

# IT'S ALL ABOUT THE BENJAMINS: ECONOMIC OBSTACLES PLUGGING THE DIVERSITY PIPELINE INTO THE PRACTICE OF LAW

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Full and equal participation of minorities in the legal profession has been a concern for the American Bar Association (ABA) for decades.<sup>1</sup> Even though the overall representation of minorities in the United States is approximately 30%, the ABA Presidential Advisory Council on Diversity (ACD) in the Profession reports that, “[n]early 90% of the legal profession is white, with racial and ethnic minorities making up the remaining 10 or 11%.”<sup>2</sup> However, “law firms, corporate legal departments, government, and the judiciary cannot recruit attorneys of color . . . as long as there remain too few people who decide to enter the profession in the first place.”<sup>3</sup> Consequently, it is imperative to examine the roots of educational obstacles to the legal profession and how they impact the diversity pipeline into the legal profession.

Studies indicate that socio-economic status has “the most significant influence on educational attainment.”<sup>4</sup> Regardless of “pre-college aspirations, self-image, and college grades [. . .] upper-class students are more successful in getting professional credentials than their less advantaged counterparts.”<sup>5</sup> Asians and Caucasians have the highest median incomes and advanced degree percentages, ranging from 9.5% to 17.4%. Meanwhile, Hispanics and African Americans have the lowest median incomes and advanced degree percentages ranging from 3.8% to 4.8% respectively.<sup>6</sup> Furthermore, a disproportionate percentage of minorities come from a disadvantaged background.<sup>7</sup> The absence of any significant exploration of the link between socio-economic status and the under-representation of minorities in the legal profession is surprising.

Legal scholars and practicing attorneys have offered various hypotheses to explain the obstacles that minorities face when entering legal education and practice. They often attack affirmative action, over-reliance on LSAT scores in admissions criteria, and the absence of racially and ethnically diverse role models to provide information about the legal profession.<sup>8</sup> Additionally, authorities advocate specific ways to solve these issues.<sup>9</sup> They support initiatives, including seminars to assist disadvantaged minorities with LSAT preparation, pre-enrollment institutes to prepare students for the rigors of law school, and special recruitment programs to raise the interest of minorities in the profession.<sup>10</sup>

Despite these initiatives, diversity in the legal profession will likely remain low because education attainment issues facing minorities may bar entry into the legal profession. This essay asserts that financial obstacles are significant barriers preventing qualified, under-represented minorities from pursuing careers in the legal profession. First, this article examines how federal financial aid policy creates excessive educational debt burdens for minority college graduates. Second, it discusses the

effect of the anti-affirmative action movement on minority-targeted scholarships, which in turn creates another financial barrier for minorities interested in attending law school. Third, it examines how the financial costs of law school, when compared to other graduate programs, discourage minority students. Finally, this article proposes private funding of minority scholarships as a possible solution to help resolve these diversity pipeline obstacles.

## THE LOAN-BASED FEDERAL FINANCIAL AID POLICY DISPROPORTIONATELY BURDENS MINORITY GRADUATES WITH EXCESSIVE DEBT

Almost four decades ago, Congress enacted the Higher Education Act of 1965 (HEA), which “institutionalized federal support for higher education as a national interest and pledged that no student would be denied opportunities in higher education due to financial barriers.”<sup>11</sup> Every five years, Congress reauthorizes the HEA, often adding amendments that change the scope of funding for student financial aid, state-federal partnerships, and institutional support.<sup>12</sup> However, federal student aid policy steadily transformed from a grant-based system into a loan-based system beginning in the 1980s.<sup>13</sup> At the same time, public college tuition costs accelerated.<sup>14</sup> Specifically, tuition at public four-year colleges increased by 166% and at public two-year colleges by 112%.<sup>15</sup> Therefore, despite financial aid benefits, this combination of tuition increases and “reliance on student loans” has continually limited under-represented minorities.<sup>16</sup>

Given this increased reliance on student loans to finance higher education, the debt graduates will accrue necessarily shapes the decision-making process occurring before and after the completion of undergraduate studies: whether to attend college, where to attend college, what to study, whether to continue to graduate school, and what kinds of careers to pursue.<sup>17</sup> The decisions students make, especially after college, are more limited for borrowers than for non-borrowers. Although this negative consequence of educational debt affects all borrowers, “African American, Hispanic, and lower-income students are disproportionately represented among students whose decisions are limited as a result of borrowing for college.”<sup>18</sup> Since patterns of student borrowing are affected by race, gender, and class characteristics, the reality of higher education for African Americans, Hispanics, and students from lower-income families is the necessary accumulation of educational debt.<sup>19</sup> Students with higher debt burdens are less likely to apply to graduate or professional school.<sup>20</sup>

## THE EFFECTS OF THE ANTI-AFFIRMATIVE ACTION MOVEMENT

The Supreme Court addressed affirmative action in undergraduate admissions in the 1978 decision *Regents of the University of California v. Bakke*.<sup>21</sup> The outcome invalidated the school's special admissions program and prohibited the school from taking race into account as a factor in its future admissions decisions.<sup>22</sup> More recently, in *Grutter v. Bollinger*, the Supreme Court held in a 5-4 vote that the Equal Protection Clause does not prohibit a law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining educational benefits from a diverse student body.<sup>23</sup> However, in *Gratz v. Bollinger*, the Court found by a 6-3 vote "that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates" the Fourteenth Amendment.<sup>24</sup> Although the later two decisions found that diversity may constitute a compelling state interest, the split judgments demonstrate the difficulty of precisely tailoring measures that serve permissible diversity goals in higher education.

Although the Supreme Court has held that affirmative action measures may be permitted, a few states have made any form of affirmative action unlawful. For example, in 1996, California banned affirmative action and amended the State Constitution to provide that the "state shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."<sup>25</sup> In 1998, the state of Washington adopted a similar initiative banning affirmative action.<sup>26</sup> In 1999, Florida also prohibited affirmative action in government employment, state contracting, and higher education. In short, a distinct anti-affirmative action sentiment is alive and well, continuing to challenge minorities' ability to gain access to education in the future.

Following *Podberesky v. Kirwin*, where the Court did not find enough evidence of historical discrimination to justify a merit-based scholarship program for African Americans at the University of Maryland,<sup>27</sup> the future of race-based scholarships continues to be in doubt. During the Clinton Administration and following the Supreme Court's determination not to review *Hopwood v. Texas*,<sup>28</sup> the Fifth Circuit case which banned affirmative action in state university admissions, Judith Winston, General Counsel of the United States Department of Education (DOE), issued a letter to college and university counsel,<sup>29</sup> which in part read:

I am writing to reaffirm the Department of Education's position that, under the Constitution and Title VII of the Civil Rights Act of 1964, it is permissible in appropriate circumstances for colleges and universities to consider race in making admissions decisions and granting financial aid. They may do so to promote diversity of their student body, consistent with Justice Powell's landmark

opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-315 (1978). See also *Wygant v. Jackson Bd. Of Education*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring). They also may do so to remedy the continuing effects of discrimination by the institution itself or within the state or local educational system as a whole.<sup>30</sup>

During a Democratic Administration in the White House, a party historically known to support affirmative action, this letter likely eased university administrators' fears of action by the Office of Civil Rights. However, given the present Bush Administration's official anti-affirmative action stance that race-neutral alternatives will achieve diversity,<sup>31</sup> there is low probability that the DOE will continue to allow minority-targeted scholarships that are not in strict compliance with stringent DOE guidelines. Consequently, although school officials believe that minority-targeted scholarships play "an important role in the recruitment, retention, and graduation of racial and ethnic minority students"<sup>32</sup> and an elimination of these scholarships will "attenuate their ability to recruit and retain minority students,"<sup>33</sup> some schools have cut raced-based scholarships and revised minority scholarship programs to make them race-neutral in fear of litigation.<sup>34</sup> In summary, the anti-affirmative action movement has essentially led to the elimination of many university funded and administered minority-targeted scholarship programs. Therefore, in addition to excessive undergraduate debt obstacles discussed earlier, reduced availability of funds for minority students to finance law school costs may also discourage many qualified minority candidates from pursuing a legal education.

### LAW SCHOOLS ARE POORLY POSITIONED FOR COMPETITION WITH OTHER PROFESSIONAL PROGRAMS

With tuition growing at an alarming rate for the last twenty years, outpacing even the rate of inflation, law schools have been pressing toward the point where significant numbers of college graduates may decide that law school is not worth the economic opportunity cost and risk. Instead, they decide it makes good economic sense to seek less expensive forms of graduate education or forgo additional credentials altogether.<sup>35</sup>

Average law school tuition increased dramatically with private tuition rates increasing by 86% through public resident tuition increases of 141% in 2000.<sup>36</sup> Unsurprisingly, the annual amount of borrowing by law students also dramatically increased during this period.<sup>37</sup> Furthermore, using loan volume, enrollment data, and the estimate that about 80% of law graduates borrow to finance their education, consultants calculate "an average total law school debt of \$51,400 for each graduate of the class of 2000."<sup>38</sup> Therefore, even excluding the opportunity costs of lost income during the three years of law school, the cost of a legal education is a substantial investment.

"The National Association for Law Placement (NALP) reports that the median starting salary for all law school graduates in the class of 2000 was \$51,900."<sup>39</sup> However, individual

starting salaries are heavily influenced by employer type or firm size, and therefore, vary widely from starting salaries of \$34,000 for public interest positions to \$125,000 for large law firm positions.<sup>40</sup> Furthermore, since the largest law firms predominantly recruit from national and top-tier regional law schools, graduates' salaries are also heavily influenced by the type of school they attended.<sup>41</sup>

The average costs of a legal education are generally about the same for all students.<sup>42</sup> However, the initial expected returns for minority students are generally lower because minority graduates "are more likely than whites to enter government, public interest, and business, and less likely to enter private practice."<sup>43</sup> Furthermore, even if minority graduates enter private practice, they are more likely to work at a smaller firm.<sup>44</sup> In fact, NALP surveys report that almost 25% of minority graduates working in private practice are employed by firms with two to ten attorneys.<sup>45</sup> Therefore, the average, initial return on investment for minority law school graduates is comparatively low.

A multitude of options exist for students interested in pursuing a graduate or professional degree. For example, law schools are most likely to compete directly with Master of Business Administration (MBA) programs for students. A comparison of J.D. and MBA programs demonstrates that law schools are likely losing qualified minority applicants to other graduate and professional programs.

First, most full-time MBA programs only require two years of study,<sup>46</sup> compared to the full-time, three-year commitment of law school. Therefore, both the actual and opportunity costs of pursuing an MBA are generally lower. Second, since 1966, the Consortium for Graduate Study in Management (the Consortium) has offered full-tuition fellowships to African American, Hispanic American, and Native American college graduates admitted to one of the organization's member schools for business.<sup>47</sup> On the contrary, no comparable minority scholarship program exists for minority law school students. Third, the average salary for graduates of these schools, recruited by many of the top investment banks, consulting firms, and corporations is \$85,000.<sup>48</sup> Furthermore, the cap by most accredited law schools on the number of hours a student can work (15 hours per week during the first year and 20 hours per week during the second and third years) negatively impacts the return on investment calculation.<sup>49</sup> Conversely, a recent DOE study showed that "75% of MBA students overall and 61% of full-time MBA students work more than 35 hours a week." Consequently, law schools are at a disadvantage when competing for financially sensitive, but highly qualified minority applicants.

Not all potential law school applicants are interested in attending business school, and other graduate programs have lower returns on investment. However, considering the high undergraduate debt burdens that many minority students face and the fact that most educational institutions are no longer le-

gally allowed to offer minority-targeted scholarships, it follows that the mere existence of such an attractive alternative is convincing some minority college graduates to apply and attend business school instead of law school.

## A PROPOSED SOLUTION

One of the main obstacles for minorities in pursuing a legal career is the low number of minorities that attain bachelor's degrees. To increase the flow of minority students into the legal profession, a great deal of progress can be made by boosting the percentage of minorities with undergraduate degrees. According to U.S. Census data, only 14.3% of African Americans have attained a college degree at age 25 or older and the percentage decreases to 10.4% for Hispanics and Latinos.<sup>50</sup> Minorities cannot possibly consider law school without first earning a college degree.<sup>51</sup> However, as this article argues, even those that clear this initial hurdle often face economic obstacles, which prevent them from pursuing a legal education.

Title VII of the Civil Rights Act of 1964 prohibits programs where the university completely funds the program and selects the recipient, programs where the university selects the recipient with funding provided by a private donor, or programs where the university partially funds the scholarship and a private donor selects the recipient and provides partial funding. The only type of minority scholarship not prohibited is where a *private* organization selects the recipients and completely funds the scholarships.<sup>52</sup>

Other professions have been more proactive in addressing diversity pipeline issues, and consequently, have been more successful in diversifying their professions. The Consortium has produced over 5,000 alumni during the past three decades. Instead of creating diversity programs, the legal profession should try to duplicate the Consortium's success by creating a similar program. The economic obstacles discussed in this article should be addressed with an economic solution; a scholarship program to attract minority students into the legal profession by helping finance their legal educations.

## CONCLUSION

In summary, one way to help clear the diversity pipeline into the practice of law is for the legal community to establish an organization, funded by private donors, to offer minority students full-tuition scholarships to attend law school. Not only would this solution allow minorities burdened with excessive, undergraduate debt to consider the option of applying to law school, but it would also circumvent hurdles like the unconstitutionality of university-sponsored minority scholarships and the slow death of affirmative action. Additionally, this solution can place law schools in a better position to compete with other graduate and professional programs for the most qualified minority students.

## ENDNOTES

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<sup>1</sup> Elizabeth Chambliss, *MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION* ix (2000).

<sup>2</sup> Diane Abraham, *The Critical Need to Diversify the Pipeline into the Practice of Law: Previews of the Upcoming ACD Report*, AMERICAN BAR ASSOCIATION, Jan. 1, 2005, at <http://www.abanet.org/leadership/councilondiversity/factsandstats.html>.

<sup>3</sup> *Id.*

<sup>4</sup> Derek V. Price, *BORROWING INEQUALITY: RACE, CLASS, AND STUDENT LOANS* 46 (Lynne Rienner Publishers 2004).

<sup>5</sup> *Id.* at 47.

<sup>6</sup> Carmen DeNavas-Walt, Robert W. Cleveland, & Bruce H. Webster, Jr., *Income in the United States: 2002*, CURRENT POPULATION REPORTS: CONSUMER INCOME 3 (2003), available at <http://www.census.gov/prod/2003pubs/p60-221.pdf>; Kurt J. Bauman & Nikki L. Graf, *Educational Attainment: 2000*, CENSUS 2000 BRIEF 5 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-24.pdf>.

<sup>7</sup> Alemayehu Bishaw & John Iceland, *Poverty: 1999*, CENSUS 2000 Brief 8 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-19.pdf>.

<sup>8</sup> William Malpica & Mauricio A. Espana, *Expanding Latino Participation in the Legal Profession: Strategies for Increasing Latino Law School Enrollments*, 30 FORDHAM URBAN L.J. 1393, 1396-1414 (2003).

<sup>9</sup> *Id.* at 1404-24.

<sup>10</sup> *Id.*

<sup>11</sup> Price, *supra* note 4, at 2.

<sup>12</sup> *Id.*

<sup>13</sup> James C. Hearn, *CONDEMNING STUDENTS TO DEBT: COLLEGE LOANS AND PUBLIC POLICY BORROWING* 47 (Richard Fossey & Mark Bateman eds., Teachers College Press 1998).

<sup>14</sup> Michael Mumper, *The Future of College Access: The Declining Role of Public Higher Education in Promoting Equal Opportunity*, 585 ANNALS 97, 101 (2003).

<sup>15</sup> *Id.*

<sup>16</sup> Price, *supra* note 4, at 18.

<sup>17</sup> *Id.* at 43.

<sup>18</sup> *Id.* at 25.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> 438 U.S. 265 (1978).

<sup>22</sup> *Id.* at 271-272.

<sup>23</sup> *Id.* at 329, 334.

<sup>24</sup> 539 U.S. 244, 251 (2003).

<sup>25</sup> CAL. CONST. art. 1, §31(a).

<sup>26</sup> WASH. REV. CODE ANN. §49.60.400(1) (West 2002).

<sup>27</sup> 514 U.S. 1128 (1995).

<sup>28</sup> 518 U.S. 1033 (1996).

<sup>29</sup> Letter from Judith A. Winston, General Counsel, U.S. Department of Education, to College and University Counsel (July 30, 1996), available at <http://www.ed.gov/about/offices/list/ocr/docs/dearcol.html>.

<sup>30</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92 (1989); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992).

<sup>31</sup> U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS: ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION (2004).

<sup>32</sup> GAO/HEHS-94-77, at 9.

<sup>33</sup> *Id.*

<sup>34</sup> *University Cuts Race-Based Scholarships*, CNN.com, at <http://archives.cnn.com/2001/fyi/teachers.ednews/08/30/race.based.scholarships.ap> (last visited Jan. 3, 2005).

<sup>35</sup> John R. Kramer, *Legal Education in an Era of Change: Will Legal Education Remain Affordable, By Whom, and How?*, 1987 DUKE L.J. 240, XXX (1987).

<sup>36</sup> John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 516, XXX (2002).

<sup>37</sup> *Id.* at 521.

<sup>38</sup> *Id.* at 522.

<sup>39</sup> *Id.* at 522-23.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 524.

<sup>42</sup> Chambliss, *supra* note 1, at 3.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 9.

<sup>45</sup> *Id.*

<sup>46</sup> Graduate Management Admission Council, *Two-Year, Full-Time MBA*, at <http://www.mba.com/mba/FindYourProgram/ChooseAProgramType/Two-YearFull-TimeMBA.htm> (last visited Jan. 3, 2005).

<sup>47</sup> Consortium for Graduate Study in Management, *Member Schools*, at <http://www.cgsm.org/schools.asp> (last visited Jan. 3, 2005).

<sup>48</sup> U.S. NEWS & WORLD REPORT, *TOP BUSINESS SCHOOLS* (2005), available at <http://www.usnews.com/usnews/edu/grad/rankings/mba/premium/main/mbarank.php>.

<sup>49</sup> UNIVERSITY OF HOUSTON LAW CENTER STUDENT HANDBOOK 4 (2005), available at <http://www.law.uh.edu/student/SH0203.pdf>.

<sup>50</sup> Bauman, *supra* note 6, at 5.

<sup>51</sup> Malpica, *supra* note 9, at 1396 (citing Law School Admission Council & Am. Bar Association, *ABA-L.SAC Official Guide to ABA-Approved Law Schools* 11-13 (2003)).

<sup>52</sup> William E. Thro, *The Constitutional Problem of Race-Based Scholarships and a Practical Solution*, 111 ED. LAW REP. 625, 627 (1996).