

DISCRIMINATION IN THE LEGAL PROFESSION

Response to the Second Report of the United States
to the United Nations Committee on the Elimination
of Racial Discrimination

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Society of American Law Teachers

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Summary of the Issue.

1. Persistent barriers to inclusion of racial minorities in the legal profession in the United States constitute race discrimination in education and in employment and lack of equality before the law and in the administration of justice. The serious under-representation of racial minorities in the legal profession is caused in part by continuing overuse of law school admissions and

¹ For more than thirty years, the Society of American Law Teachers (SALT) has been the United States' largest membership organization for teachers of law. SALT has a three-part mission: 1) creating and maintaining a community of progressive and caring law professors dedicated to making a difference through the power of law; 2) promoting the use of many forms and innovative styles of teaching to make our classrooms more inclusive; and 3) challenging faculty and students to develop legal institutions with greater equality, justice, and excellence.

attorney licensing tests with significant disparate impacts on African Americans, Hispanics, and Asian-Americans. Instead of addressing the racial imbalance in the legal profession or the misuse of these discriminatory tests, the United States government, through the Department of Education and, ironically, the Civil Rights Commission, is using its control over accreditation of law schools to undermine efforts to establish greater racial diversity in legal education and in the legal profession.

The Legal Profession is Overwhelmingly White.

2. Using United States census data from 2000, the American Bar Association (ABA) has recognized that “minority representation in the legal profession is significantly lower than in most other professions.” Specifically, the ABA reports that minority representation among lawyers is about 9.7 percent, “compared to 20.8 percent among accountants and auditors, 24.6 percent among physicians and surgeons, and 18.2 percent among college and university teachers.”² Although minority participation in the legal profession increased dramatically between 1970 and 2000, minority entry into the profession has slowed to an alarming extent since then. The African American law school admissions figures increased in 2006, but in 2005 African American enrollment in law school had dropped more than 10% from the previous year. In fact, African American enrollment in 2005 was at its lowest point since 1990 – a fifteen-year low. Mexican American enrollment in law school dropped over 9% in 2005, standing at its lowest point since 1993. In fact, although a larger number of law schools and larger classes created an increase of approximately 4,000 more entering law students in 2005 than in 1992, there were actually fewer African American and Mexican American first year law students in the Fall 2005 class (3595 combined) than existed in Fall 1992 (3937).³

The Lack of Racial Diversity in the Legal Profession is the Responsibility of the United States Federal Government, State Governments, and Private Entities.

3. Licenses to practice law are primarily granted at the state level, with each state’s highest court typically controlling admissions practices in the state. The federal government oversees licensing, however, in that the federal government, through the Department of Education, controls accreditation of law schools. In most states, only graduates of accredited law schools are eligible to become licensed to practice law. Since the mid-twentieth century, the Department of Education has approved the Council of Legal Education and Admissions to the Bar of the American Bar Association (the Council) as the recognized national agency for the accreditation of law schools. Thus the federal government grants the Council accrediting authority, and the states use the Council’s accreditation process to establish standards of legal education to prepare for the practice of law.

Admission to Law School is Increasingly Determined by Scores on the Law School Admissions Test (LSAT), A Standardized Test with Established Disparate Impact on Racial Minorities.

² American Bar Association (ABA) Commission on Racial and Ethnic Diversity in the Profession, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (2005).

³ See SALT diversity website, located at <http://www2.law.columbia.edu/civilrights/>, using data from the Law School Admissions Council.

4. Many scholars have linked the decreasing enrollment of African American students to over-reliance in law school admissions on the LSAT, a three-hour test on which white students receive higher scores than members of other racial groups.⁴ To achieve accreditation by the Council, a law school is required to use a “valid and reliable” admissions test, and the LSAT is the only one presumptively approved.⁵ In 2005 the Council rejected proposed revisions to the accreditation standards that would have prohibited the use of discriminatory admissions tests.⁶ Rather than questioning this refusal to address the discriminatory impact of its admissions standards, the United States Department of Education took the opposite tack in its review of the Council as the accrediting agency for U.S. law schools, challenging the Council’s standard requiring law schools to take concrete actions toward diversity.

Admission to the Practice of Law is Determined by Standardized Tests That Have Never Been Correlated With Successful Practice of Law, But Which Result in Dramatic Racial Disparities.

5. The exams used by most states for licensing to practice law have dramatic racial disparities in passage rates. The only national study of bar passage rates established that, for first time test takers, Whites passed at 91.93%, Asian American’s at 80.76%, Mexican Americans at 75.88%, Puerto Ricans at 69.53%, American Indians at 66.36%, and Blacks at 61.40%.⁷ More recent data from New York shows continuing strong patterns of racial disparities. The first time passage rates for the July 2005 New York bar exam were 86.8% for Whites, 80.1% for Asians/Pacific Islanders, 69.6% for Hispanics/Latinos, and 54.0% for Blacks/African Americans.⁸ These figures are especially egregious in light of the limited relationship of bar exams to the skills necessary for the practice of law.⁹ Instead of using its oversight authority to address the problem that bar exams as currently administered operate as a significant bar to the profession for racial minorities, the Department of Education has recently taken the opposite tack, pressuring the Council to revise its accreditation standards to give greater emphasis to bar passage rates. If successful in these efforts, the Department of Education will increase the pressure on law schools to reduce the admission of students of color even further, making a very serious problem even worse.

⁴ See, e.g., Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN’S L. REV. 41 (2006); Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN’S L. REV. 107 (2006); John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN’S L. REV. 167 (2006).

⁵ See ABA Section on Legal Education and Admission to the Bar, 2007-2008 STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 503 (available at <http://www.abanet.org/legaled/standards/standards.html>).

⁶ Randall, *The Misuse of the LSAT*, supra note 3.

⁷ Linda F. Wightman, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 27 (1998).

⁸ New York State Board of Bar Examiners, *Impact of the Increase in the Passing Score of the New York Bar Exam* (July 2007) (report available at <http://www.nybarexam.org/summary2.pdf>).

⁹ See, e.g., Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002).

Instead of Addressing These Serious Racial Disparities in the Legal Profession, the United States Is Trying to Reduce the Obligations of Law Schools to Improve Racial Diversity in Legal Education and in the Profession of Law.

6. The United States should be using its oversight authority to address the serious issues of under-representation of racial minorities in the legal profession and in law schools. Instead, in early 2007 the Department of Education challenged the Council's standard for accreditation that requires law schools to "demonstrate by concrete action ... a commitment to having a diverse student body."¹⁰ The Council is being threatened with loss of its accreditation authority unless it weakens its diversity standard related to admissions and increases the relevance of the discriminatory bar passage rates in law school accreditation. In addition, the United States Commission on Civil Rights, which also should be addressing the lack of students and attorneys of color, instead is intervening in the accreditation question for the purpose of challenging affirmative action in law school admissions.¹¹

Violations of Convention Rights.

7. In SALT's view, the under-representation of racial and ethnic minorities in American legal education and the government's continuing misuse of its accreditation power implicate several provisions of the ICERD. The ongoing under-representation raise concerns about the rights of racial minorities to education and training under Article 5(e)(v). It also implicates Article 5(a), as the exclusion of minorities from the legal profession negatively impacts the equal treatment of the under-represented communities before tribunals and other justice organs. The problem of under-representation similarly jeopardizes the United States' compliance with the Article 6 right to effective protection and remedies. Because a legal education is an important entry route into political office, minority under-representation also affects Article 5(c) political rights.

8. As described above, the United States government's use of its law school accreditation power is worsening the situation. The government's actions implicate a cluster of Convention protections requiring that ratifying states address situations of *de facto* discrimination and inadequate development, including: 1) the Article 1(4) requirement of special measures for "adequate advancement" to ensure equal enjoyment of human rights and fundamental freedoms; 2) the Article 2(1) requirement that the government condemn and eliminate discrimination and to promote understanding; 3) the Article 2(2) mandate of special concrete measures to ensure adequate development and protection of certain racial groups or individuals belonging to them; and 4) Committee Recommendation XIV calling for an end to practices and legislation that are discriminatory in effect, if not in purpose.

¹⁰ See Katherine Mangan, *Education Department Will Challenge Law-School Accrerator's New Diversity Standard*, CHRONICLE OF HIGHER EDUCATION, Jan. 9, 2007; Katherine Mangan, *Opponents of Affirmative Action Seek Revocation of ABA's Accrediting Power*, CHRONICLE OF HIGHER EDUCATION, Mar. 9, 2006.

¹¹ Peter Schmidt, *Civil Rights Panel Wants Law Schools Required to Disclose Key Affirmative Action Data*, CHRONICLE OF HIGHER EDUCATION, Aug. 28, 2007; Jennifer Jacobson, *Proposed Accreditation Standard for Law Schools Comes Under Attack at Right-Panel Hearing*, June 19, 2006; see also U.S. Commission on Civil Rights, BRIEFING REPORT, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS, Apr. 2007, available at <http://www.usccr.gov/pubs/AALSreport.pdf>.

List of Recommendations.

9. The United States, through the Department of Education, should use its accreditation oversight responsibility to insist that all accredited law schools admit a racially and ethnically diverse student body, specifically forbidding the use of any admissions practice that disadvantages racial minorities and that has not been validated as an accurate predictor of competent law practice..

10. The United States, through the oversight authority of the Department of Education and the enforcement authority of the Equal Employment Opportunity Commission, should forbid the use of any attorney licensing test that disadvantages racial minorities unless it can be shown that use of such a test is necessary for valid measurement of minimum competence to practice law.

11. The United States, through programs enacted by Congress, should remedy the longstanding racial discrimination denying access to the legal profession by offering tuition subsidies to low income minority students to enable them to attend law school.

12. The United States should direct all federal agencies, as well as the Commission on Civil Rights, to develop and aggressively promote affirmative action programs designed to increase the diversity of the bench and bar. In this regard, the United States should acknowledge that racial preferences designed to assist groups that have been historically discriminated against are not the equivalent of racial preferences designed to subjugate and therefore must not be considered to be race discrimination.