jobs to serve the public are often surprised when upon completion of their government service they face difficulties in obtaining equivalent positions for equivalent pay. These matters need to be studied; they must be evaluated.

IV. CONCLUSION

Although I would like to reach a more positive conclusion, I believe that the future of the black lawyer in America is as bleak in the 1980's as it was in the 1940's. The number of black lawyers is proportionately the same; however, the issues facing the poor have mulitplied beyond the black lawyer's ability to deal with them all. The new tactic being waged by the opposition is to take the offensive away from the black lawyers by placing both the black lawyer and his or her client on the defensive.

I believe that black lawyers and the black community must continue to ask our friends to assist in the prosecution of civil rights for minorities in America. The future of the black legal practitioner is the dogged battle for survival.

However, the black lawyer does him or herself no good by bemoaning the past. The past should provide us with the necessary will to be better thinkers, better leaders and more devoted followers. The black community looks to the black bar to assist them in the development of their future. The future of the black lawyer may well be inextricably tied to the growth and development of the black community.

GREAT EXPECTATIONS AND DUBIOUS RESULTS: A PESSIMISTIC PROGNOSIS FOR THE BLACK LAWYER

Ralph R. Smith*

I. INTRODUCTION

The over one million black students enrolled in United States colleges and universities constitute "the largest single pool of black intellectual manpower in the world."[1] Similarly, the black students enrolled in the nation's law schools present an unprecedented opportunity to alter substantially the relationship between the communities from which they come and American law and legal institutions. However, this is an opportunity that might well

* The author gratefully acknowledges the assistance in editing the manuscript and preparation of footnotes of his colleague, Karen Porter, J.D., 1974 Northeastern University School of Law.

1. C.R. Wharton, Jr., *Education and Black Americans: Yesterday, Today and Tomorrow* (Feb. 19, 1978). *See* W.J. Wilson, *The Declining Significance of Race? Implications for the 1980's* (Jan. 5, 1979) (paper presented to Section on Minority Groups, Association of American Law Schools and published currently in 7 BLACK LAW JOURNAL, *supra*.)

be lost. Black enrollment in law schools has peaked.[2] Moreover, there are more than a few indications that yet another generation of black law graduates will be excluded from the career paths that traditionally afford members of the legal profession significant access to the levers of power and substantial influence over and input to the making and shaping of public policy. If these indications mature into reality, they will give lie to the great expectations of merely a decade ago.

The expectations for the black lawyer are rooted deeply in the historic struggle against racial oppression. Despite being misled by the hope of law while being denied its help, black Americans have sought and are still seeking legal remedies for historic and continuing wrongs. While many white lawyers have served the cause conscientiously and well, the black community has seemed to know intuitively that truth given voice by the great Charles Hamilton Houston:

> There are enough white lawyers to care for the ordinary legal business of the country if that were all that was involved. But experience has proved that the average white lawyer, especially in the South, cannot be relied upon to wage an uncompromising fight for equal rights for Negroes. He has too many conflicting interests and usually himself profits as an individual by that very exploitation of the Negro which, as a lawyer, he would be called upon to attack and destroy.[3]

This explains in part why black law schools were established shortly after the Civil War and why they survive today.[4]

As the black community moved from slavery to freedom, black lawyers served as both sword and shield. Theirs is a story that can be described only in the superlative. The writings of Loren Miller, Richard Kluger, and Walter Leonard recount the exploits of black lawyers who fought to keep blacks out of electric chairs and get them into polling places.[5]

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2. Between the school years 1969-70 and 1976-77, inclusive, black law student enrollment all over the United States steadily increased (from 2,128 to 5,503, respectively). Then, in 1977-78, this enrollment dropped to 5,305, rising slightly to 5,350 in 1978-79, then falling again to 5,257 in 1979-80. (*A Review of Legal Education in the United States, Fall 1979*, American Bar Association Section of Legal Education and Admissions to the Bar, 1980, p. 60. Hereinafter *ABA Report*.) The University of Pennsylvania Law School, one of the leading law schools in the country, saw a drop from seventy black students for the 1978-79 school year to only fifty-one black students for the 1979-80 school year. Penn had seen a 600 percent increase in black enrollment from eleven to seventy-seven in a ten-year period (1967-68 — 1977-78). But, between the school years 1977-78 and 1980-81, inclusive, Penn has experienced a forty-eight percent decrease in black enrollment, from seventy-seven to forty black students. (Information supplied by Registrar, University of Pennsylvania Law School).

See Bain and Winer, *Law School Applications Sink for '79, Survey Finds Decline of 14%; Drop-Off by Blacks Tied to Bakke*, The National Law Journal, 1 (April 2, 1979); *Schools Enroll Fewer Blacks*, The National Law Journal, 1 (Sept. 24, 1979); Ramsey, *Affirmative Action at American Bar Association Approved Law Schools: 1979-1980*, 30 JOURNAL OF LEGAL EDUCATION 377 (1980).

3. Charles H. Houston, *The Need for Negro Lawyers*, 4 JOURNAL OF NEGRO EDUCATION 49 (1935).

4. During Reconstruction, the need was seen for the opening of black law schools - at a time when white law schools would not admit blacks. Parker and Stebman report that "the first effort to attract blacks to the legal profession was launched by Howard University." Howard's law school opened in 1869 and "had a virtual monopoly on the production of black lawyers," having trained 328 of the 728 black lawyers in the country by 1900. Kellis E. Parker and Betty J. Stebman, *Legal Education for Blacks*, 407 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 144, 145 (1973). *See* Genna Rae McNeil, *Justiciable Cause: Howard University Law School and the Struggle for Civil Rights*, 22 HOWARD L.J. 283 (1979).

5. Throughout the first half of this century, it was the black lawyer who would be seen press-

It was the black lawyer who even then was perceived as launching the attack on the "separate but equal" doctrine which had imposed legal apartheid in this country. And, when in 1954 the barriers seemed to fall, those lawyers who long had been heroes to their people became heroes to the world. Raymond Pace Alexander, the great black jurist from Philadelphia, noted in 1969 that

> It was the Negro lawyer who gave hope to the defenseless poor masses of black people of the South and sustained him in the belief that America offered a future for him and his family free from torture and despair.
>
> And to the everlasting glory of the Negro lawyer of America, it was he who was victorious in the overwhelming number of civil rights and human rights cases argued before the Supreme Court of the United States, the great tribunal, during the last 40 years, including the greatest in the field of education in all its history, the Brown v. Board of Education case in 1954. . . .[6]

For the black community, its faith apparently had been justified. After a century of often futile struggles for equality and dignity, the help of the law finally arrived to support the hope of black Americans. A promise had been made—a promise which, when sought to be enforced, would have eventually overwhelmed the pitifully small number of blacks matriculating at the few historically black law schools.[7] Fortunately, some of the milestones along the road to *Brown* were cases opening up graduate and professional school opportunities. Four of those cases directly involved access to legal education in state-supported institutions.[8] The last, *Sweatt* v. *Painter*,

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ing the cause for black rights in Mississippi, in Alabama, in Texas, in South Carolina and in Virginia—in all parts of the country. William Lewis of Boston and James A. Cobb of Washington—the first blacks in a group of NAACP attorneys bringing a major case before the U.S. Supreme Court—fought racist real estate practices in Washington; Charles H. Houston successfully obtained admission of Donald Murray to the University of Maryland School of Law and Lloyd Gaines to the University of Missouri School of Law; J. Alston Atkins argued for black rights in elections in Texas; Walter White was involved in the famous Alabama Scottsboro Boys case and in defending George Crawford on a charge of dual murder in Virginia; and, in South Carolina, Henry R. Boulware fought for school buses for black children, as well as for "equalization" of teachers' pay and school facilities. *See* KLUGER, SIMPLE JUSTICE (1977); LEONARD, BLACK LAWYERS (1977); and MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO (1966).

6. Raymond Pace Alexander, *The Negro Lawyer and His Responsibility in the Urban Crisis*, 40 PA. BAR ASSN. QUARTERLY 584, 586 (1969).

7. Parker and Stebman, *supra*, note 4; Leonard, *supra*, note 4. That small number had achieved much more than might ever have been expected from their small proportions. But the need for more blacks trained in the powerful legal profession became more and more apparent, for the struggles of the future would require even more of them.

8. Along the road to Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), black lawyers helped themselves by opening white law schools to black law students, at least where "separate but equal" ones did not exist for blacks. That road was a rocky one, and black civil rights lawyers, most notably Charles H. Houston and Thurgood Marshall, fought four major battles for legal education for blacks in the 1930's and 1940's. The decisions in these cases, though in some ways evidencing "gains" for blacks in education, did not bring to the fore the validity of the *Plessy* separate but equal doctrine, but constituted variations on that theme, presaging the *Brown* results. See Plessy v. Ferguson, 163 U.S. 537 (1896).

In 1935 Donald Murray—fully qualified academically—sought admission to the University of Maryland Law School. In rejecting his application, the university invoked a state statute providing two alternatives for Murray; either (1) to attend a substandard local school for blacks or (2) to obtain statutorily authorized scholarship funds and go to law school outside the state. Represented by Houston and Marshall, Murray asserted what he thought to be his rights as a citizen, the first challenge in the courts of a separate—but clearly not equal—educational system. He did not chal-

would allow the conceptual breakthrough that led inexorably to *Brown's* rejection of the separate but equal doctrine. In *Sweatt* the Court moved beyond the question of equalization of the physical plant and other tangibles. Imbued with an understanding of how much the profession depends on an "old-boy network," the Court noted that

> [A]lthough the law is a highly learned profession, we are well aware

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lenge the state's right to maintain a separate system. In a 1936 state court decision Murray was admitted to the University of Maryland Law School. Murray v. Maryland, 182 A. 590 (1936); 169 Md. 478 (1937). The separate but equal doctrine was reaffirmed, but the "equal" part had to be (at least facially) real. Ironically, Thurgood Marshall—though winning Murray's case—had just a few years earlier opted to attend the Howard University School of Law because he knew that he would not have been admitted to Maryland's law school, which would have been a more convenient choice for him:

> I for one was very interested in that subject [segregation] because I couldn't go to the University of Maryland. I had to ride the train, twice a day, back and forth, from Baltimore to Washington; and I didn't like that.

(*See Thurgood Marshall Speaks*, 34 EBONY 176, 178 [May 1979].)

The focus then shifted to Oklahoma, where ten years later Ada Sipuel—again, a superior student—applied to the University of Oklahoma Law School. In this case the turndown did not involve the spurious offering of an alternative for the applicant to attend an existing substandard school or go out of state. This time admission of the black applicant was refused because the state "planned to open" a segregated law school. In other words, blacks should wait and defer legal education if and when it could be offered. Sipuel took her case to the U.S. Supreme Court, which decided that the state had to offer legal education to blacks the same as it would to white students. Sipuel v. Oklahoma State Board of Regents, 332 U.S. 631 (1948). The state was ordered to allow her admission to the University of Oklahoma or establish a separate ("but equal") school immediately. It chose the latter alternative by roping off a section of the state capitol and hiring three professors. Taking a second bite of the apple, Sipuel returned to the Court charging that the state's remedy was insufficient, a frontal attack on the separate but equal doctrine. However, the Court said only that the state had to offer *something* to black students and offer it soon. The substandard quality of the separate system was not found lacking in constitutional terms.

Finally, shortly after the *Sipuel* decision, the Supreme Court did put some "teeth" in the idea equality by deciding that true equality must exist in the segregated system. Heman Sweatt, a black mailman, wanted to go to law school at the prestigious University of Texas. Like Oklahoma, Texas had no black law schools. In response to Sweatt's suit challenging refusal of admission, a county judge ordered the establishment of a separate facility. Again, there was a hurried effort to establish a minimally equipped and staffed law school for blacks. Sweatt refused to accept this and took his case to the U.S. Supreme Court. This time the Court said that equality was required under the Constitution—of course, never really tackling the question of the inherent inequality of segregated facilities and continuing on the assumption that separate facilities could be equal, even though there was abundant expert testimony on the record that racial segregation in legal education was unreasonable and deficient by spokespersons from the University of Pennsylvania, as well as from other schools. Sweatt v. Painter, 339 U.S. 629 (1950). Record as *Sweatt*, R. 192-194, 216-218, 220, 221, 344-350.

The access guaranteed by *Sweatt* was more illusory than real. During the period of this developing strategy for legal education for blacks, black law schools were opened hastily by several southern states. But, by 1950 the total enrollment at six black law schools was only 113, and the total number of black lawyers nationwide was only 1,450. (By the mid 1970's, it was estimated that only 3,000—or three percent—of the nation's 300,000 lawyers were black. LEONARD, *supra*, note 5 at 8. In 1979 one commentator estimated the number of black lawyers at 11,000. *See* Dr. J. Clay Smith, Jr., *The Future of the Black Lawyer in America*, speech of May 26, 1979.

Two other important admissions cases of the same period were (1) McLaurin v. Oklahoma State Regents for Higher Education 339 U.S. 637 (1950), in which a 68-year old black student sued for admission to a doctoral program in education; a federal court had invalidated Oklahoma statutes prohibiting desegregated schools, and the U.S. Supreme Court found that plaintiff's subsequent physical isolation in the classroom, library and cafeteria hampered his education and constituted a denial of equal protection of law; and (2) Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938), where the Court invalidated the refusal to admit a black student to the Missouri State University Law School where no separate facility for black law students existed and where the state's willingness to fund the plaintiff's legal education at an out of state facility was insufficient.

> that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.[9]

The net effect of *Sweatt* was to open at least in theory the doors of the nation's predominantly white law schools. Qualified blacks could now compete for all the seats and not just the few alloted to the black schools.

II. From Access in Theory to Access in Fact

The access seemingly guaranteed by *Sweatt* would not become a reality until well into the 1960's. During that turbulent decade, a number of factors converged to make possible first a dramatic increase in the number of black and other minorities enrolled in undergraduate programs at institutions of higher education and then in the nation's law schools.

First. The post-Sputnik concern about the quality of American education engendered a more active federal role in higher education.[10] This new role injected substantial amounts of new moneys into various institutions.[11] This extra funding eventually translated into new seats. Literally thousands of additional students were enrolled in higher education.[12]

Second. National concern about sharply rising rates of juvenile delinquency and youth crime helped to change the constituency of higher education's student population by providing the incentive and the money to fill some of the new seats with youth who would otherwise have been denied educational opportunities.[13]

Third. The escalation of the civil rights struggle during the 1960's heightened the nation's consciousness, focused attention on continuing exclusion and discrimination, and, equally importantly, underscored the dangers attending continued refusal to effectuate peaceful change. White students and faculty who participated in the "freedom rides" and who urged an end to apartheid in the South were increasingly uncomfortable upon re-

9. 339 U.S. 628.

10. National Defense Education Act of 1958 (as amended), U.S. Code 1976 Title 20, 401 et seq. Sept. 2, 1958, P. L. 85-864, 72 Stat. 1506.

11. American Council on Higher Education, Facts on American Higher Education, (1977).

12. *Id.*

13. In one city studied in the early 1960's it was found that forty percent of black male children were destined to appear in court on delinquency charges before the age of eighteen, and in some neighborhoods of the same city fifty-one percent of the children who had lived in those communities since the age of seven had been charged with delinquency by the age of eighteen. *See* U.S. President's Committee on Juvenile Delinquency and Youth Crime, Report, 1962, p. 4.

turning to their all-white campuses. Many joined forces with the few blacks then on campus to demand that special efforts be undertaken to recruit, attract and admit more black students. In large measure, these efforts were successful, so that by the end of the 1970's there would be a large pool of black students other than those in the historically black institutions—students who could be considered an available pool for legal education.[14]

Fourth. The 1960's brought an even more acute awareness of the potential for change, contribution and personal success which attended legal education. Law school applications skyrocketed.[15] So did law school enrollment. Between 1969 and 1978 the number of students enrolled in ABA approved law schools nearly doubled from 68,386 to 121,606.[16] Ironically, this widespread interest in obtaining a legal education and the competition it induced would become a formidable barrier to minority students.

As in any situation where the demand for a resource so far exceeds the supply, the suppliers of learning obtain considerable leverage. In the commercial market the leverage is exercised by raising the price. In the academic world it manifests itself by increased selectivity. Law schools can now demand significantly better paper credentials than they could have ten years ago.

In general, law schools have not viewed this enlarged pool as an unparallelled opportunity to select persons with the greatest potential to make a positive contribution to the legal profession and the community as a whole. Instead, they saw the flood of applicants as an added burden to administration. Rather than using available technology to devise a mechanism which could identify the skills and traits so desperately needed by the profession, the collective intelligence of the law school world stampeded toward almost total reliance on the so-called "objective" indicators.

It became quite clear that this excessive reliance on test scores and grades would exclude blacks just as effectively as intentional racial discrimination had excluded them for so long. Faced with this reality and with the realization that the activism of the 1960's demanded some increased minority presence, law schools joined the rest of higher education and adopted additional policies for an increase in minority students. The policies could have encouraged a complete re-evaluation and overhaul of the admission process, but that was not to be. For the most part these policies had a tangential impact, if any at all, upon the ongoing admissions process.

Satellite programs were established and called "minority" admissions, "special" admissions, "task force" programs and a host of other euphemisms, all of which implicitly deny that the programs are integral to the mission of the host institution. Instead, these programs are treated as an

14. *See* Institute for the Study of Educational Policy, *Equal Educational Opportunity: The Status of Black Americans in Higher Education*, 1975-1977, Howard University, 1980. In 1976, for example, black students constituted ten percent of all undergraduate students enrolled; five percent of all full-time graduate students and 6.6% of all part-time graduate students; and 4.5% of full-time professional school students and 4.7% of part-time professional school students.

15. *ABA Report*, *supra* note 2.

16. *Id.*, p. 61. The number of minority students enrolled in law schools for the same period increased from 2,933 to 9,922. *See* W.J. WILSON, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITITONS (1978) and Smith, *Affirmative Action in Extremis: A Preliminary Diagnosis of Symptoms and the Causes*, 26 WAYNE L. REV. 1337 (1980).

ancillary part of the admissions process and give the impression that the institution is "bending" its rules, "lowering" its standards, or otherwise doing something extra for the students admitted via these channels.[17]

Not surprisingly, this approach created almost as many problems as it solved. Special programs (adopted to provide the access promised by *Sweatt*) precipitated a national debate that would continue for the duration of the 1970's.[18] Although much of the stridency has passed, there is still

17. *See generally* JOEL DREYFUSS AND CHARLES LAWRENCE, III, THE BAKKE CASE: THE POLITICS OF INEQUALITY (1979); Fleming and Pollack, *The Black Quota at Yale Law School - An Exchange of Letters*, 19 PUBLIC INTEREST 44 (1970); Baeza, *Efficiency, Equality and Justice in Admissions Procedures in Higher Education*, 3 BLACK L.J. 132 (1974); James, *Is It Easier to Get in If You're Colored?* THE NATIONAL CATHOLIC REPORTER, 8 (Oct. 15, 1969).

18. The debate over special admissions programs has involved many arguments as to their effectiveness and necessity, expecially in the early 1970's, before taking a turn to focus on the "reverse discrimination" (purportedly against white males) issues in the latter part of the decade. One commentator attacked the assumption that training more blacks in law would in fact be beneficial to society: "I do not know that Negroes do or should prefer that their attorneys be Negroes, or that Negro attorneys can more effectively represent their interests." Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351, 354 (1970). This statement was made despite the historical facts that (1) black lawyers have often fought for equality for their people when no one else would and (2) many, if not most, white lawyers simply do not wish to serve a black clientele for even everyday matters. The same commentator refuted the important role models black lawyers can be for their community, as well as their significant political voice: "Ineffective minority group lawyers will disserve the cause of minority group equality and recognition." *Id.*, 355. This statement brings to the fore the most strident argument against special admissions: that the process brings to professional training black students who become inadequate professionals. This argument has been made by many who totally dismiss the history of education in this country, which has been to prefer white males of the upper class regardless of qualifications. *See* Dreyfuss and Lawrence, *supra* note 17, Chapters 5 and 6. It also swallows the line that "objective" meritocratic standards determine who is "qualified" and who is not "qualified" to enter professional training. For a persuasive rebuttal to the meritocracy arguments, *see* Kinsley, *The Conspiracy of Merit*, NEW REPUBLIC, Oct. 15, 1977, at 22. For an excellent appraisal of the meritocracy argument, *see* Institute for the Study of Educational Policy, Howard University, *Affirmative Action for Blacks in Higher Education: A Report*, 49-52 (1978). The lowering of so-called objective criteria for law school admissions (such as LSAT scores and grade point averages) through the special admissions process provided the fuel for this argument although such objective criteria have never been the rule for white males, and these criteria are questionable in themselves. The objective criteria argument also fails to account for experiential qualifications of applicants, such as the unique experience which blacks (and women) can bring to the practice of any profession.

> . . . [T]he problem seems more with the tester than the applicant. To say that minority group applicants require extra, supportive help smacks of the 'white man's burden' syndrome. If we had admissions standards which were neutral, fair, merit-rewarding, quality-insuring, and job-related if that is what regular admissions standards of the GPA and LSAT actually did, and what Bar exams were accomplishing, and if the results were the same as today, then I would be forced to decide whether we need a truly 'preferential admissions policy,' for historical or other reasons, to include members of groups otherwise excluded. But we are far from that point. We do not have neutral admissions standards. They tend to be artificial, exclusionary standards. They are standards not positively correlated to lawyering even if they may be predictors of how well one will perform on first year tests in law school and on multiple choice Bar exams.

Symposium: The Minority Candidate and the Bar Examination, 5 BLACK LAW JOURNAL 124 (1976) statement by Temple University School of Law Dean Peter J. Liacouras, at pp. 156-157.

Again assuming the objective criteria standard for law school admissions, another critic of special admissions argued that blacks entering through these processes lose self-esteem when competing with "better qualified" white students. Paul G. Haskell, *Legal Education on the Academic Plantation*, 60 A.B.A.J. 203 (1974). The same critic gave short shrift to the fact that black students often face very real racism on the part of some fellow students, some members of faculties and some administrators, a factor which has in some cases affected self-esteem and performance. This racism is encountered by many Black students whether admitted through "regular" or "special"

substantial disagreement about the degree to which the debate effected a *de facto* renegation of *Sweatt's* promise and about whether these programs can and ought to survive.

Even though the debate grew more strident as it went on, there were many who opposed special admissions programs from the outset. In the words of one commentator, these programs were an "unreal solution to a real problem."[19]

Predictably, this opposition found expression in litigation. Cases of the "affirmative action/reverse discrimination" genre would dominate the courts up to and including the nation's highest tribunal for the entire decade. And, while the best known of these cases would be *Regents of the University of California* v. *Bakke*,[20] involving admission at a medical school, it was a law school admissions case, *DeFunis* v. *Odegaard*,[21] that first brought the issue to the forefront of the nation's legal agenda. Ten years, five major U.S. Supreme Court decisions and twenty-two opinions later, the litigation goes on with no respite in sight.[22] And yet both sides have alternatively claimed victory and bewailed defeat.

III. THE *BAKKE*-LASH

In the wake of the affirmative action/reverse discrimination debate and the litigation assault, it is not surprising that there is still uncertainty about whether special admissions programs can survive. The Rockefeller Foundation attempted to shed some light on this question by commissioning Professor Thomas Pettigrew, the noted Harvard social psychologist, to conduct a survey of the nation's undergraduate, graduate and professional schools. On the basis of an eighty-three percent response rate from his scientifically selected sample, Professor Pettigrew ventured, -

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admissions and whether or not they have met "objective" admissions criteria. As Derrick Bell has noted,

> [O]pposition, 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. 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 wellbeing of our society dictate that law schools follow the lead of the courts by implementation of an affirmative plan.

Derrick A. Bell, Jr., *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 119 U. PA. L. REV. 364, 369-370 (1970).

19. C. W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 TOLEDO L. REV. 377 (1970). Professor Summers concludes that special admissions programs did not really significantly increase the number of minority students admitted to schools but instead handicapped their professional training.

20. 438 U.S. 265 (1978).

21. 416 U.S. 312 (1974).

22. At this time, for example, an appeal is pending in DeRonde v. Regents of the University of California, No. 32781 (Cal. Super. Ct. July 17, 1975), *appeal pending*, Nos. 16461, 16732, 16872 (Cal. Ct. App. Dec. 10, 1976). A law school admissions case involving white plaintiff Glen DeRonde, denied admission by the University of California at Davis Law School, the argument is that of violation of the equal protection clause of the Fourteenth Amendment on the basis of sex *and* race. In this case, where the trial court concluded that DeRonde would not have been admitted even in the absence of the school's affirmative action program, a declaratory judgment was awarded, holding the program in violation of the United States and California constitutions.

> Tentative conclusions concerning the effects of the *Bakke* ruling are presented in descending order of the confidence with which they can be advanced: (1) Since *Bakke*, there has been a 20 percent reduction, from 51 to 41, in the number of programs that utilize a separate committee to evaluate minority applications. (2) Major changes have recently been made in admissions procedures, criteria, goals, and particularly documentation—especially in nonelite undergraduate schools. (3) A perception that *Bakke* has negatively altered the national attitude toward affirmative action in enrollment policies is held by many admissions officers, particularly those in elite programs. Yet these same officers deny any such change affecting their own admissions policies. (4) Suits and threats of suits from majority students on the grounds of "reverse discrimination" have become more common in recent years. Many of them are similar in pattern to the much-publicized *Bakke* example in that they concentrate on nonelite law and medical schools. (5) Alleged discrimination suits act as mediators of *Bakke* effects in that they cause admissions officers to regard the ruling more seriously and as making their minority admissions more difficult. (6) The study's numerical admissions data were obtained from a too-small and too-biased subsample to warrant confident generalizations.[23]

What follows is my response to Professor Pettigrew.[24]

It would be much easier to assess the "impact of the *Bakke* decision on higher education" if some consensus could be derived as to what "the *Bakke* decision" meant. Among the several generalizations which may be ventured about the meaning of *Bakke*, three appear worth noting at this stage.

First, *Bakke* focused attention on the admission policies and practices of the nation's more selective institutions of higher learning. In doing so, the decision subjected these policies and practices to an unprecedented degree of scrutiny. An issue of *Rights*, a periodic publication of B'nai B'rith's Anti-Defamation League, published shortly after the *Bakke* decision is a perfect example of this scrutiny. Entitled *A Study of Post-Bakke Admissions Policies in Medical, Dental & Law Schools Throughout the United States*, the report concludes that—

> Sixteen schools maintain racially discriminatory admissions procedures based on ethnic/racial classifications clearly in violation of *Bakke*. Another twenty schools maintain admissions procedures that are visibly suspect with respect to the ethnic/racial classifications made illegal by *Bakke*.[25]

Moreover, the report is prefaced by what recent history and current circumstance would define as a threat:

> It is essential to keep in mind that this report is the basis for action. In the upcoming months we will be contacting those schools whose admission procedures appear to violate *Bakke*, seeking answers to those questions raised by the materials submitted in response to our survey. In this way, we will both communicate our concern and alert them to the need of scrupulously conforming their admissions policies to the requisites of the Supreme Court's *Bakke* ruling.[26]

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23. THE ROCKEFELLER FOUNDATION, BAKKE, WEBER, AND AFFIRMATIVE ACTION (1979), 1-2, (hereinafter *Rockefeller*).

24. This represents an edited version of a paper presented at a Rockefeller Foundation Congress on July 12-13, 1972, *supra* note 23.

25. *A Study of Post-Bakke Admissions Policies in Medical, Dental and Law Schools Throughout the United States*, RIGHTS (1979), 1.

26. *Id.*

Second, the *Bakke* phenomenon fostered a preoccupation with the question of access for minorities and in doing so tended to obscure or overshadow the equally important questions of retention and survival. The newly opened doors at many institutions have become revolving doors, ejecting minority students in numbers far out of proportion to their presence in the entering class. Unless remedied with some dispatch, the revolving door will reduce to a Pyrrhic victory even the most favorable outcome of the special admissions debate.

Third, *Bakke* did not advance the effort to achieve greater racial and ethnic diversity within higher education. Heightened scrutiny of admissions policies raises grave questions about the continuing autonomy and heterogeneity of American higher education. Exclusive focus on questions of access confronts minority communities with tactical and strategic problems of major proportions. However, it is this seemingly obvious observation which frames the discussion of impact.

Virtually no one has contended seriously that *Bakke* advanced the cause of minority students. The only question concerns the degree of retardation. The enterprise in which we are now engaged is, in reality, a damage assessment.

As noted by Professor Pettigrew, some (this writer included) predicted catastrophic consequences if the California court were affirmed. And many in that camp have found precisely such consequences. Others predicted that a decision would have no effect. They are even now hard-pressed to discern any impact whatsoever. Still others, harkening to the call of prudence, both agreed and disagreed with the extremes. A self-admitted adherent to this point of view, Professor Pettigrew now confirms it in his study suggesting that while *Bakke* will precipitate no catastrophe, it will have a chilling effect which "will in time reduce significantly the proportion of minority students in higher education."[27]

Because it is so temperate, the Pettigrew position will no doubt prove the most widely accepted. That is why it may be appropriate to explore its premises and approach even at this early moment with a view toward assuring that the inevitably moderate results do more than merely approach reality.

By this gentle criticism of Professor Pettigrew's "initial reconnaisance," I do not suggest that the issue is not complex, nor that this has not been a useful attempt. Moreover, I am aware both of the time and funding limitations and of his candid caveats. I make observations with a view to the future and with the hope that subsequent attempts, whether by Professor Pettigrew or by others, will reflect a deeper probing and a more skeptical stance. An accurate assessment of this period of transition in higher education will result only from a multi-faceted approach—one designed to discern not only the superficial indicia of either change or continuity, but also to uncover the not so obvious trends and pressures.

Focusing upon the field of legal education the basic question is: If the Pettigrew survey had achieved a 100 percent response rate from the law schools sampled, would the data afford us an accurate assessment of the

27. *Rockefeller*, *supra* note 23.

impact of Bakke on minority enrollment in legal education? The answer is clearly No. And that negative response can be supported on several bases.

First. An accurate assessment must account for the pre-Bakke trends in minority application and enrollment. Not to do so is to insure the inability to gauge just what portion of the numerical changes, if any could be attributed to Bakke and what not. Unlike the Association of American Medical Colleges (AAMC), neither the Association of American Law Schools (AALS) nor the Law Schools Admissions Council (LSAC) has been able to produce reliable information about the number of minority applicants. Consequently, the leveling off or decline in applications must be established inferentially. In this regard, the available data establish that the number of black students matriculating in the first year of ABA-approved law schools has remained relatively stable for the past seven years. (See Table 1.)[28]

This trend first came to light in 1974, when the number of first year black law students decreased from 1,943 to 1,910. Black law teachers around the country commenced a discreet inquiry into the problem. For the most part, the information collected was anecdotal, nonquantifiable and non-scientific. But there was sufficient consistency among schools and across regions to suggest that the leveling off in matriculants was related directly to a decline in applications. Furthermore, there appeared to be identifiable reasons for this occurrence.

For one thing, the leveling off seemed to be an inevitable consequence of the self-selecting nature of the applicant pool. Absent some major new initiative that would provide additional incentives for a student to choose to study law, there is no reason to expect that a disproportionately large segment of the pool eligible for graduate study would continue to choose law.

Another reason readily apparent was the nonfeasance and sometimes malfeasance of law school admissions officers and undergraduate pre-law advisors and career counselors. Their inability and even unwillingness to provide black students with an adequate amount of accurate information on a timely basis contributed immensely to many students failing to know of available opportunities in the field of law. Horror stories abound of potential law students who turned away from a legal career because they were misinformed about their chances for admission to law school and success thereafter.

Interestingly enough, neither of the preceding two reasons seemed to have as great an impact on potential minority applicants as a third—that is, black students appeared to be dissuaded from applying to law school because of a genuine concern for their academic, economic and emotional survival. The message which potential applicants seemed to have gotten from their immediate predecessors was a somber one: law school is virtually impossible to get into; once in, there is a high probability of premature and involuntary termination (in short, flunking out); even blacks who do not flunk out can expect to be marginal performers; this marginal performance makes it difficult to pass the bar examination[29] or to get a decent lawyering

28. *See* Appendix page 99.

29. The bar examination hurdle is discussed in numerous articles. One study, conducted in the early 1970's, showed, for example, that in California (year not given) only forty-four percent of black and Latin graduates passed the bar examination, compared with seventy-six percent of

job. In sum, at each step along the way, law school is perceived as a direct threat to the survival of the black students.

Even the most cursory appraisal of the data on tuition trends seems to provide some foundation for these fears. When living expenses are considered, the normal three-year process can now cost the single student in excess of $30,000. (See Table 2.)[30] It is no exaggeration to say that these students are being asked to mortgage their futures to pay for a legal education.

Attrition rates for minority law students also seem well above the national average. Again, statistics are difficult to come by. Nonetheless, the gross figures available offer some insights. The figures for the decade indicate over twenty-five percent of minority students matriculating in the first year of law school did not enter the third year on schedule. Of course, this does not mean that twenty-five percent of the students were dismissed or delayed for academic reasons. Many may have withdrawn in good academic standing. Others may have taken leaves of absences or pursued joint degree programs. Nonetheless, no reason appears for assuming that the latter categories are significantly larger than the general law school population. In the absence of such an assumption, it does appear that the attrition rate is large enough to merit much concern.

Second. An attempt to proceed by way of a selected sample must be cognizant of the fact that minority law students are found in numbers in only a small portion of the ABA-approved law schools.

Over fifty-three percent of the minority student population is located in thirty-one law schools which collectively account for only twenty-four percent of the overall law school population. (See Table 3.)[31] Mexican Americans and Mainland Puerto Ricans are even more concentrated. Nineteen schools in three states account for sixty-four percent of Mexican Americans enrolled in law school. (See Table 4.)[32] Nineteen schools in three states

nonminority graduates. In 1973 184 of the 200 blacks taking the examination in the District of Columbia failed; In Illinois the same year twelve of sixteen blacks failed; in Ohio eleven of twenty-nine blacks failed. The results of the 1972 Georgia State Bar Examination showed that even blacks graduating from "Ivy League" schools did not fare well:

> The results show that all forty-one blacks who took the Bar failed—while fifty percent of whites passed compared to zero percent of blacks.
>
> All of the white Yale Law School graduates who took the Georgia test passed but the two black Yale graduates failed. All of the white Harvard Law School graduates passed and the one black Harvard person failed.
>
> All of the white Columbia law students passed and the three black graduates from Columbia failed.

Symposium: The Minority Candidate and the Bar Examination, 5 BLACK L.J. 124-151 (1976). *See generally* Stevens, *Bar Exams and Minority Group Applicants*, 56 A.B.A. J. 969 (1970). Extensive litigation has been conducted in well over half the states to challenge bar examinations as discriminatory toward minorities. *See*, *Note: Constitutional Law - Civil Rights - Georgia's Bar Exam Does Not Unconstitutionally Discriminate on the Basis of Race*, 27 MERCER L. REV. 1189 (1976); *Recent Decisions—Constitutional Law—Fourteenth Amendment—Challenging the South Carolina Bar Exam*, 60 MARQUETTE L. REV. 1134 (1977); *Recent Decisions—Civl Rights—State Bar Examination Held Constitutional Despite Disproportionate Failure Rate of Minority Applicants—Richardson v. McFadden*, 36 MD. L. REV. 886 (1977); Goger, *Validity, Under Federal Constitution, of State Bar Examination Procedures*, 30 ALR FED. 934. The National Conference of Bar Examiners publishes regular reports on bar examination litigation in *The Bar Examiner*.

30. *See* Appendix page 99.
31. *See* Appendix pages 100-1.
32. *See* Appendix pages 102-103.

account for fifty-six percent of Mainland Puerto Ricans. (See Table 5.)[33]

Third. It is imperative to view critically any self-assessment. The articulated and published admissions policies of individual institutions have only rarely been descriptive or determinative of the actual practices of the respective schools. Consequently, it may be extremely difficult to ascertain what, if any, impact *Bakke* has had on the admissions operations except the most obvious of cosmetic changes, i.e., abolishing separate committees.

The bland statements in law school catalogues are no doubt due *in part* to the heightened concern about litigation stimulated by Marco DeFunis' suit against the University of Washington's law school.[34] In large measure these bland statements reflect the fact that minority admissions is a matter of continuing debate within law faculties and not one of settled policy. The existence of the debate suggests that a number of less formal factors may be far more accurate predictors and describers of actual policy. For example, the strategic placement of sympathetic faculty members may explain the dramatically different results obtained among the many programs which are similarly described. As importantly, the available data suggest that the presence or absence of minority faculty may be critical. Despite the fact that forty-one percent of approved law schools have no black or Spanish-surnamed faculty members, not one school having more than 100 minority students is in this category. Moreover, seventy-five percent had two or more minority faculty. (See Table 6.)[35]

Fourth. Contrary to general expectations, in the area of minority admissions, the elite law schools do not seem to be particularly unique.

Logic would seem to compel a prediction that the stratification within the ranks of the nation's law schools would be manifest in any appraisal of the impact of *Bakke*. Thus Professor Pettigrew extends his "chilling effect" prediction:

> . . . elite private institutions with rigorous entrance requirements and high tuitions may be largely exempt from the chill. They typically have only small numbers of minority students and are not likely to be besieged in the future by large numbers of additional minority students . . . Hence, affirmative enrollment policies at these schools are the most firmly rooted and least likely to demonstrate enrollment shifts or other negative effects of the Bakke decision.[36]

An appraisal of this hypothesis in the context of the elite law schools raises serious doubt about its acuity. That there are schools with high tuition and rigorous entrance requirements is clear. However, contrary to the ar-

33. *See* Appendix pages 104-5.

34. When Marco J. DeFunis, Jr. was notified in 1971 that he was neither admitted, nor put on the waiting list, by the University of Washington School of Law, he decided to sue. What started out as a claim alleging unjust discrimination between residents and nonresidents of the State of Washington and as a proclamation of the right of DeFunis to a preference as a qualified applicant to a state supported institution because of his status as state resident and taxpayer became, ultimately, a claim of racial discrimination against a white male. After trial, a subsequent appeal to the Washington Supreme Court, which upheld the constitutionality of the university's action, DeFunis took his case to the United States Supreme Court. But the result was anticlimatic for all those awaiting a *landmark* decision, when the Court determined that the controversy was moot because DeFunis would have completed his law school studies by the end of the term for which he was registered at the time, regardless of any Court decision on the merits.

35. *See* Appendix page 106.

36. *Rockefeller*, note 23 at 3.

ticulated norm, the majority (five of eight) have over 100 minorities each and thus can be viewed as high minority enrollment law schools. Assuming that the number of applicants is relevant to the degree "besieged," these schools elicit more minority applications than any others.

One of the schools—the University of Pennsylvania—has admitted publicly to a major revision of its admission processes. At least two others have made what they insist are minor adjustments. And there are continuing indications that, notwithstanding public posturing, several of the others are responding informally to the pressures of *Bakke*.

For example, shortly after the *Bakke* decision, a minority applicant who had been wait-listed at one of the elite law schools received a letter of rejection. In a hand-written note at the bottom of the formal letter, a senior administrator of the school had this to say:

> I am very sad to have to send this letter to you. It was my hope that we might see you among our new students this fall. With all the inactivity of our waiting list 'til now and *with Bakke now the law of the land* it is finally hopeless. Good luck to you. (emphasis added)[37]

This is one of the schools which denies to this day that their policies and practices have been altered by *Bakke*.

Although my comments and observations argue that a survey instrument that is more finely tuned to the nuances of the terrain might not pass lightly over significant landmarks, my concerns are more fundamental. There appears to be an underlying assumption that there exists some substantial commitment to affirmative action and minority admissions. That assumption is at best suspect and, more likely, erroneous. The *Bakke* phenomenon may not be an *actor* in the sense of impacting on currently existing policies and practices. Rather, *Bakke* may be an *excuse* available for institutions pressured into doing that which they would have preferred not to do. To this extent, the major impact of *Bakke* may have been to resolve the continuing institutional and national debate over minority admissions in favor of those who would have continued to oppose such policies, regardless of how the legal issue was decided. The absence of a definitive decision in *Bakke* is thus more than a matter of historical curiosity. It is a matter of substantive policy.

IV. Toward Full Participation[38]

The eventual outcome of the affirmative action/reverse discrimination debate is important as regards the question of entry level access. However, the expectations of the black community went beyond entry level access to participation. The notion was that black law students would become black lawyers and that that status would afford them access to the levers of power and influence in the society at large—an access that would enable them to articulate the aspirations and protect the interests of the black community.[39]

37. *Rockefeller*, *supra* note 23 at 50.

38. This section is an edited version of a paper prepared in consultation with the Carnegie Corporation of New York, parts of which were reprinted in the Fall, 1979 and Fall, 1980 Newsletter of the Section on Minority Groups of the Association of American Law Schools.

39. *See generally* Smith, *supra* note 16 at 1361, and K. Tollett, *Black Lawyers, Their Education and the Black Community*, 17 Howard L. J. 326 (1972).

In this regard, whatever the effects of the *DeFunis-Bakke* genre of cases, there is substantial reason for concern. Because of disparate academic performance, black law students may be precluded from even becoming the black lawyers envisioned. What follows is a brief analysis of this problem.

Bakke and other cases of the "reverse discrimination" genre, have focused attention on the minority admissions programs of law and the other professional schools. By doing so, the litigation has made the issue of access appear paramount to all others. Despite the importance of access-type issues, there are others equally compelling in nature and equally deserving of attention—particularly with regard to the issue of the career patterns of black professionals.

One such important issue is that of post-admission academic performance. While by no means uniform, the evidence is in on academic performance. Minority students are being outperformed by their white counterparts. At some schools, this can be seen through disproportionate attrition rates. (See Table 7.)[40] Even where the situation is not so extreme, it is still obvious that minorities are not evenly distributed across the grading curve. The most salient evidence can be seen by examining the membership rolls of law reviews and journals at the major law schools. Only a mere handful of minorities has managed to be selected to participate in this educational, important, prestigious and career-boosting experience.[41]

Absence from law reviews is but a small dimension of a much larger problem. In 1977 the National Conference of Black Lawyers (NCBL) initiated an effort to assess how black students were faring in the nation's top institutions. The information gathered, while by no means complete, was far from encouraging. In every instance, black law students were being outperformed by their white counterparts. To illustrate, consider the response of the school from which the most complete data were obtained. The attrition rate of black students had dropped to a point where it could be compared favorably with that of the rest of the class. However, for the period studied, fully eighty percent of all black law students at that institution were in the lowest *quarter* of the class. Ninety-six percent were in the bottom half. While no exhaustive survey has been completed, the available evidence (anecdotal and otherwise) suggests that the disparity is not an aberration confined to a single institution. Rather, it appears to be a nationwide phenomenon.

The disparate academic performance of minority law students ought not be perceived as simply a matter of academic curiosity. This is a phenomenon with real visible and tangible adverse effects. Because of disparate academic performance, minority law graduates are often closed out of the

40. *See* Appendix page 107.

41. Very recently Harvard Law School's law review editors decided to institute an "affirmative action plan" for law review membership. Although Harvard's law student population is composed of twenty-eight percent females and fourteen percent minorities, the recent law review membership had only eleven percent females, one Asian member and no black members out of a total staff of eighty-six. Although students traditionally had been chosen on the basis of first-year grades, for years membership could also be attained through open writing competition, which, although not involving grades as a criterion, had never been utilized to recruit women or minorities specifically. Under Harvard's new plan, up to eight of the forty students usually chosen on the basis of first-year grades will be selected from among women and minorities, regardless of grades. *See A Law Review Reviews Its Ethics*, *New York Times*, March 1, 1981, and *Drawing Distinctions at Harvard Law*, *New York Times*, March 3, 1981.

more attractive career opportunities. For example, judicial clerkships, graduate fellowships, associate status with prestigious law firms, honors programs with government agencies and law teaching are all highly sought after opportunities which hold substantial promise for an influence-laden and successful career. Few minority students obtain these slots. The major reason—grades.

In short, the disparate academic performance in large measure precludes minority law graduates from full participation in the legal profession and thus denies their communities many of the benefits which should be derived from a trained cadre of minority lawyers.

Many explanations may be advanced for the performance gap. Some go to the core of legal education and argue persuasively for reform. There can be little doubt that complete reliance on the traditional end-of-year or end-of-semester law school examination designed and graded by a single professor, without benefit of review of pre-testing, is bound to impact adversely on those students who do not share the cultural wavelength of the professor. However, there are other factors which may be more amenable to resolution than those requiring meaningful reform in legal education. If the competitive position of minority students is to be improved, attention must be paid to these concerns, such as the ones enumerated below.

1. Many minority students are products of urban education systems and thus come to higher education with a less extensive inventory of highly developed basic skills.
2. Because so many of today's minority students are first generation professionals, they have not had access to valuable inside information as to the nature and significance of the process—often known as the "tricks of the trade."
3. Partly because of the paucity of minority law professors, minority students are isolated from the informal educational process.
4. Also because of the paucity of minority faculty, minority law students are denied the benefits in terms of guidance, career development and recommendations which flow from a preceptor or mentor relationship.
5. Many minority students experience a significant amount of cultural dissonance which, though alleviated over time, tends to be most acute in that critical initial semester.[42]

These concerns argue persuasively for drastic institutional changes, for comprehensive new academic support programs and for revitalized research agenda. On the institutional level, it is imperative that legal education seek to mitigate the harsh effects of cultural dissonance. The key to any such effort is the inclusion of minority faculty. The current "none-to-one/one-to-none" recruiting and hiring strategy must be abandoned.

Candor demands admission that, however unlikely, if even achieved, these institutional changes will not suffice as a complete cure for disparate academic performance. Academic support programs are essential if the performance gap is to be narrowed. Without attempting to be exhaustive, let me suggest that among the programs that an academic support project could

42. *See The Painful Problem of Blacks and Legal Education*, STUDENT LAWYER (April 1974); Bell, *Black Students in White Law Schools*, 2 TOLEDO L. REV. 539 (1970); Casson, *The Negro Law Student: His Childhood Experience, Vocational Interests and Professional Concerns*, Ph.D. dissertation, University of Michigan (1970); McPherson, *The Black Law Student: A Problem of Fidelities*, 225 ATLANTIC 93 (April 1970).

sponsor are the following: (1) *Intensive Skill Development Programs* which could attempt to remediate basic skill deficiencies before the student commences his/her legal education; (2) CLEO type *pre-law school summer institutes* designed to aid in the transition to law school by reducing cultural dissonance; (3) a series of *inter-law school competitive activities* designed to afford minority law students an opportunity to acquire, develop, enhance and demonstrate their various lawyering skills. For example, an appellate moot court competition, a legal essay contest, a trial advocacy competition, a client counseling competition; (4) *a national support network* of lawyers, judges, and legal educators who can serve as role models, advisers and counselors to minority law students, thus reducing the sense of isolation now so prevalent at the predominantly white law schools.

Finally, if the debate is to be joined properly, it is important that more critical data be adduced by sustained research efforts. Despite the difficulty of securing funding, a number of inquiries should be undertaken in the not-too-distant future. Among them are the following:

1. An inquiry into the extent to which minority students perceive themselves as being victimized by discriminating law school practices. Such an inquiry should also consider (a) whether the law students' perceptions accord with reality and (b) the likely impact of such a perception on performance.
2. An investigation to test the twin hypotheses that (a) a preceptorship or mentor relationship is as important to career options as "academic performance" and that (b) minority law students in the predominantly-white law schools are generally unable to foster such a relationship.
3. An investigation to test the hypothesis that the disparate performance of minorities is due primarily to the phenomenon that most minority law students are enrolled in a law school one or two notches above the students' level. According to this hypothesis, if there were a better "fit" between the minority student and the institution, performance disparity would disappear.
4. An investigation to determine whether and to what extent law school examinations are biased (even if unintentionally) against minority students.
5. An attempt to locate those minority students who performed well in law school to determine whether certain common characteristics, traits, habits and perceptions are identifiable.
6. An investigation to document the impact of disparate performance on the composition of law review staffs and on subsequent career options and patterns.

V. CONCLUSION

Neither modest nor significant improvements will be made in the status quo unless there is a vital and viable constituency for change within the ranks of legal education. Thus, black faculty members are doubly important. They must serve as role models, counselors and preceptors for black law students. They must also serve as advocates for the refocusing of resources and attention sine qua non to achieving institutional change. The harsh reality is that all the good ideas will be of no avail if there is not a cadre to insure their implementation.

APPENDIX

Table 1

First Year Law School Enrollment

Year	Black American	Mexican American	Puerto Rican	Other Hispano American	Asian or Pacific Islander	American Indian or Alaskan Native	Total 1st Year Minority	Total 1st Year National	% First Year Minority to National
1969-70	1115	245	29	35		44	1468	29,128	5.0%
1971-72	1716	403	49	74	254	71	2567	36,171	7.0%
1972-73	1907	480	73	96	298	79	2933	35,131	8.34%
1973-74	1943	539	96	94	327	109	3108	37,018	8.39%
1974-75	1910	559	117	182	429	110	3307	38,074	8.68%
1975-76	2045	484	113	217	436	118	3413	39,038	8.74%
1976-77	2128	542	119	225	484	133	3631	39,996	9.07%
1977-78	1945	529	134	316	509	137	3570	39,676	8.99%
1978-79	2021	551	190	334	557	145	3798		

Source: Annual Survey of Minority Group Students Enrolled in Approved Law Schools. American Bar Association, 1979.

Table 2

Tuition and Fees Increases at the Nation's Elite Law Schools

Law School	68-69	78-79	%--
University of California (Berkeley)*	$1516.50	$2705	78.37%
University of Chicago	$2100	$4935	135 %
Columbia University	$1904	5032	164 %
Harvard University	$1845	$4200	127 %
University of Michigan*	$1760	$4073.84	131 %
University of Pennsylvania	$2150	5073.00	136 %
Stanford University	$1920	$5331.00	178 %
Yale University	$2150	$4900.00	128 %

* Public Institution; nonresident costs.

Source: Law Schools and Bar Admission Requirements, A Review of Legal Education in the United States, Fall 1968-Fall 1977. Published by American Bar Association.

Table 3

Schools With Over 100 Minority Students 1978-1979

Law School	Number of Minorities	Total Enrollment	% Minorities to Total Enrollment
Antioch School of Law	146	423	35.52%
Boston College	100	777	12.87%
* University of California, Berkeley	227	936	24.25%
** University of California, Davis	90	482	18.67%
University of California, Hastings (S.F.)	296	1501	19.72%
University of California, (Los Angeles)	232	993	23.36%
Cleveland State	103	1163	8.86%
Columbia University	149	901	16.53%
University of Florida	103	1065	9.67%
Georgetown	392	2593	15.12%
Golden Gate	109	825	13.21%
Harvard University	232	1821	12.74%
University of Houston	166	898	18.48%
*** Howard University	398	480	82.92%
** University of Maryland	94	529	17.77%
University of Michigan	125	1151	10.86%
University of New Mexico	113	313	36.10%

New York Law School	105	1292	8.13%
New York University	118	1399	8.43%
*** North Carolina Central	117	197	59.39%
University of Pacific (McGeorge U.)	103	709	14.52%
University of Pennsylvania	117	643	18.19%
Rutgers University (Newark)	196	646	30.34%
University of Santa Clara	150	730	20.55%
University of San Francisco	123	551	22.32%
Seton Hall	115	604	19.03%
*** Southern University	143	184	77.71%
Southwestern University	115	1042	11.04%
Temple University	143	1470	9.72%
University of Texas	242	1578	15.33%
*** Texas Southern	261	348	.75%
Wayne State	147	713	20.62%
Total	5,270	28,957	18.20%

* Schools using 1976 figures.

** Had over 100 minority students in 1977-78 or 1976-77.

*** Predominantly black schools.

Source: Annual Survey of Minority Group Students Enrolled in Approved Law Schools. American Bar Association, 1979, 1976. Law Schools and Bar Admission Requirements. A Review of Legal Education in the United States, Fall 1977.

Table 4

Chicano Enrollment in Selected Schools (1978)

Schools	# of Mexican Americans enrolled	% of Total Mexican Americans enrolled nationally ***
University of California, Berkeley	73*	04.71%
University of California, Davis	23	01.57%
University of California @ Los Angeles	96	06.56%
University of Southern California	23	01.57%
University of the Pacific	31	02.12%
California West	16	01.09%
University of San Diego	24	01.64%
University of California Hastings	78	05.33%
Golden Gate University	35	02.39%
University of San Francisco	43	02.94%
University of Santa Clara	41	02.80%
Stanford University	35*	01.98%
Total	508	34.75%

New Mexico		
University of New Mexico	83	05.67%
Texas		
University of Texas	164	11.22%
Southern Methodist University	6	00.41%
South Texas College of Law	31	02.12%
Texas Tech University	24	01.64%
Texas Southern University	58**	03.96%
St. Mary's University	56	03.83%
Total	339	23.18%
Total of 3 States	903	63.61%

** 1974 figures
* 1975 figures
*** Total National Enrollment – 1,462

Source: Annual Survey of Minority Group Enrollment 1979. American Bar Assoc.
Annual Survey of Minority Group Enrollment 1976. American Bar Assoc.

Table 5

Puerto Ricans Enrollment in Selected Schools (1978)

Schools	# of Puerto Ricans Enrolled	% of total Puerto Ricans enrolled nationally*
New Jersey		
Rutgers University Camden	6	01.35%
Rutgers University Newark	37	08.33%
Seton Hall	34	07.66%
Total	77	17.34%
New York		
Albany Law School	3	00.67%
SUNY Buffalo	7	01.57%
Cornell University	4	00.90%
Brooklyn Law School	9	02.02%
Columbia University	20	04.50%
Fordham University	20	04.50%
Hofstra University	20	04.50%

New York University	29	06.53%
St. John's University	11	02.48%
Syracuse University	7	01.58%
Total	130	29.28%
Pennsylvania		
Dickinson School of Law	6	01.35%
Temple University	17	03.82%
University of Pennsylvania	14	03.15%
Duquesne University	1	00.22%
University of Pittsburgh	1	00.22%
Villanova University	1	00.22%
Total	40	09.00%
Total of the 3 States	247	55.63%

* Total National Enrollment - 444

Source: Annual Survey of Minority Group Enrollment 1979. American Bar Association.

Table 6

Distribution of Black and Spanish Surname Law Faculty Among A.A.L.S. Approved Law Schools

Representation on Faculty of:	0 # - %	1 # - %	2 # - %	3 # - %	4 # - %	5 # - %	5+ # - %	
All Law Schools	66-41 %	45-28 %	32-20 %	7- 4 %	3- 1.9%	4- 2.5%	4- 2.5%	161
Elite Law Schools	1-12.5%	3-37.5%	3-37.5%	1-12.5%	0- 0 %	0- 0 %	0- 0 %	8
High Minority Schools (Smith)	0- 0 %	7-25 %	8-29 %	4-14 %	3-11 %	2- 7.1%	4-14 %	28
High Minority Schools (Pettigrew)	3-21 %	5-36 %	4-29 %	0- 0 %	1- 7.1%	1- 7.1%	0 0 %	14
Predominantly Black Schools	0- 0 %	0- 0 %	0- 0 %	0- 0 %	0- 0 %	0- 0 %	4-100 %	4

Table 7

Gross Attrition Rates of Minority Students in ABA-Approved Law Schools

1969-1970	1st year	2nd year	% decrease 1st year to 2nd year	3rd year	% decrease 1st year to 3rd year
Black	1,115	N/A	N/A	761	31.74%
Mexican American	245	N/A	N/A	170	30.61%
Puerto Rican	29	N/A	N/A	18	37.93%
Asian	N/A	N/A	N/A	72	N/A
1971-1972					
Black	1,716	1,324	22.84%	1,207	29.66%
Mexican American	403	337	16.37%	271	32.75%
Puerto Rican	49	40	18.36%	25	48.97%
Asian	254	218	14.17%	202	20.47%
1972-1973					
Black	1,907	1,443	24.33%	1,329	30.30%
Mexican American	408	386	5.39%	329	19.36%
Puerto Rican	73	47	35.61%	56	23.28%
Asian	298	297	0.33%	288	3.35%
1973-1974					
Black	1,943	1,587	18.32%	1,452	25.27%
Mexican American	539	447	17.06%	381	29.31%
Puerto Rican	96	87	9.37%	96	0.00%
Asian	327	322	1.52%	287	12.23%
1974-1975					
Black	1,910	1,511	20.89%	1,488	22.09%
Mexican American	559	421	24.68%	446	20.21%
Puerto Rican	117	121	-3.41%	100	14.52%
Asian	429	343	20.04%	378	11.88%
1975-1976					
Black	2,045	1,654	19.11%	1,508	26.25%
Mexican American	484	435	10.12%	388	19.83%
Puerto Rican	113	94	16.81%	100	11.50%
Asian	436	439	-0.68%	423	2.98%
1976-1977					
Black	2,128	1,648	22.55%	1,572	26.12%
Mexican American	542	459	15.31%	445	17.89%
Puerto Rican	119	95	20.16%	111	6.72%
Asian	484	409	15.49%	398	17.76%

Source: Annual Survey of Minority Group Students Enrolled in Approved Law Schools. American Bar Association, 1979.