IN DEFENSE OF MINORITY ADMISSIONS PROGRAMS: A RESPONSE TO PROFESSOR GRAGLIA

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The most effective rebuttal of Professor Graglia's position opposing minority group admissions programs is a reading of his article. While assumedly written for the legal profession, the article eschews legal analysis for vague, unsupported suggestions that such programs may constitute "reverse discrimination." [1] The article establishes a number of premises: that the Law School Admission Test (LSAT) and undergraduate grades measure law school and professional potential with mathematical accuracy; that most law schools adopting minority admissions standards previously had selected students almost entirely on the basis of academic criteria; and that minority students unable to meet "minimum academic standards" are "unqualified." None of these are correct.

From these invalid assertions, all manner of incorrect, misleading, and even frightening conclusions are drawn: the conclusion that inadequate prelegal education cannot be compensated for in law school is erroneous; the finding that poverty and not racial discrimination is the most "unjust disadvantage" in our society is, given the economic status of most black people, irrelevant; the expectation that the society will more quickly correct racial injustices if these are combined with those resulting from poverty is wishful thinking; the intimation that it is racism to urge that Negroes do not need or prefer black attorneys is presumptuous; and the prediction that blacks will be judged as individuals and not as blacks if admitted under regular criteria is absurd.

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[1] The article cites but does not answer the argument adopted by most courts that compensatory programs for blacks are constitutionally permissible and may, in some cases, be required. Askin, *The Case for Compensatory Treatment*, 24 RUTGERS L. REV. 65 (1969).

To date, courts, particularly when reviewing school plans designed to correct past de jure or de facto racial discrimination, have not sanctioned claims by whites that such plans violate their rights. *See* Bell, *School Litigation Strategies for the 1970's*, 1970 WIS. L. REV. 257, 264-65 n.26.

As Professor Freund suggests in a work also cited (but otherwise ignored) by the Article, no constitutional issue will be raised where admissions programs are designed to reach the "disadvantaged segment of the community, whether economically, educationally, or politically." P. FREUND, ON LAW AND JUSTICE 44 (1968).

One must assume that Professor Graglia's opposition to minority admissions programs goes to their wisdom rather than to their legality.

The article is outdated in its reportage, incorrect in its legal and educational conclusions, and misguided in its asserted moral concern for racial injustice. It succeeds only in performing that serious disservice to disadvantaged minority group students (and the law schools who would aid them) which is its most frequently repeated charge against minority admissions programs.

But with all these shortcomings, a substantial number of middle America law schools which maintain an intransigent opposition to admissions policies designed to increase the number of minority group law students will likely welcome Professor Graglia's article.[2] They will note with pleasure its publication in a respected law review, and predictably will cite it to justify their continued refusal to adopt programs endorsed by leading legal organizations and a growing number of law schools.[3] It is also probable that Professor Graglia will receive praise for his courage in having taken the unpopular side of a difficult question from those law school administrators who publicly disagree with his position, but privately harbor doubts about the wisdom of programs that add substantially to their already heavy burden of responsibility. It is regrettable then that the article fails to dig below the surface of so challenging a contemporary problem in legal education, but rather parades before the reader all the old fears in a manner most likely to impress that echelon of American law schools whose academic standards are more nearly suited—according to Professor Graglia—to the abilities of the "culturally deprived" student.[4]

Based on current enrollment statistics at the nation's leading law schools, it would appear that opposition to minority admissions procedures is less a difficult issue than a lost cause.[5] But the early mis-

[2] Of the more than 140 law schools approved by the American Bar Association, a recent study indicates that approximately 50 schools enrolled 90% of all minority group students in American law schools during the 1969-70 academic year. ASSOCIATION OF AMERICAN LAW SCHOOLS, THE LAW SCHOOLS AND THE MINORITY GROUP LAW STUDENTS 12 (1970) [hereinafter cited as 1970 AALS REPORT].

[3] The major organization for minority group recruitment and placement is the Council on Legal Education Opportunity (CLEO), which is jointly sponsored by the Association of American Law Schools, the American Bar Association, the National Bar Association, and the Law School Admission Test Council. *Id.* 11.

The justification for support of minority group admissions programs is contained in a statement by CLEO Chairman, Professor Frank Sander:

> [A]t a time when society is seeking to adapt to changing conditions and when effective communication between the races is becoming increasingly important, lawyers can play a vital role. Quite apart from all that, it is morally right that these opportunities so long denied be swiftly restored and expanded.

[4] An analytical approach might be helpful in Professor Graglia's own school. When the minority population in the University of Texas Law School's 1500 student body reached 45 (20 black, 25 Chicano), the Board of Regents in August 1969 passed a rule, aimed primarily at the law school, prohibiting the admission to any college at the university of students not meeting the school's "normal admission criteria." S.E. Lee, Memorandum for 1970 AALS Report, Apr. 3, 1970.

[5] In the mid-1960's, there were only a few hundred black and other minority group students in the nation's law schools. Then, in response to a wide variety of

adventures experienced by schools attempting to increase minority enrollments have been well publicized and the solutions eventually and painfully evolved have been little noticed and not infrequently ignored in the continuing controversy sustained—one suspects—as much by a self-serving attachment to the status quo as by any unbreachable gap between traditional admission standards and minority admissions programs.

Professor Graglia asserts that neither the historic injustice done to blacks nor the alleged need for more black lawyers justifies the admission of "unqualified or unprepared students to law schools," and predicts that their admission will inevitably result in frustration and failure for the students and diminished academic credibility for the schools. While conceding that the nation's "grounds for guilt in racial matters are great indeed," and that racial injustices "must be rectified by every rational means," he warns that law schools which lower their standards to admit disadvantaged students increase the likelihood of disruptive and destructive behavior in the schools, some of which he feels are already lowering traditional standards of student performance in response to threats of "intimidation and extortion."

Much of Professor Graglia's opposition to minority admissions standards is similar to that emanating from disgruntled old grads and others who leap from the undeniably correct premise that students incapable of doing law school work should not be admitted to law school, to the wholly erroneous conclusion that law schools can and should determine student capability on the basis of undergraduate grades and LSAT scores. It assumes that through utilization of such criteria, admissions officers will unerringly select the best and most qualified applicants. This has never been the case.

Former Yale Law School Dean Louis H. Pollak, in a recently published response to a letter raising concerns surprisingly similar to those presented in Professor Graglia's article, explained that Yale admissions officers select students with a "substantial promise of high professional capacity." [6] In adherence to this standard, Dean Pollak reports that a high degree of subjective skill is necessarily required. Thus, even as to white students, grades and LSAT scores are supplemented by other criteria, including letters of recommendation, interviews, and so forth.

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recruitment and special admissions programs, the totals rose by 1968 to 1,254 black and 362 other minority group students. By 1970, these figures had almost doubled to 2,154 black and 885 other minority group students. 1970 AALS REPORT 10.

While no statistics are yet available, it is likely that the number of minority group law students will again substantially increase during the current 1970-71 school year.

[6] Fleming & Pollak, *The Black Quota at Yale Law School—An Exchange of Letters,* 19 THE PUB. INTEREST 44, 50 (1970).

Dean Pollak continues that, based on doubts that LSAT scores and college records are accurate predictors of ultimate professional distinction "for applicants whose childhood and family background are remote from the experiences and aspirations of (primarily white) middle-class America, to which our conventional indices of academic aptitude and achievement are inevitably oriented," Yale has for at least the past fifteen years given less weight to LSAT scores and college grades in assessing black (and occasionally white applicants) whose histories appear culturally atypical but reflect high promise.[7]

These students, concedes Dean Pollak, have not (with few exceptions) achieved academic distinction in law school, but many upon entering the profession "speedily demonstrated professional accomplishments of a high order." [8] Yale's standards and the similar criteria adopted by other law schools are not violative but in furtherance of sound educational policies. These policies are more visible but no less valid because they are combined with intensive recruitment programs. In fact, given the available evidence that LSAT scores and college grades do not accurately measure law school capacity, a refusal to adopt more meaningful criteria could expose a school—particularly one with a poor record of admitting minority group students—to civil rights action.[9]

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[7] *Id.* 50-51. Yale's experience with LSAT scores and minority group students is not unique. Most predominantly white schools have discovered what the predominantly black schools learned years ago: that LSAT scores are relatively unreliable predictors for black law students. The *1970 AALS Report* states that "[S]ome schools reported minority students who scored low on the LSAT performing in the upper 25% of their classes." 1970 AALS REPORT 32.

Professor Graglia reports that LSAT studies reveal no difference in the test's accuracy for "culturally deprived" students. But this was in 1968. While LSAT officials have not admitted that their tests are less accurate predictors of minority group performance, the LSAT Council meetings have continued to discuss the issue at great length, and in May 1970, the Council authorized a study to determine whether "the same prediction equations [can] properly be applied to predicting the law school grades both of Negroes and of whites." LSAT ANNUAL COUNCIL REPORT 201-02 (1970).

[8] Fleming & Pollack, *supra* note 6, at 51. The Yale law faculty, in a resolution made public in March 1969, recognized that it was infeasible to judge all applicants by admissions standards of "general applicability" and approved the continued consideration of "past educational disadvantage" and "cultural difference." The resolution was interpreted to permit the admission of up to 10% of the class according to the disparate standards.

[9] *Cf.* Green v. County School Bd., 391 U.S. 430 (1968); Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir.), *cert. granted,* 399 U.S. 926 (1970); cases cited in Askin, *supra* note 1. The thrust of these decisions is illustrated by language in Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968):

> What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.

Despite its educational inaccuracy, the administrative attractions of placing major or even sole reliance on academic qualifications would appear hard to resist. It seems a relatively simple means of selecting a first year class from the growing number of law school applicants, and is ideally suited to soothe increasingly troubled alumni. But law school admissions officers report that academic standards, even as applied solely to nondeprived students, are an inadequate measure where for every opening there are eight to ten applicants, a substantial percentage of whom submit similarly impressive academic credentials.[10]

Moreover, as every law school knows, even students with the most impressive academic backgrounds occasionally flounder on the law school curriculum. And as James McPherson[11] has so dramatically pointed out, such academic catastrophes are not limited to brilliant white students, but are perhaps more likely to befall the academically able black student, all too frequently consumed by his inability to resolve the seeming conflict between his commitment to the black community and his enrollment in law school with its allegiance to existing institutions and its procedures apparently so insensitive to contemporary social problems.[12]

In addition to its deficiencies in the areas of law and education, Professor Graglia's position is out of date. Minority admissions programs have not remained stationary. They have increased in number and effectiveness since their initial adoption only a few years ago. Many of the unfortunate experiments with tutorial programs, separate grading, and lowered retention standards that Professor Graglia parades before us have been abandoned or modified with measurable benefit to both minority group students and their schools. The conduct of faculty toward minority group students is more natural. The former are more relaxed and the latter less hostile. As the transition from a white law school with a few token blacks evolves to a multi-racial law

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[10] Harvard received more than 5,000 applications for the 1970-71 class of 550 students. The median LSAT score for these applicants was 640 (800 is the highest mark obtainable). Any effort to select a class from, say, applicants with LSAT scores above 640, would have required decisions based on meaningless decimal points of difference in academic grades. The median score for students admitted was 695, but even among white applicants some students with lower LSAT and college grades were admitted when it appeared that their capacity for exceptional accomplishment as reflected by other criteria, such as personal motivation, letters of recommendation, and extracurricular involvements, surpassed that of students with superior academic credentials.

[11] McPherson, *The Black Law Student: A Problem of Fidelities,* ATLANTIC, Apr. 1970, at 93.

[12] *Id.* 96-97; *see* Bell, *Black Law Students in White Law Schools,* 1970 TOLEDO L. REV. 539. Actually, black students are not alone in their concern that law schools may not prepare them for meaningful work in the areas of poverty and race. Nader, *Law Schools and Law Firms,* 54 MINN. L. REV. 493 (1970); Savoy, *Toward a New Politics of Legal Education,* 79 YALE L.J. 444 (1970).

school (including faculty and administration), issues of "separate facilities," "racist teachers," and "inadequate financial aid" recede.

In addition, there are now many more black and minority group law school applicants. More and more of these applicants (many of whom are the products of the increasing number of minority recruitment and admissions programs in undergraduate colleges and universities across the country) are meeting academic qualifications no different from those of their white peers.

This transition has not been easy and is far from complete, but Professor Graglia's pointed charge that minority admissions programs lead to classroom disruptions and campus violence is particularly unfair. It is certainly true that black and other minority group students have been involved in and responsible for disruptive protests in the past few years, but the turmoil that has embroiled our society and radicalized college students stems from sources far more serious than the easing of traditional academic qualifications for a few thousand black students.

In summary, and despite the criticism and continuing resistance at many institutions, the movement to increase substantially the number of black and other minority group students in American law schools has achieved a commendable measure of success. Legal challenges of the "reverse discrimination" variety have failed to materialize. Scholastic problems have been experienced, but these are as much a result of practices traceable to law faculties' low expectation of minority students' ability to keep up as with the real (but in most cases surmountable) academic difficulties minority students have encountered. As has been shown in school after school, these problems can be solved with both short and long term benefits to the students, the school, and the society.

It is not likely that successful minority group enrollment programs will automatically serve to decrease the resistance to altering what many schools self-righteously consider their "color blind" admission standards. Indeed, in the present reactionary political climate, opposition to minority admissions programs, sparked by attacks such as those made by the Vice President,[13] could increase. But opposition, politically motivated or not, cannot alter the fact that there is a serious shortage of minority group lawyers and that by earnest effort the law schools can and must play the major role in filling this need.

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[13] The Vice President criticized minority group quotas and labeled advocates of open admissions policies "supercilious sophisticates." N.Y. Times, Feb. 13, 1970, at 1, col. 2. In subsequent attacks, he modified his opposition, suggesting that educationally deprived students should attend government-financed preparatory schools, *id.*, Mar. 10, 1970, at 26, col. 2, rather than mix with the best students, whom he categorized as a "natural aristocracy." *Id.*, Apr. 14, 1970, at 30, col. 3.

Weaknesses and defects in minority group admissions programs should be identified and corrected. But criticism that concedes the appropriateness, decries the shortcomings, and urges the abandonment of efforts sincerely undertaken to remedy past racial injustices has the effect (when, as here, no alternative plans are suggested) of enshrining present practices in a policy of passive inaction at a time when considerations of law, morality, and the well-being of our society dictate that law schools follow the lead of the courts by implementation of an affirmative plan.