

DOCUMENT RESUME

ED 202 382

HE 013 897

AUTHOR Liacouras, Peter J.
 TITLE Toward a Fair and Sensible Policy for Professional School Admission.
 INSTITUTION Education Commission of the States, Denver, Colo. Inservice Education Program.; State Higher Education Executive Officers Association.
 SPONS AGENCY Kellogg Foundation, Battle Creek, Mich.
 REPORT NO IEP-906-1
 PUB DATE Apr 78
 NOTE 10p.; Paper presented at a Seminar for State Leaders in Postsecondary Education (Washington, DC, April 1978).

EDRS PRICE MF01/PC01 Plus Postage.
 DESCRIPTORS *Admission Criteria; Affirmative Action; Black Students; *College Admission; College Entrance Examinations; Equal Education; *Ethnic Groups; Ethnicity; Higher Education; *Law Schools; *Minority Groups; Predictive Measurement; Professional Education; Scores
 IDENTIFIERS *Law School Admission Test; *Seminars for State Leaders Postsec Ed (ECS SHEEO); Temple University PA

ABSTRACT

Major assumptions and goals on which professional school admission decisions are based, the use of the Law School Admission Test (LSAT) as an admission criteria, and approaches to admission used by the Temple University Law School are examined. One consideration in making admissions policies is group needs, or whether there is a need for more black and other racial minority professionals in law, medicine, and other professions. The groups needs goal refers not only to blacks, Hispanics, Native American, and Asian Americans, but to ethnic minorities. It is suggested that regular admissions policy must be fair to all groups. A second societal goal is the individual's needs: that access to the professions should be within the reach of every American determined by that person's own individual merit. Individual merit means that the total relevant record of the applicant be examined, and that attention be directed to the record of the individual rather than the group to which the applicant belongs. It is suggested that the LSAT does not measure, and was not designed to measure, a person's capacity for being a good lawyer or community leader, but rather to predict performance in the first year examinations of law school. The LSAT does not measure common sense, self-discipline, motivation, judgment, character, leadership, and many other qualities. The individual circumstances, such as holding a full-time job during college, may be important considerations in addition to LSAT scores. One issue is that some colleges with a large proportion of ethnic minorities (e.g., Slavic and Polish-American) have been found to have lower median LSAT scores than predominantly white colleges: it is not just predominantly black colleges that may tend to score lower on the screening test. The Temple Law School uses both nondiscretionary and discretionary approaches to admission. (SW)

ED202382

Inservice Education Program (IEP)

Paper Presented at a Seminar for State Leaders in Postsecondary Education

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TOWARD A FAIR AND SENSIBLE POLICY FOR PROFESSIONAL SCHOOL ADMISSION

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PETER J. LIACOURAS

Dear, and Professor of Law
Temple University School of Law

Washington, D.C.
April 1978

IEP Reprint No. 906-1

IE 013 297



Inservice Education Program (IEP)
Education Commission of the States
1860 Lincoln Street, Suite 300
Denver, Colorado 80295



The IEP Program has been supported primarily by the W. K. Kellogg Foundation with additional funds from the Education Commission of the States, the Frost Foundation and the State Higher Education Executive Officers



Toward a Fair and Sensible Policy for Professional School Admission

Peter J. Liacouras
Dean and Professor of Law
Temple University School of Law
Philadelphia

To demonstrate the need to look beyond code words and behind sacred cows, permit me to poke fun at myself. During a recent television discussion show on the *Bakke* case, I was asked to define "reverse discrimination." There was an awkward pause while I silently outlined, with some sophistication, the complex subject matter which, at various times and according to different speakers, falls under that rubric. "Reverse discrimination," I blurted out, "is the opposite of old-fashioned or 'forward discrimination,' and it is just as bad."

Sometime later I realized that although substantively empty, such television rhetoric at least neutralized both sets of code words. It underlines our duty to reexamine *in context* the major assumptions and goals on which admission decisions are based if we are serious about moving toward a fair and sensible policy for professional school admission.

We have had more than a decade of experience with the impact of "racial minority admissions" on professional schools — some of it bad, but mostly good. The attitude we should have developed is not a "15 years ago or nothing" Hobson's choice by suggesting that we either continue business as usual or go back to 1963. The question is whether we have learned anything since then.

Fair and sensible criteria based on true merit, quality and potential performance as lawyers and community leaders will, in my judgment, produce plenty of blacks and other minorities in the professions. Such criteria will also produce a fair share of professionals of all races from economically poor backgrounds. We certainly should use scholastic achievement indicators such as grade point averages and standardized test scores. But we should not begin or stop there in our minds or actions; yet we have. We should not be conclusively bound by such indices; yet we have been. This should be the rule for everyone, not only for racial minorities or any other discrete group in society; yet it has not been.

Racial minorities have been, but should not be, the scapegoat for the numbers and admission crunch in professional schools. We should, instead, reexamine the larger issues of admission — the traditional admission standards and procedures. We should question the assumption that only numerical indices such as grades and standardized tests — the sacred cow — can measure quality, merit, individual worth or potential for performance in the trenches of a profession or community leadership. And we must place cost-benefit analysis

that rationalizes over-reliance on these indices and argues that faculty time is too valuable to be diverted to the tough task of making admission judgments.

Properly understood, admission to professional school is an issue that raises a series of policy judgments: who, from what groups in society, with what backgrounds and to achieve what kind of future profession and what kind of society, will be given the opportunity to enter the profession and become our future community leaders by first getting into the professional school? The same typology would apply to all professions, but I will use the legal profession as an example to help provoke a contextual analysis of these fundamental policies. With several qualified applicants for each available place in law school, and with the realization that access to the legal profession is a significant ladder to social, economic and political mobility, is there any other context in which to assess admission standards and procedures?

Group Needs vs. Individual Needs: An Irresistible Force Meets an Immovable Object. There are two fundamental societal goals in competition here. The first is the needs of the group (e.g., the Puerto Rican community needs more Puerto Rican lawyers and community leaders). The second is the needs of the individual (e.g., Jane Doe should be treated on her own individual merits).

Group Needs: An Irresistible Force. Simply put, there is an overwhelming group need for more black and other racial minority professionals in law, medicine, etc. Blacks, Hispanics, Asian Americans and Native Americans, who constitute between 15 and 35 percent of the population, depending on regions of the nation, constitute only about 2 percent of the professions of law, medicine and dentistry, and about 8 percent of the students in professional schools.

The need for more racial minority professionals is obvious to peace-loving Americans. We recognize the pernicious residual effects of the institution of slavery and other types of old-fashioned or "forward discrimination" even today on all of us. We also can observe the tendency of professionals to become role

models and leaders in the very communities from which they spring.

The point is not that a black lawyer is consigned to serve only black clients, a white doctor only white patients, etc. The clear-cut tendency, however, has been along those lines. Especially in the Northeastern quadrant where ethnic neighborhoods have been preserved, the political leaders of a community have come from such discrete or identifiable communities. This is cultural pluralism and responsive democracy in action. We should not begin "reform," as the pro-Bakke forces urge, at the expense of blacks and other racial minorities just when they are finally beginning to produce a group of professionals and leaders for their communities and the entire nation.

Traditional White Ethnic Minorities and Some More Social History. The "group needs" goal refers not only to the Black, Hispanic, Native American and Asian American communities. It also applies to Americans whose roots are Polish, Italian, Lithuanian, Greek, Irish, Catholic, Jewish, etc., the "bluecollar, rowhouse, working class, Sunday sports-nut" prototype in "elitist" cartoons.

In debates about access to the professions, however, there has been a clear tendency during the past decade to consider everyone who is not a racial minority member as part of one Anglo-majority group. Such lumping has certainly worked to the detriment of traditional white ethnic applicants. They have been ignored. They have not been getting into professional schools at what they think is a decent enough rate. Perceptions count as well as actual results. Hostility between and even within minority groups has resulted, with the most extreme position being that attributed recently to Mayor Rizzo of Philadelphia. Rather than unmask policies that have Balkanized the black and white minority communities, a typical white ethnic response has been: "When it hurt to be a 'minority,' we were minorities; now that being 'minority' helps, we are not. Therefore [sic], the blacks are to blame and affirmative action programs must go."

Yet, if the four blacks who were part of the affirmative action program of 16 racial

minorities at Davis Medical School in *Bakke* were rejected, is it even probable that those seats would go to Italian-Americans, Polish-Americans, Appalachian or rural whites or other children from the blue-collar communities? Are white ethnics fairly represented in professional schools, the professions and national leadership?

The problem, I suggest, is not with affirmative action for blacks or Chicanos or women; it is that fair affirmative action is not universal enough. The problem, more directly, is with the 84 seats at Davis not subject to affirmative action. The real issue is the regular admission programs in professional schools. Are the standards and procedures that yielded this class fair and sensible, job related, demographically defensible?

Admission policy must be fair to all groups. So many groups should share in the American Dream that it is counterproductive and unfair to single out one group or to ignore others, as too many pro-Davis forces have urged. My first point, then, is a societal "group need" for *all* communities to get a piece of the action. This is an irresistible force.

Individual Needs: An Immovable Object. Simply put, the second societal goal is the individual's needs. By this we mean that access to the professions should be within the reach of every American determined by that person's own *individual* merit. Individual merit dictates that one innocent person not be deprived of fair treatment because of another person's wrongdoing. But merit does not attach simply by achieving better grades or scoring higher than the next person on multiple choice "aptitude" tests (e.g., LSAT). Individual merit means that we should look at the total relevant record and then select or pass over each person on the basis of what he or she has done and probably will do.

My second point underscores the need to look at the record of the individual rather than the group to which he or she may belong. The tendencies in our social history to treat persons conclusively as members of a particular group, and to grant them benefits or impose burdens solely on that basis, have been pernicious. It was not long ago that "Catholics need not apply" signs and Jewish

quotas were facts of life. The newer call for "proportional representation" is beginning to take on characteristics of the old Jewish quota and should be exposed as such.

Should a worthy, innocent young man or young woman in 1978 pay for the sins of the general society or the sins of particular members of this or an earlier generation? If so, should such a burden be assessed in determining access to the professions? Will not racial, religious, ethnic and other intergroup bickering, turmoil and even violence predictably result from such policies? Or, I repeat, from policies that effectively deny access to the professions to almost all members of a minority group as does overreliance on the LSAT?

This, then, is the immovable object.

The Need for Honest Pragmatism in Clarifying Common Interests of Everyone. Pluralism is the lifeblood of a nation built on freedom, equality of opportunity to succeed or fail on your own merits, and a legitimate diversity that emphasizes our common humanity. Each of us should, on individual merit, be given an equal opportunity. Equal opportunity is not the exclusive preserve of the members of just one or several groups in society. It is due each of us. We must learn to think not in either-or terms, or as majority versus minority, or by ostensibly neutral principles masking real intentions and results, or by *reductio ad absurdum* logic or overladen with patricians' burdens. Honest pragmatism is needed to clarify our common interests.

The Inadequacy and Mischief of the Sacred Cow. One might respond that all we have to do is "apply the standards." Certainly, that response cannot mean such discredited, non-egalitarian standards as the "good old boy" or "Harry's son" or the "Congressman's candidate" or the "old Jock" or the "school's big donor." These standards have quietly been used for as long as memory, but practically never to help racial minorities and the poor. Such policies have not yet been overcome, and insufficient scholarly and lay attention has been directed at them.

By the response "apply the standards," one may mean to let those in who are qualified

and keep out the others. Everyone agrees. Our challenge is this: If there are three times as many qualified applicants as available seats, who should sit in them? Why has the answer been the sacred cow, i.e., the grade point average and the relevant standardized multiple-choice test, and even more particularly the so-called aptitude portion (LSAT, MCAT) of it? The designers and even the sellers of the LSAT warn against overreliance on them ("they should be used only in conjunction with other valid admissions factors"). But the caveat seems more like a whisper and has not been heard.

The LSAT Is Too Narrow as a Lawyering Aptitude Test and Is Not Synonymous With Merit. The LSAT does not measure, and indeed was not designed to measure, a person's capacity for being a good lawyer or community leader. The LSAT was designed solely to predict performance in the first year examinations of law school. It purports to measure narrow analytical skills and quick response. The analytical skills it is primarily aimed at are the *syntactic* (implication, coimplication and other logics more like a closed language system such as mathematics) and *semantic* (referents to the real world of the tester) rather than *pragmatic* (the "so what") skills.

Do your first-year law school grades tell us how well you will do in the real world? Does the fact that you rank higher in the class than the next person mean that you are more qualified to be a lawyer or more likely to be a better lawyer? You may be a great law student but a corrupt or incompetent lawyer. In fact, there is no systematic study validating which law students actually do become the best lawyers — although there are apocryphal stories such as the one holding that "A" students become the professors and "B" students the judges, while "C" students make all the money!

What the LSAT does not even purport to measure — and what is not seriously and systematically measured in most general admission processes — turns out to be so much of what *does* count in lawyering and good community leadership: common sense, self-discipline, motivation, judgment, practicality, idealism, tenacity, fidelity, character and ma-

turity, integrity, patience, preparation, the ability to listen, perseverance, client-handling skills, creativity, courage, personality, oral skills, self-confidence, organizational ability and leadership.

These qualities you may have in abundance, but the tests and the professional gatekeepers may pay them no mind. Does the fact that you study 40 hours a week to achieve a 3.0 grade point average and that another applicant studies only 10 hours weekly for a 3.5 average mean that you are less meritorious? Does the fact that you hold a 40-hour-a-week job during the school year to pay for your education while earning a 3.0 average mean that you are less qualified than another applicant whose parents pick up the entire tab, who does not hold any job and who "achieves" a 3.5 average? Which person is more likely to be a good lawyer?

Does the fact that you are black, the son of professional parents and score in the 70th percentile on the LSAT mean that you are more meritorious or will do better in practice than another applicant who is white, the daughter of a first generation coal miner father and stay-at-home mother, who slept in the same bedroom with six sisters and scores in the 50th percentile on the LSAT?

Why should you obey your parent's injunction to be honest, to help others, not to be selfish, to persevere and not to be tempted by material opulence if none of these facts count in competition for scarce resources such as professional school seats? Are these not criteria of merit, aptitude for lawyering or community leadership? Why should you be a good citizen if all that counts in getting to the professions is test-taking skill?

When we are told that "when other things are equal, the applicant with the better test scores is more likely to succeed," is there a commitment to search out and consider for everyone such facts and judgments as these? Is such a commitment limited only to racial minorities? Is that fair and sensible? How can we assume "other things are equal" unless we look at the record?

It bears emphasizing that we are not discussing unqualified applicants. We are focusing on

qualified applicants, regardless of race, national origin, etc., who are passed over because their test scores are lower than those applicants who are admitted, not necessarily because they are less qualified on merit or job potential.

There are other problems with the LSAT. It was on the question of racial minority admissions that the discriminatory effect of the LSAT was first realized. The social history of the 1960s called into question one of the features that had recommended the LSAT — its apparent fairness and freedom from bias. As reliance on the LSAT increased, the number of black law students in predominantly white schools decreased to virtually nil. Overreliance on the LSAT was excluding Black and Hispanic applicants disproportionately. Rather than calling into question the major premises of the sacred cow, this glaring defect was considered to be merely a unique social exception that “proved” the validity of the LSAT and similar standardized criteria. We believe what we want to believe.

What has not been fully realized, however, is that white ethnic minorities are also being turned back by the same professional school gatekeepers. Data from 1975 indicate that the median LSAT score for students from two colleges with a substantial number of Slavic or Polish-American students (Alliance and St. Procopius, now Illinois Benedictine College) was 473 and 468 (about the 28th percentile). Meanwhile, the median LSAT for students at two predominantly black universities, Howard and Fisk, was 418 and 400 (about the 15th percentile). These scores compare with the M.I.T. median of 674 (93rd percentile). Comparable studies of colleges with substantial numbers of other ethnic or racial minorities would probably yield similar results. There is no way, given the overreliance on standardized tests, that the door will open to the 28th or 15th or 50th percentiles when the 80th or 93rd are also knocking.

But is the median M.I.T. student necessarily more likely to be a better lawyer or community leader for some groups or the nation in a pluralistic society than the median Alliance or Fisk student? Hardly. It all depends on a host of relevant factors that do not become “other things being equal” unless you look at,

consider and fairly weigh them. For me the LSAT median, in general, may count less than the language and subcultural experiences that the median Alliance or Fisk student probably possesses and that the median M.I.T. student probably does not have. Before making my final decision, I would want to know more than such limited, abstract probabilities about each applicant. Yet, our sacred cow, our societal mind-set, blocks further serious inquiry and precludes empirical verification of the advantage of the M.I.T. student and the detriment of the Alliance and Fisk students.

Indeed, the advantage of fluency in a second language, culture or subculture is somehow transformed by rhetoric reminiscent of colonialism so that one becomes “culturally deprived,” “disadvantaged,” “not fully developed,” or “unqualified to learn.” These are the same slogans used to thwart the national independence of peoples in Africa and Asia. In the United States this attitude defends “regular” standards that systematically exclude blacks who then become the proper object of paternalism as in my Fisk example, and that have only marginally different results for white linguistic or cultural minorities (such as Polish-Americans) who are ignored as “one of the majority” as in my Alliance example.

Is that a fair and sensible admission policy?

Based on present trends, our young ethnic friends will probably find the door to the professions closed. It is a statistical fact that not only Blacks, Hispanics and Native Americans, but also other groups whose first or family language is not standard English (our traditional white ethnics) and who are not a product of the elite preparatory school system, are outscored on such tests by native-born majority Americans who are. This has little, if anything, to do with brains or ability or merit or predicting who will do best in the profession.

These ostensibly objective tests are not the easy-to-recognize “minorities keep out” obstacles such as the Jewish quotas and “Catholics need not apply” practices of the early 1900s. But they are just as effective barriers. The systematic exclusion of racial and white ethnic minorities by such continued overre-

liance on the LSAT is discriminatory and indefensible.

How then, can one reasonably argue, in the words of the Private University Amici in *Bakke*, that "societal benefits are so doubtful" from their possible abandonment as not to warrant a change for any except racial minorities? Those who argue for true individual merit must answer this question.

From the cradle to the grave, we are increasingly being judged on the basis of artificial, "objective," standardized tests, rather than on our total merit and practical performance. Such overreliance on standardized tests is not only bad for racial minorities and white ethnics. It also inhibits well-roundedness in all of our youngsters. It tends to pollute our educational processes with an instant-result orientation and a phony elitism. It glorifies quick cleverness. Unchecked, it may produce a superabundant monotony, a sameness in our professions and nation.

Some Concluding Points. What is the next step?

One partial solution would be to take several times as many students into medical, dental, law and other professional schools. Indeed, we could let everyone with minimal qualifications attend and place the burden on law faculties to weed out those who are actually incompetent. Such an approach takes courage. It would require a major reorientation in thought and action. Each profession's lobby would, of course, resist such solutions, although the legal profession has demonstrated a much greater inclination to expand. Law school enrollments virtually tripled during the past 15 years. There is a great temptation to pull up the rope when you reach the top of the mountain!

Even then we would probably continue to experience a numbers crunch, even if it were not the present excess national demand of three applicants for each available seat (or that of "selective" schools with 10 applicants), almost all of whom are qualified under reasonable criteria. The major thrust of our criticism and reexamination of admission policies would still have to be faced.

Certainly, each profession must maintain the highest practical and fair standards, and protect the public from incompetence and treachery. But we see that, under the false banners of "neutrality," "high standards," "objectivity," "the need for one-on-one clinical education" and the like, plenty of mischief has been and continues to be perpetrated.

A fundamental caveat is appropriate at this point. We should be fully aware of an earlier social history filled with excessive, unchecked use of subjective factors to the detriment of Jews, blacks, etc. Accordingly, the standards and procedures used to supplement numerical indices with other relevant portions of each applicant's total person must be subject to effective audits. Those audits should be both internal, within the law school, and external, by agencies such as courts.

The goal of increasing the number and quality of racial minority lawyers in the United States is a national goal. It should not come about at the expense of white ethnics (such as children of the last generation or new immigrants) who are individually and, as a group, blameless for slavery, the old barriers and the woefully inadequate number of racial minorities in the professions. Neither should the present majority suffer for transgressions of an earlier generation. Fairer and less arbitrary approaches should be given a chance to work. But not with "deliberate speed" if that means slow.

As an example of one possible alternative — realizing that it is not a panacea — I will now briefly describe the Temple Law School Sp.A.C.E. Program.

The Temple Law School Sp.A.C.E. Program. At Temple Law School there are two routes to admission: nondiscretionary and discretionary. As to nondiscretionary admissions, roughly 60 percent (this percentage varies annually) of the 1977 entering class were admitted "through the numbers," which means using almost exclusively the college grade point averages and the LSAT scores. At Temple there was room in fall 1977 for only one in nine of our applicants. The median grade point average of that group was above 3.5 and the median LSAT well up in the 600s, which means in the top 10 percent of the

takers of that examination. Almost all of the persons admitted through this nondiscretionary formula were white men and white women.

As to discretionary admissions (i.e., the Sp.A.C.E. Program), during the past six years there have been approximately twice as many whites admitted as racial minorities through the Sp.A.C.E. Program. The Fall 1976 and 1977 entering class experiences were not substantially different. Our Sp.A.C.E. Program seeks out and carefully, individually and affirmatively selects those applicants — minority and majority group members — who have an outstanding performance record and an exceptional aptitude for the study and practice of law and community leadership, not necessarily reflected by their LSAT scores.

Our student body of 1,145 is, we believe, the equal of any in the nation. Although women now constitute 39 percent of our student body (not the 2 percent of 13 years ago), our racial minority students are still only about 12 percent, with blacks making up 9 percent of the total enrollment, up from less than 1 percent 10 years ago. The percentages of women and minorities in the fall 1977 entering class were somewhat higher. We do not shoot for numerical goals or quotas, just the best available persons.

Temple Law School's Sp.A.C.E. Program has followed in the spirit of the founder of our university, Russell Conwell. We have maintained our populist tradition in making a superior legal education available to highly qualified working men and women and their children, irrespective of ethnic or racial or social origin or religious heritage or favoritism. Each is treated on his or her individual merits.

Every applicant admitted to Temple Law School brings in a very strong academic record. Some, thus specially admitted, have extraordinarily high grade point averages from college but LSAT scores below those regularly admitted. Others have exceptional work experience, two or three languages, experiences with minority cultures, a record of leadership, overcoming racial, religious, ethnic bias or physical handicap that would have neutralized the ambition and ability of the average

person. Many picked themselves up by their own bootstraps. As a group, they include men and women from practically every racial, ethnic and economic class, religion, age group and walk of life.

Every student at Temple Law School is treated precisely the same. Each has an equal opportunity to succeed or not to succeed on his or her own merits. We do not have two classes of citizenship, in body, mind or spirit. There is no second-class citizenship syndrome holding that "whites are admitted 'on their merit' as a right and blacks are 'allowed' in by sufferance." That point is crucial to our success.

Our program is popular with our students, who prefer to be treated as individuals rather than as members of a majority or minority group. It is popular with our faculty, who are primarily concerned with the maintenance of the highest academic and professional standards of excellence. And it is popular with our alumni, who are very practical people.

We have sought to fulfill our historic commitments to excellence and populism by doing the extra work — literally 10,000 person-hours last year logged in admissions by our faculty members and administrators. Such allocation of resources is an indispensable reason for our success, and we reject the argument of others who claim that "the benefits are so doubtful." A thoughtful, reasoned defense is made by three (and sometimes up to five) faculty members and administrators for each Sp.A.C.E. decision. The process is long and frustrating, but we are developing some objective standards in exercising sound discretion in each case.

To illustrate the scope and yield of our admissions process: There were 3,250 applicants in 1977, and some 2,000 of these were individually and personally reviewed for consideration under the Sp.A.C.E. Program. This means that in each of the 2,000 cases, some discretion was exercised.

In the 1977 entering class there are 382 students. Of these, 224 were admitted "through the numbers," having scored at least 2,470 on the nondiscretionary numerical index. The remaining 158 persons in the first

year class were admitted via discretion, i.e., by the Sp.A.C.E. Program. Of the 158 admitted through the discretionary route, 44 were racial minority group members and 114 were majority group members, including many white ethnic minorities.

The number or percentage of students entering Temple Law School via discretionary or nondiscretionary routes is not fixed. It is not necessarily repeated. Nor is it set aside exclusively for members of any particular group in society. Indeed, discretionary admissions have ranged from about 3 percent in 1971 to 40 percent in 1977. The basis for admission is

our judgment of the individual merit and potential for lawyering and community leadership of each individual applicant competing with all others that year.

At Temple, we began six years ago to move slowly and, we think, carefully in the right direction. We are finding that overreliance on grades and test scores was denying individuals from many groups in society a share of the American Dream, and that a good percentage of those excluded are at least as deserving and as qualified as many who were getting into law school "through the numbers." So we are doing something about it. We are not perfect, but we are trying to be honestly pragmatic.