

LEVELING THE PLAYING FIELD IN LAW SCHOOL: A LOOK AT ACADEMIC ASSISTANCE PROGRAMS FOR MINORITY LAW STUDENTS

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Introduction

The issue of academic assistance programs in law schools has become a widely debated topic, given its origins in the policies of affirmative action. The purpose of this article is to elucidate the necessity of such programs in order to promote equality in legal education and the legal profession. First, this article reviews the obstacles that minority students have faced in order to gain admission to law school and the obstacles that remain after entrance. Second, this article discusses the creation of academic assistance programs, focusing on the goals of the programs, the criticism of the implementation of such programs and the particular contributions and benefits that warrant their existence. Lastly, the article defends the programs against criticisms by enumerating their advantages.

A Historical Look at Minority Students and Law School

After *Brown v. Board of Education*² was decided, American universities sought to remedy any discrimination in their educational system and increase and encourage minority participation in higher education by initiating race-based actions, more commonly known as affirmative action policies, for minority students.³ Such programs included targeting minorities specifically for recruitment by specific schools.⁴ In the landmark decision, *Regents of the University of California v. Bakke*, a suit was brought challenging the special admissions program at the medical school at the University of California at Davis.⁵ After being rejected twice under the general admissions program, Allan Bakke alleged that the special admissions program had excluded him “on the basis of his race, which violated his rights under the Equal Protection Clause of the Fourteenth Amendment.”⁶ The trial court found that the special admissions program operated as a quota system based on race and ethnicity given that sixteen

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²*Brown v. Board of Education*, 349 U.S. 294 (1955).

³Emily V. Pastorius, *The Erosion of a Affirmative Action: The Fifth Circuit Contradicts The Supreme Court On The Issue of Affirmative Action: The Fifth Circuit Contradicts The Supreme Court On The Issue of Diversity*, 27 GOLDEN GATE U.L. REV. 459, 471 (1997).

⁴*Id.* at 472.

⁵438 U.S. 265, 269 (1977).

⁶*Id.* at 277-78.

out of one hundred seats in the class were reserved for minority students.⁷ The school was prohibited from taking race into account when making decisions on whether to admit a specific applicant, and the district court held the program to be unconstitutional.⁸

The Supreme Court held that the program violated Title VI of the Civil Rights Act of 1964.⁹ With respect to the issue of constitutionality of the program, the opinion by Justice Lewis Powell recognized that the program was clearly a classification based upon race and ethnic background.¹⁰ He wrote: “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”¹¹ Despite this, Justice Powell found that the law school’s attainment of a diverse student body is, indeed, a constitutionally permissible goal.¹² He wrote that, in considering race or ethnic background to simply be a “plus” factor in the applicant’s file, an admissions program would not be insulating the individual applicant from comparison with other applicants.¹³ An institution could consider the various qualifications and characteristics of the applicant in order to ascertain his “potential contribution to diversity, without the factor of race being decisive.”¹⁴

The repercussion of the *Bakke* decision was the effective implementation of affirmative action admission policies in law schools that permitted them to consider a prospective student’s race when making admissions decisions. In evaluating applicants for admission, law schools previously focused on scholastic records from lower institutions and on the Law School Admissions Test (LSAT) which is designed to be an indicator of a candidate’s competency to study law.¹⁵ Unfortunately, the LSAT has a disproportionate impact on minority candidates, who tend to receive low test scores.¹⁶ Historically, these low test scores, as well as grade point averages, were the result of the disadvantaged educational

⁷ *Id.* at 279.

⁸ *Id.*

⁹ *Id.* at 284.

¹⁰ *Id.* at 289.

¹¹ *Id.*

¹² *Id.* at 311-12.

¹³ *Id.* at 317.

¹⁴ *Id.*

¹⁵ Okechukwu Oko, *Laboring In the Vineyards Of Equality: Promoting Diversity In Legal Education Through Affirmative Action*, 23 S.U. L. Rev. 189, 200 (1996).

¹⁶ *Id.* at 201.

backgrounds of these minority students.¹⁷ The prevailing belief has been that minority students are increasingly able to gain access to institutions of higher learning and quality education, which allows these students to bring up their grades and test scores and close “the gap between the traditionally disadvantaged and others.”¹⁸ However, this belief remains short-sighted for two reasons. First, minority students, as a result of the urban areas in which they live, are faced with poorly subsidized public school systems.¹⁹ Second, minority students “do not necessarily receive the same education or learn similar rules of behavior or achievement.”²⁰ Thus, minority students still tend to receive lower test scores than other advantaged students.²¹ The poor performance of minority students is clearly reflective of larger social problems caused by race and socioeconomics and not of a minority student’s ability level.²²

Therefore, factors that had been considered less important such as personality, motivation, leadership ability, and other capabilities were now emphasized more in the admissions process of a minority student, along with LSAT scores and GPAs, which had traditionally been the method of measure.²³ Some law schools also sought to create diversity within the school “which has the potential to enrich everyone’s education and [thus make] a law school’s class stronger than the sum of its parts,”²⁴ and achieved this by admitting a substantial amount of minority students.²⁵ This practice raised the contention that law schools employed race as a factor in making its admissions decisions.²⁶

Such an issue was first addressed in *Grutter v. Bollinger*, where Barbara Grutter, a white Michigan resident, had applied to the law school at the University of Michigan with a 3.8 GPA and an LSAT score of 161.²⁷ After initially being placed on a waiting list, Grutter was denied admission and, subsequently, filed suit alleging that the reason her application was rejected was because the law school adhered to a policy which used race as a predominant factor which gave

¹⁷Kathy L. Cerminara, *En Essay Remembering Arthur: Some Suggestions For Law School Academic Support Programs*, 21 T. MARSHALL L. REV. 249, 253 (1996).

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.* at 254.

²¹*Id.*

²²*Id.*

²³Stephen R. Ripps, *Comment: A Curriculum Course Designed for Lowering the Attrition Rate for the Disadvantaged Law Student*, 29 How. L.J. 457, 460 (1986).

²⁴See *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003).

²⁵*Id.* at 316.

²⁶*Id.* at 316-317.

²⁷*Id.* at 316.

certain minority applicants a significantly greater chance of admission over applicants “with similar credentials from disfavored racial groups.”²⁸ Furthermore, she argued that the law school lacked a compelling interest “to justify their use of race in the admissions process.”²⁹ The law school contended that its policy, in regards to admissions, required the evaluation of each applicant based on the entire file, which included undergraduate GPAs, LSAT scores, letters of recommendation, personal statements, and the applicant’s essays on the manner in which they could contribute to the law school. However, grades did not guarantee admission, as the law school looked at other “soft variables” in order to achieve a racially and ethnically diverse class.³⁰

The test the Court applied was that when race-based action is needed to further some compelling government interest then, as long as the action is narrowly tailored to achieve that interest, the action will not violate the constitutional guarantee of equal protection.³¹ To be narrowly tailored, an admissions system, based upon race consideration, cannot insulate certain categories of applicants from competition with other applicants based upon desired qualifications.³² However, a university may consider race as a “plus factor” in the applicant’s file, without insulating the individual from all the other applicants.³³ The Court found that the law school gave serious consideration to all the ways an applicant could contribute to a “diverse educational environment,” and this consideration was afforded to all of the law school’s applicants of all races.³⁴ The school’s admissions program did not operate as a quota, where there are a certain fixed number of seats exclusively reserved for students of certain minority groups;³⁵ rather the program was flexible enough to ensure that evaluations rested upon each applicant’s individual identity and not on the applicant’s race or ethnicity as a defining factor of their application.³⁶ The Court found that the law school’s narrowly tailored use of race in its admissions programs to further its compelling interest in achieving the benefits of having a diverse student body was not prohibited by the Equal Protection Clause.³⁷

²⁸ *Id.* at 316-17.

²⁹ *Id.* at 317.

³⁰ *Id.* at 315-16.

³¹ *Id.* at 327.

³² *Id.* at 334.

³³ *Id.*

³⁴ *Id.* at 337.

³⁵ *Id.* at 335.

³⁶ *Id.* at 337.

³⁷ *Id.* at 343.

Unfortunately, despite the fact that these race-based admissions policies enabled minority students to gain admission to law school, the students continued to face obstacles to legal education because the law schools, themselves, did nothing to welcome them, nor teach in ways that took account of their history and interests.³⁸ These students generally did not do as well as their white counterparts and, as a result, many minority students would be either academically withdrawn or dismissed or would voluntarily withdraw for academic reasons.³⁹ Unfortunately, as the learned Professor Sander, a member of the law faculty at UCLA, discovered, this atmosphere of academic instability has not dissipated; current statistics reveal that African- American students are two and a half times as likely as white students to not graduate from law school.⁴⁰ Minority students that do make it through three years of law school continue to face difficulty when attempting to pass the bar. African-American students are four times as likely to not pass the bar on their first attempt, and are six times as likely not to pass after multiple attempts, than their white colleagues.⁴¹

The institutions began to realize that many of these students were incapable of adequately competing with other students.⁴² They responded to the low retention rate by instituting programs that offered assistance to aid the students in reaching “their academic potential.”⁴³ Also, with the advent of affirmative action there was an increase of minority students interested in law school and so the schools perceived this as a way to diversify the legal profession and legal education.⁴⁴

The Solution: Academic Assistance Programs

Traditional legal education assumes that a student can decipher on their own what is required in legal coursework.⁴⁵ On the other hand, academic support “assumes these skills must be taught more explicitly and that a crucial component of effective legal education is teaching students with varied learning styles and

³⁸ Cerminara, *supra* note 17, at 252.

³⁹ *Id.*

⁴⁰ Touro Law Symposium, Professor Sander, p.12 (2004).

⁴¹ *Id.*

⁴² Leslie Yalof Garfield, *The Academic Support Student in the Year 2010*, 69 UMKC L. REV. 491, 494

⁴³ *Id.*

⁴⁴ Ellen Yankiver Suni, *Academic Support At the Crossroads: From Minority Retention to Bar Prep and Beyond- Will Academic Support Change Legal Education Or Itself Be Fundamentally Changed?*, 73 UMKCL Law Rev 497, 497-98 (2004).

⁴⁵ Suni, *supra* note 44, at 500.

needs to become lifetime learners of the law.”⁴⁶ The learned Professor Scherer, founder of the Legal Education Access Program (LEAP)⁴⁷ at Touro College, Jacob D. Fuchsberg Law Center, maintains that the reason that minority students are unable to “figure this out” is due to the kind of educational environment that these students face at most predominantly white law schools.⁴⁸ First, they are “not fully included in the student to student information systems through which the most important information is communicated to first year students concerning what a law student must do to succeed in law school.”⁴⁹ Second, many students face a hostile environment that is caused, in large part, by the false assumptions and stereotypes that minority students face about their academic ability.⁵⁰

Academic assistance programs refers to an educational institution’s efforts to provide a supportive environment for, to enhance the sense of community among, to increase the information flow to, and thus to improve the performance of, a group of students who have traditionally been at risk of under performance [and to] provide early academic assistance to students who have traditionally been at risk for under-performance.⁵¹

Different schools have resolved to approach the programs differently depending upon the needs of their minority students.⁵² Whatever the type of program, they are all designed to be early intervention programs that are usually offered during the summer prior to the first semester of law school and then as an additional class or series of seminars during the first year of school.⁵³ Originally, such academic assistance consisted of simply reviewing a student’s exam or instructing them on briefing; but now, academic support professionals seek to recognize the learning styles of the students and educate them on time and stress

⁴⁶ *Id.*

⁴⁷ The LEAP program at Touro Law School was established in 1990 with the purpose of providing minority students with an opportunity to achieve success in law school; the program focuses on upper level students mentoring first year students and providing them with skills training. Prior to the beginning of the school year, a four week program is organized, which first year students are encouraged to attend, that introduces them to the basics of the legal education as well as studying skills such as case-briefing. In addition to this, study-groups are run throughout the semester where upper level students discuss and review the classroom material and the first years are counseled on how best to prepare for examinations.

⁴⁸ Touro Law Symposium, Professor Scherer, p.30 (2004).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Cerminara, *supra* note 17 at 251.

⁵² Ollivette E. Mencer, *New Directions in Academic Support and Legal Training: Looking Back, Forging Ahead*, 31 S.U. L. REV. 47, 55 (2003).

⁵³ Garfield, *supra* note 42, at 495.

management.⁵⁴ Current academic assistance programs include but are not limited to tutoring/study groups, study/exam skills, summer programs that concentrate on preparation, special classes, orientation programs, advising and bar exam preparation,⁵⁵ separate legal writing courses, memo or exam writing courses, summer and full-year programs, various degrees of course work during the first two or successive semesters, or even programs that last for a semester or two.⁵⁶

The Law School Admissions Council (LSAC) initially recommended a structure that consisted of “a summer program and an academic school-year program with bi-weekly review sessions and monthly small-group sessions,” and recommended the employment of teaching assistants to run the sessions.⁵⁷ Now, many schools have shifted away from this rigid structure and towards the flexibility of creating their own format of assistance “that operate basically as periodic open review or skills-enhancement segments.”⁵⁸ Nonetheless, many of their programs still combine components and features of the LSAC structure such as “a primary focus on skill development and technique but in conjunction with substantive courses, a low student-teacher ratio, quality instruction by professional staff and, although difficult from a practical perspective, a focus on preventive action for students who might eventually experience problems.”⁵⁹

University of California, Los Angeles School of Law has been an institution that has invested large amount of resources into forming its academic assistance programs.⁶⁰ Their program includes seven components consisting of “a two week summer program,⁶¹ tutoring throughout the year, a special course in the spring of the first year, exam workshops, faculty-led study groups, a special course for students who are on academic probation and review sessions.”⁶² This program has been seen as one which combines all the best-known and most tested elements of academic support into one format.⁶³

⁵⁴ *Id.* at 497.

⁵⁵ Richard Cabrera and Stephanie Seman, *Law School Academic Support Programs- A survey of Available Academic Support Programs For the New Century*, 26 WM. MITCHELL L. REV. 205, 209-10 (2000).

⁵⁶ Mencer, *supra* note 52 at 56.

⁵⁷ *Id.* at 56.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 57.

⁶¹ *Id.*

⁶² Cerminara, *supra* note 17 at 264.

⁶³ *Id.*

Another type of program, offered by Columbia University School of Law, focuses instead on memo and exam writing.⁶⁴ Rather than reviewing and reinforcing material taught in the classroom, as the UCLA program does, this program assists students in achieving success by helping them to improve their writing skills.⁶⁵ At Columbia, the dean of students employs the former director of the Teachers College Writing Skills Center, Columbia University, to design and conduct periodic memo and exam writing workshops throughout the fall.⁶⁶ These workshops and individual sessions focus exclusively on the writing process itself, and the skills and learning styles of the student.⁶⁷ Notably, this program is available to all students, not exclusively those of minority backgrounds.⁶⁸

Notwithstanding the form of assistance and its components, the goals of most programs is to support and promote social, racial and economic diversity in the legal profession,⁶⁹ to provide early academic assistance to students at risk of not succeeding,⁷⁰ and “to create a supportive working community in the law school and assist students in maintaining their confidence, values, and self worth in the rigorous and often alienating environment of the American law school.”⁷¹

Weighing the Advantages Against the Criticism

Despite the fact that, through these programs, minority students are able to achieve academic success and thus raise the reputation of a law school, there has been widespread criticism of academic assistance programs among members of the legal profession. The predominant argument is that those who take part in such programs are concerned with the label of “assistance,” arguing that such a term actually stigmatizes minority students.⁷² When those students are placed in class or offered academic programs which are targeted especially against them and have a remedial character, it fosters the belief that these students are less intellectually capable than the other students attending law school.⁷³ In addition, the simple existence of these programs may lead to charges that the school is

⁶⁴ *Id.* at 265.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Adam G. Todd, *Academic Support Programs: Effective Support Through a Systemic Approach*, 38 GONZ. L. REV. 187, 192 (2002).

⁷⁰ Mencer, *supra* note 52 at 57.

⁷¹ Todd, *supra* note 69 at 192.

⁷² Cerminara *supra* note 17 at 255.

⁷³ *Id.* at 256.

lowering its academic standards for minority students.⁷⁴ But more importantly, the implementation of assistance programs has raised a backlash among other students who envy the existence of these programs for minority students.⁷⁵

Admittedly, some very valid contentions have been raised against the implementation and even the existence, altogether, of such programs. But before one can discard the programs based on their disadvantages, the importance of the programs should also be considered. First, such programs “further legal education’s role in developing and supporting a public profession.”⁷⁶ In order to properly serve the public, there must be a diverse membership of lawyers representing various ethnic, racial, and economic classes; law schools may affect this by admitting minority students and implementing programs that will enable them to succeed in their education.⁷⁷ “Second, academic support efforts advance the educational process on a much more fundamental level”⁷⁸ by giving students a sense of belonging and camaraderie within the school. Law students tend to feel isolated, lonely and unable to comprehend substantive material during their first year of school, but such feelings are more common among minority students who have less of a support structure than other students.⁷⁹ Academic support programs are not only able to provide students with a greater sense of community, but they are also able to assist minority students in building relationships, which are automatically fostered among other students in law school.⁸⁰

Third, academic support programs have been increasingly instrumental in assisting minority students in passing the bar exam. Bar passage rate statistics are extremely important to law schools and have become public record, accessible by firms that have a history of hiring from the school and by prospective students.⁸¹ However, assisting with preparation for the bar exam is a task most law faculty do not consider as part of their responsibilities and, furthermore, only a small percentage of the faculty possess the skills needed to actually assist students.⁸² Academic support professionals on the other hand possess these desired skills.⁸³ Therefore, schools concerned about the bar passage rate of their students would

⁷⁴ *Id.*

⁷⁵ *Id.* at 257.

⁷⁶ *Id.*

⁷⁷ *Id.* at 258.

⁷⁸ *Id.* at 258-9.

⁷⁹ *Id.* at 258.

⁸⁰ *Id.* at 259.

⁸¹ Suni, *supra* note 44, at 506.

⁸² *Id.* at 507.

⁸³ *Id.*

desire to have academic assistance programs implemented in their schools in order to acquire such professionals.⁸⁴

Conclusion

Throughout the history of the United States, minority individuals have continuously faced impediments in attempting to access better education and standards of living. Though affirmative action policies were created with the intention of establishing equality in the areas of education and business, minorities, nevertheless, are still treated differently than majority individuals in seeking higher education; the goal of academic assistance programs is to aid minority students to succeed in law school, an area of study typically alien to them, where they lack the tools necessary to adequately compete with those from a majority background. Many argue that these programs are themselves discriminatory, in that they give an unfair advantage to a select group of students rather than to everyone notwithstanding their backgrounds. Though this may be true, the advantage is necessary in order to create a level playing field in law school, where minority students can be on the same level as their more advantaged peers. In such a learning environment, all students may have the opportunity to succeed.

This is clearly a situation where the ends outweigh the means; the discriminatory effects of the program are greatly outweighed by the academic, social, and economic ramifications and benefits that the programs bring. Most importantly, however, it must be recognized that these programs are not permanent fixtures on the academic policies of law schools. Given that they are successful, once these programs foster confidence and provide skills in a generation of minority law students, these skills will no doubt permeate through the minority communities. Similar to majority communities, the minority communities will also inherently possess the ability to compete with others in law school and, eventually, there will be no need for such programs to exist. Such an advantage is necessary in order to create long-term equality in legal education.

⁸⁴ *Id* at 506-7.