 61 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967); Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Stell v. Savannah-Chatham County Board of Education, 333 F.2d 55 (5th Cir.), *cert. denied,* 379 U.S. 933 (1965); Olson v. Board of Education of Malverne, 250 F. Supp. 1000 (E.D.N.Y. 1966); Dowell v. School Board of Oklahoma, 244 F. Supp. 971 (W.D. Okla. 1965); Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964), *vacated on other grounds,* 351 F.2d 323 (3d Cir. 1965), *merits of original opinion adhered to,* 250 F. Supp. 81 (D.N.J. 1966); Addabbo v. Donovan, 16 N.Y.2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68, *cert. denied,* 382 U.S. 905 (1965); Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied,* 379 U.S. 881 (1964).

51. Green v. County School Board of New Kent County, 391 U.S. 430 (1968); Vetere v. Allen, 15 N.Y.2d 259, 206 N.E.2d 174, 258 N.Y.S.2d 77 (1965); Van Blerkom v. Donovan, 15 N.Y.2d 399, 207 N.E.2d 503, 259 N.Y.S.2d 825. (1965).

52. Ramsey, *Law School Admissions: Science, Art or Hunch?,* 12 J. LEGAL ED. 503, 517 (1960).

53. 15 STUDENT L.J. 23 (1970).

> [T]o say that the Negro youth is unable to meet the traditional standards for measuring qualifications to study law is not to say that he is inferior; that is, without the equipment necessary to acquire a legal education; and incapable of the mental agility to comprehend and handle the law. For our purposes, qualification must be defined as the innate and, in many cases, untested and undemonstrated ability to succeed at the study of law. Qualification to study law should not be confused or equated with methods used to determine qualification, unless, of course, the methods used to determine qualifications are inclusive of all possible methods. It would be of little value to say that one has the ability to study law if there were no possible way to determine that ability. The question is: how is qualification to be determined? . . . None of the . . . justifications for present methods of determining qualifications to study law are applicable to the Negro youth. He has not been sufficiently exposed to cultural advantages and educational materials which tend to develop innate abilities. . . . This being true, many Negro youth may be excluded from the study of law, not because they lack ability, but rather because inappropriate

cants therefore violates no fourteenth amendment equal protection proscription.[54]

Another factor the court must consider in determining whether the measures are reasonable is the burden imposed on qualified white students by the MSP. It is clear that while a court may approve of a program to provide for equal educational opportunities for minority students, it cannot permit the program to deprive the majority group of *their* constitutional rights.[55]

> There is no perfectly satisfactory solution for this dilemma. We must acknowledge that the large institutional changes which will be necessary in order to achieve rectification of major social injustices can only be achieved at the cost of some individual injustice. . . . [N]obody should be asked to bear too heavy a burden of sacrifice.[56]

It is relevant to the solution of this problem that the history of black Americans is one of injustice and discrimination. The court would have to balance the interest of rectifying these past injustices against the interest in

---

> means of determining their ability have been and are being employed. . . . The only satisfactory test of determining a Negroe's ability to study law is to afford him an opportunity to do so.

Carl and Callahan, *supra* note 20, at 258-59. *See also* Blumrosen, *supra* note 23, at 501; Askin, *supra* note 24, at 77; Comment, *supra* note 10, at 644 n.32. *See* note 21 *supra*. *Cf.* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

54. Porcelli v. Titus, 302 F. Supp. 726 (D.N.J. 1969). (School board suspended policy of requiring principals and vice-principals to be appointed on the basis of test scores. The validity of the tests was questioned and the Board realized that if Negroes were to be appointed to these positions, the tests would have to be abandoned. A § 1983 action was brought by qualified white applicants who were passed over for the positions in favor of Negro applicants who had not passed the tests. The court held that the appointment of the Negroes did not violate the constitutional rights of the qualified whites.) A similar controversy has arisen over a proposal by school Chancellor Harvey B. Scribner that licensing examinations for teachers and supervisors in the New York City School System be eliminated in favor of less rigorous requirements. This would permit more Negroes and Puerto Ricans to qualify for the positions. The present test requirements are being challenged in a federal court suit by the NAACP Legal Defense and Educational Fund, on the ground that they discriminate against Negroes and Puerto Ricans and do not measure fitness and merit. N.Y. Times, Oct. 15, 1970, at 1, col. 2. *Id.*, Oct. 16, 1970, at 40, col. 6.

55. Olson v. Board of Education, 250 F. Supp. 1000 (E.D.N.Y. 1966). "The constitutional rights of one class of citizenry may not be sacrificed or suppressed in order to vindicate or render more secure the constitutional rights of another class." Addabbo v. Donovan, 22 App. Div. 2d 383, 390, 256 N.Y.S.2d 178, 185 (2d Dep't) (concurring opinion), *aff'd*, 16 N.Y.2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68, *cert. denied*, 382 U.S. 905 (1965).

56. Hughes, *supra* note 38, at 1072.

> There are instances where it is not only justified, but necessary, to provide for such allegedly 'unequal treatment' in order to achieve the equality guaranteed by the Constitution.

Taylor v. Board of Education of City School Dist., 191 F. Supp. 181, 196 (S.D.N.Y.), *appeal dismissed*, 288 F.2d 600 (2d Cir. 1961). *See also* Hughes, *supra* note 38, at 1070-71.

not imposing temporary injustices on white students. Practical considerations counsel that the "injustices" imposed on white students be minimized to prevent the creation of undue antagonism and resentment in the larger society when the feeling grows that remedial measures are overstepping reasonable bounds.[57] The burdens imposed by the use of racial classifications, albeit benign, may have a negative effect by interfering with efforts to create a society in which people are not judged by their color.[58]

In the instant case, if the burden imposed on the white students by the MSP was to deprive them of their legal education entirely, it would appear that *their* constitutional right to an equal educational opportunity is being violated. But, if the burden imposed on them would only require them to attend a less desirable law school, arguably this is permissible. The latter result is the more likely one in this case as the white students have met fairly high qualifying standards. They should therefore experience no great difficulty in gaining admission into another law school.

The ideal solution to the "dilemma" would be to adopt a course of action that would not antagonize the white students by depriving them of their favorable position and would at the same time fulfill the societal need for more black lawyers. This solution would be possible only if the law school facilities were expanded so as to accommodate not only the same number of white students but also an increased number of black students. Implementation of this solution would require that the government—state and federal, executive and legislative—accept its responsibility to protect the equal educational opportunities of blacks and act accordingly to provide practical means of meeting educational needs. It is apparent that the courts cannot accomplish this task as they lack the power to compel the legislature to appropriate the funds required to expand the educational facilities.

Until the government makes implementation of this "ideal solution" possible, however, the courts should be cognizant of the fact that an individual educational institution working with severe limitations of space and facilities will be compelled to curtail to some extent the past "privileges" of white students in its attempts to make meaningful inroads in the area of minority admissions.

---

57. Vieira, *supra* note 37, at 1610.

58. *Developments* at 1113.

> For the foreseeable future we will have a complex of laws requiring citizens in various of their activities to be color blind. . . . The principle all these laws are attempting to establish can be phrased in different ways with different types of emphasis. One is that man is entitled to be judged on his individual merit alone; another is that race is irrelevant to the worth of an individual. Whatever the formulation, however, a statute specifically granting Negroes a benefit tends to undermine the principle we are working so hard to establish.

Kaplan, *supra* note 22, at 379-80.

There is a related problem in determining whether or not the remedial measures are reasonable. It could be argued that the petitioners as individuals are not responsible or morally culpable for the past deprivation of rights of black Americans and therefore reverse discrimination[59] against them is unwarranted; and, by the same token, the individual black students admitted through the MSP have not shown themselves to be victims of discrimination and therefore remedial measures to aid them are inappropriate. These arguments cannot withstand close scrutiny.

Stripped of its emotional appeal, the former argument amounts to a plea for the preservation of an illicit advantage gained, albeit innocently, through unfair practices.[60] There is no constitutional right to have inequality perpetuated.[61] If equal treatment is applied to an unequal situation without any adjustments being made, the differential impact of the application of uniform standards will only serve to perpetuate the oppression of the former victims of unequal treatment.[62]

The answer to the latter argument lies in the class character of the discrimination against blacks.

> The reality of black oppression in this country, however, lies in its class character. Black people were brought to this country as a class, and segregated as a class. . . . And that is why every individual act of discrimination against an individual black person has had an impact on all black people. . . . Any exclusionary or discriminatory practice stigmatizes and degrades the entire class, and the way to end black oppression is not merely to prevent indi-

---

59. In the context of employment, Professor Blumrosen suggests that reverse discrimination is a "red herring designed to distract attention from the fact that the employer involved has been discriminating and that this discrimination has denied to the minority employment opportunities over substantial periods of time, which in many cases have gone to members of the 'white community' only. The 'discrimination in reverse' argument, in effect, reflects a desire to maintain the privileged sanctuary for white employees which the employer had established by his past discriminatory practices." Blumrosen, *supra* note 23, at 489. *See* Askin, *supra* note 24, at 70.

60. Blumrosen, *supra* note 23, at 492. This argument has often been illustrated by analogy to a footrace. Let us suppose that there are two runners at the start of a footrace; one of them is shackled while the other is unencumbered. As the race progresses, the shackled runner drops far behind. If at this point the shackles were removed and the race permitted to continue, *would the result be fair?* Does it make a difference who placed the shackles on the runner? If the race was a relay, does it make a difference that the subsequent runners are no longer shackled? The answers to these questions are an emphatic "no." Yet this is precisely the proposition for which the petitioners argue. They wish to preserve intact the lead that has been built up by unfair practices.

It is quite apparent that what fairness demands is that an adjustment be made so that the race can continue on a more nearly equal basis. Of course, the unshackled runner is relinquishing his advantage in the process, but he cannot be heard to complain as he was not entitled to it in the first place. *See* Kaplan, *supra* note 22, at 365.

61. United States v. Jefferson County Board of Education, 372 F.2d at 877.

62. *See supra* note 56 and accompanying text.

vidual acts of discrimination, but to guarantee entry of the entire class of black people into the mainstream of American life.[63]

If the harm has been inflicted upon a class, it is only fitting that the remedy be likewise directed toward the class; since the group has been discriminated against, it is only fitting that opportunities be provided for members of the group especially since the specific persons discriminated against in the past cannot be identified individually but only by their class character and affiliation.[64]

Since the petitioners in this case would have the burden of proof to demonstrate that the remedial measures are unreasonable and arbitrary,[65] it is unlikely that they could sustain it. In effect, what the law school is doing is making allowances in its admissions policy for the needs of the minority community in two ways—by providing appropriate legal help and by correcting the effects of past discrimination. There is nothing unconstitutional about that. Veterans are regularly given preference on civil service exams. "Large scale hire-the-handicapped programs are undertaken without objection; yet loss of a leg is often less of a handicap than being born with a dark skin, and physical handicaps have not been deliberately inflicted as have racial handicaps."[66]

The measures taken seem reasonably related to the school's purpose and the court would not be inclined to question the school's choice of means.[67]

It should be noted in conclusion, that while there may or may not exist a constitutional *duty* on the part of law schools to take action toward remedying the shortage of minority lawyers, a professional and moral duty to do so certainly exists. In these increasingly turbulent times, if alienation and divisiveness are to be curbed, and if the schismatic influences in our society are to be ameliorated, it will require leaders of sensitivity, insight and compassion to speak for the disenfranchised minorities.

CLARENCE J. SUNDRAM

---

63. Askin, *supra* note 24, at 76. *See also* Note, 20 U. CHI. L. REV. 577 (1953).

64. Blumrosen, *supra* note 23, at 489. There is ample precedent for this type of reparations in the case of the American Indians who were compensated for their lands, and in the case of the Jews who were compensated following World War II.

65. Tometz v. Board of Education, Waukegan, 39 Ill. 2d 593, 237 N.E.2d 498 (1968).

66. L. MILLER, in EQUALITY 29 (1965). *But see* Vieira, *supra* note 37, at 1613.

67. McLaughlin v. Florida, 379 U.S. 184, 194 (1964). There is no way of determining at this point whether the MSP will in fact benefit the minority community or will merely benefit individual students. The law school has made good faith attempts to insure that the minority community will be benefited — this was one of its primary aims in recruiting the minority students.