THROUGH A DIFFERENT LENS: A REPLY TO STEPHAN THERNSTROM

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In a continuation of the debate over the role of preferential admissions in higher education, Professor Stephan Thernstrom prepared an evaluation of my study *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*.[1] He purports to set forth three broad critiques of the study: (1) the analysis is "badly flawed," (2) key questions that could have and should have been asked never were asked, and (3) the evidence runs directly counter to the conclusions. I address his critique first generally and then more technically, to show that his conclusions represent neither the intent nor the substance of my study.

I.

First, my study examines the consequences of abandoning race as a factor in admission to law school and analyzes the success of minority students in their quest to enter the legal profession. My study presents to Professor Thernstrom a glass that is three-quarters full, but he criticizes it for not trumpeting that the glass is one-quarter empty. In his review, he mischaracterizes important aspects of the purpose, design, and conclusions of my study, and then criticizes the study based on those mischaracterizations.

Second, Professor Thernstrom utilizes provocative language to make a strong political statement as a response to my technical analyses. He decries "inferior academic qualification[]" of students who received "racial preferences in admissions" under

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1. 72 N.Y.U. L. Rev. 1 (Apr. 1997).

affirmative action "double standards."[2] Yet, nowhere does he set forth what his criteria are for second-guessing the judgments of many law schools' own academic standards. In referring to the students for whom race was a factor in their admission as having had "intellectual handicaps,"[3] Professor Thernstrom incorrectly implies that I have claimed that their "initial handicaps apparently vanished."[4] On the one hand, he never supports his assertion that students were "handicapped"; while on the other hand, he discounts the value-added efforts the students and law schools performed that may have compensated for the students' earlier under-preparation.

Third, Professor Thernstrom introduces an implicit "divide and conquer" strategy to his agenda by suggesting that the elite law schools gave a greater boost to blacks than to other minority groups.[5] Continuing with that line of attack, he asserts that "African American applicants to law school receive much heavier preferences than members of any other racial or ethnic minority."[6] He further contends that preferences were stronger in the "top three tiers" than "down in the very unselective and undistinguished fifth-tier law schools."[7] My study did not make those kinds of judgments about law schools and it is not obvious what policy objective would make such statements relevant.

Fourth, Professor Thernstrom presents a global indictment of the ability of law schools and states conducting bar examinations to do their jobs when he denounces both law school graduation rates and bar examination passage rates as "indefensibly crude dichotomous measures of achievement."[8] He says that since most law students graduate, one could not expect law school graduation "to be a strong discriminator."[9] What he apparently fails to understand is that law schools are in the business of training lawyers and legal scholars, not simply in the business of ranking the law students they admit.[10] Moreover,

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2. Stephan Thernstrom, *Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's "The Threat to Diversity in Legal Education,"* 15 Const. Comm. 11, 12 (1998).

3. Id. at 42.

4. Id. at 13.

5. Id. at 16-19.

6. Id. at 16.

7. Id. at 17.

8. Id. at 27. He also says that graduating from law school is no great achievement. Id. at 30.

9. Id. at 28.

10. Some law schools have abandoned assigning letter or number grades to law students specifically to avoid this phenomenon.

Professor Thernstrom's arguments fail to acknowledge that so long as letter or number grades are assigned to law students, regardless of their academic preparation prior to law school one fourth of the successful students would still graduate in the bottom quartile of their class. His discussion does not reveal whether he would similarly discount graduation as a measure of qualification if only white students were in the graduating class. When the issue is whether students admitted to law school were qualified to enter law school, a measure that examines whether they completed law school cannot be so easily dismissed as a "methodological flaw." Similarly, no amount of criticism or reanalysis can discount passing the bar exam as a measure of one's qualification to enter the legal profession.

Finally, and most importantly, Professor Thernstrom's critique is virtually devoid of any apparent concern about the consequences his perspective would portend for our nation, for the legal profession, or for the depth and quality of law students' educational experiences. He purports to express concern for the one quarter of the black students who were admitted to law school but who, for a variety of reasons, did not succeed in entering the profession. He shows no apparent concern about the three-quarters of those students who would never have had an opportunity to go to law school under the perspective he presents but who, nevertheless, with the benefit of affirmative action, are now members of the legal profession.

II. WHAT IS AT THE CORE OF DIFFERENT VIEWS OF THE SAME DATA?

Although not immediately apparent from the language and style of Professor Thernstrom's evaluation of my study, his disagreements with it turn more on its implications than on the study itself. He criticizes the models, but concedes that their predictions of the impact of eliminating race as a factor in law school admissions are likely correct.[11] He criticizes the use and interpretation of law school graduation and bar examination data, but concedes that "just about every student passed the bar eventually."[12] In contrast, he devotes considerable attention to emphasizing the differences between black and white law student data, regardless of the predicted admission decision for those students, and criticizes my analyses for not doing the

11. Thernstrom, 15 Const. Comm. at 16 (cited in note 2).
12. Id. at 34.

same. It is here that he and I part ways and view the purpose and value of diversity in education through very different lenses. The consequences of adopting an admission model such as the one he suggests, with a goal toward minimizing the difference in academic performance between black and white students, is not good for legal education, is not good for students, and is disingenuous in its goals.

We live in a multicultural society, and demographic trends confirm that it will only become more so in the future. That society offers challenges and opportunities not only to legal education but also to all of higher education. Legal educators are among those most responsible for training leaders of the future. Thus, achieving academic excellence is not only a goal but a responsibility of legal education. Academic excellence must mean more than filling classrooms with students who earn high scores on standardized achievement tests. High scoring students bring something of value to the classroom. In the case of the LSAT, high scores identify students who have acquired high levels of reading and reasoning skills. But that is only one of the factors that contribute to excellence in education. Learning requires stimulating classes; stimulating classes require diversity of experience and perception. Diversity of that kind challenges assumptions and questions the status quo. Students learn from each other as much or more than they learn from their instructors. Their learning opportunity is so much broader when they do not all speak with the same voice! Students leave the classroom to serve, work with, and work within a society diverse in its needs and demands. Education is not excellent if it falls short of preparing students to enter and contribute to that world. The goal of legal education is not to graduate fungible commodities; it seeks leaders who can make a difference. Some of those leaders will be from the majority culture—leaders who will be limited in their potential to make a difference if they are denied exposure to and challenges from those who think and believe and experience differently. Other leaders will and must come from the multiple cultures that are represented in our society. The real challenges are (1) how to define those factors that taken together optimize excellent education and (2) how to identify those factors in law school applicants. We cannot make progress in meeting those challenges until we get beyond the belief that test scores and grades are the only acceptable measures of merit.

A. THE MODELS AND ANALYSES

Although Professor Thernstrom uses provocative language—such as "unfortunately, the author's analysis is badly flawed" and "the author glosses over serious methodological problems with both models,"—he identified neither flaws in the analysis nor problems with the methodology. Rather, he takes issue with the reality that the models do not completely reflect all the factors traditionally considered in the admission process. I do not disagree with the assessment about what is not included in the models, but a conclusion of flawed analysis or serious methodological problems does not follow from that assessment. The models based on LSAT score and undergraduate grade point average (UGPA) are neither intended to be nor were they represented in my study to be anything more than statistical tools to model a complex human process so that we can attempt to answer questions about potential changes in that process. The article includes a careful explanation that

> [t]he statistical models used in this study do not suggest that law schools rely exclusively and solely on LSAT scores and UGPAs (or a combination of these measures) in admitting either white students or students of color. In fact, . . . the results demonstrate that in the admission of law students, law schools do consider factors that are not numeric and that, therefore, cannot be accounted for by the models developed for this study. The purpose of the models is to evaluate differences in admission practices between and among applicants from selected ethnic groups, as well as to estimate the impact of discontinuing consideration of the race of applicants on admission decision outcomes.[13]

The analyses were undertaken to determine whether applicants with similar application credentials had a differential probability of gaining acceptance to law school if they were nonwhite than if they were white. If the probabilities were essentially identical, we could conclude that race was playing little or no role in the admission process and that color-blind admissions would have no predictable impact on diversity in higher education. In fact, the results demonstrated a significantly higher probability of admission for applicants of color. These results do not imply that race is the only other factor taken into consideration; they do suggest that law schools use different factors in reaching admission decisions for applicants of color than

13. Wightman, 72 N.Y.U. L. Rev. at 5-6 n.12 (cited in note 1).

for white applicants. In particular, LSAT scores and UGPA carry less weight for applicants of color than for white applicants. The validity and utility of the results do not require that the models be perfect predictors. Models seldom, if ever, are! If, in practice, the same models were used for applicants of color as were used for white applicants, those factors not captured by the models would have been random. In other words, the differences between predicted and actual admission would have been approximately equal across the different ethnic/racial groups. The statistic of interest was the residual—that is, the difference between the proportion actually admitted and the proportion predicted to be admitted. The residuals showed that for each nonwhite group, the proportion actually admitted was substantially larger than the proportion predicted to be admitted.

There are several points that are relevant to the choice of variables to be included in the models used in my study. First, the models with LSAT and UGPA as the only variables reproduced admission decisions fairly accurately for white applicants. These two variables alone accounted for just over 60 percent of the variability in admission decisions. Second, these variables were examined because they represent the variables that are typically of interest to opponents of preferential admission practices who advocate a "meritocratic" admission practice. Those advocates seem to equate test scores and grades with the concept of merit.[14] I have already discussed the need for a broader and different definition of merit.[15] The final point related to the models is that when other factors typically included in admission decisions were added to the model, they did not significantly improve the model. The other factors examined were state of residency for applicants to state institutions, family economic background, selectivity of undergraduate school, and undergraduate major. None resulted in prediction of actual admission decisions that was statistically more accurate than the simple LSAT/UGPA model. The estimates of decline in the admission of minority students under the two variable models, however, do not "assume that eliminating race as a factor amounts to eliminating all other factors except grades and LSAT scores."[16] In fact, my position throughout the article was exactly opposite to that assumption. Specifically, I used the data in the report to

14. Thernstrom, 15 Const. Comm. at 23 (cited in note 2).
15. See Part II at 45-46.
16. Thernstrom, 15 Const. Comm. at 16 (cited in note 2).

demonstrate that although actual admission decisions for applicants of color were larger in number than would have resulted from a simple quantitative model, they were not indicative of a decision process that admitted applicants simply because they were nonwhite. The graduation rate and bar passage data supported the claim by legal education administrators that law schools offer admission only to those applicants of color who are qualified to meet the demands of law school academic work.[17]

B. KEY QUESTIONS THAT COULD HAVE AND SHOULD HAVE BEEN ASKED

The purpose of a study defines its key questions. The primary purpose of the study reported in my article was to use empirical data and statistical models to examine the likely impact of abandoning considerations of race and ethnicity in the law school admission process. An additional goal was to determine the consequences of the admission decisions that were made. Specifically, were those applicants who would have been denied the opportunity of a legal education under an admission process that relied only on test scores and undergraduate grades able to complete law school and enter the profession? Thus, two basic questions were asked: did those students who would have been denied access graduate, and did they pass the bar examination? In other words, given the opportunity, were they able to acquire the knowledge and skills necessary to enter the legal profession? Only two criteria are necessary to address these questions: law school graduation (i.e., yes or no) and bar passage (i.e., yes or no). It is absolutely true that the available data could support additional questions. The issue then becomes, for what purpose? If the goal is to deal with the need for and the consequences of considering factors other than test scores and grades in making sound admission decisions about applicants from diverse and sometimes disadvantaged backgrounds, the two criteria used in my study are sufficient.

Alternative questions of the form "how well did the minority students who entered law school in fall 1991 perform while there?" were suggested. Comparisons of grades and class rank were requested to address these questions. Such evidence could help focus on the differences in academic performance between and among different groups of students. But what is the purpose

17. See Leigh H. Taylor, *A Faulty and Narrow Understanding of Merit and Qualification in University Admission*, Chronicle of Higher Education B3 (Sept. 15, 1995).

of asking questions in a form that will maximize differences between groups such as white students and students of color? Is it because there is sincere uncertainty that *on average* applicants with higher test scores and higher grades tend to earn higher grades in law school? Surely, there has been no shortage of studies of the validity of the LSAT, especially when used in combination with UGPA, to support that conclusion. Or, is the purpose to move forward a different agenda—an agenda designed to assure that those who have most benefitted from the privileges of a majority society continue to be assured those privileges? The case has not been made that those students who earn the highest first year (or cumulative) grades in law school become the most successful members of the profession. Interestingly, despite considerable research effort by the LSAC over an extended period of time, there is not a generally acceptable definition of success in the profession.[18] Not only in law school, but in higher education in general, the relationship between academic performance and later professional success is weak at best, and frequently not established.

C. EVALUATING AND INTERPRETING THE DATA

The conclusion from my study that seems to be most at issue is that many minority applicants who would likely have been denied a legal education under a color blind admission policy were fully capable of meeting the rigors of legal education and of entering the profession. The data supported that those students earned a degree and passed the bar in substantial numbers. The data did not suggest, nor do they need to suggest, that students who would have been denied an opportunity for a legal education under a numbers-only model caught up to or surpassed the law school grades or rank in class of those students admitted with the highest scores and grades.[19]

Professor Thernstrom called into question several aspects of my data comparisons and interpretations. These included whether graduation was a sufficiently stringent and meaningful criterion, whether differences between black and white graduation rates weren't more important than differences between the two groups of black students (predicted and not predicted to be admitted), whether first time pass rates should have been re-

18. See, e.g., Law School Admission Council, *Report of LSAC Sponsored Research: Volume IV, 1978-1983* (Law School Admission Services, 1984).

19. See Part IIB (discussing the lack of evidence to support a relationship between grades and later success in a profession).

ported rather than eventual pass rates, and what the differences in eventual pass rates mean.

Law School Graduation as a Measure of Achievement. Law school graduation and bar passage are the achievements that are necessary to enter the profession. Evidence of graduation from an approved law school, not class rank, is the criterion required by the ABA. Law school graduation was dismissed as a measure of success because the graduation rates were so high (i.e., only a relatively small proportion of entering law students failed to graduate.) The high graduation rate was attributed to the fact that law schools have lowered their standards and engaged in social promotion in response to their own affirmative action admission practices.[20] This is a strong indictment, particularly when no evidence to substantiate its validity was provided. More importantly, evidence to refute such a claim is available from the ABA accreditation standards. Further, it is not surprising that there is a high graduation rate in law schools. The number of fall 1991 applicants (the cohort included in my study) so far exceeded the number of available places that admissions were very selective. Even so, the data confirm that admission does not assure graduation, particularly when the graduation rates of nonwhite students are examined.

Within Group Comparisons vs. Between Group Comparisons. The data that show differences in graduation rates between white and nonwhite students raise the question about whether the lower graduation rates are simply a result of the different admission criteria. For example, the data showed that more than 20 percent of black students from the studied cohort failed to graduate. The compelling aspect of the data lies in the observation that although approximately 22 percent of black law students failed to graduate, and although that rate was considerably lower than the graduation rate for white students, the difference between white and black graduation rates cannot be summarily dismissed as a consequence of differential admission practices. The within-group comparisons provide the evidence that disproves such a conclusion. Those data support the conclusion that failure to graduate is independent of whether or not a student of color would have been admitted based on LSAT scores and grades alone. Those data also raise important questions that were outside the focus of my study on the threat to diversity in legal education, but are not outside the issues that

20. Thernstrom, 15 Const. Comm. at 29-30 (cited in note 2).

must be addressed by legal education. For example, if the drop-out rate is not attributable to special admission practices, then what is the explanation? What are the roles and responsibilities of educational institutions and educators when dealing with students who bring different skills, different needs, and different perspectives to the classroom? These questions are for a later day, however.

Eventual Pass Rates or First time Pass Rates? Eventual bar passage rates were examined to answer questions about entry to the profession. It is true that first time pass rates have been the focus of several earlier comparisons between white and non-white bar exam takers. But it is also true that both educators and researchers have questioned the utility of that focus.[21] Interestingly, one reason for the focus on first time pass rates was the availability of those data. It is more difficult to accumulate eventual pass rate data. More importantly, the issue of the purpose of the question must be raised again. One criticism of reporting eventual pass rate was that "some of those she classifies as having passed might have done so on their sixth crack at it. If the beneficiaries of affirmative action only eke out a passing grade after two or three years— with as many as five or six tries—it is reasonable to wonder how firm their command of the law is."[22] First, there is no basis for concluding that applicants to the bar who pass after five or six attempts have less command of the law than those who pass after the first or second try. Bar examinations use blind grading, graders are not aware of the number of previous attempts, and each decision is independent of decisions on previous bar examinations. More importantly, the accusation of eking out a passing grade after five or six tries is unfounded. In fact, the data reporting number of attempts showed exactly one black examinee who did not pass until the sixth attempt and two who passed on their fifth try.[23] These three examinees are exceptions, not descriptive of the pool of examinees. For comparison, there were 10 white examinees who passed on their fifth try. There was no white examinee who

21. See, e.g., Edna Wells Handy, *Blacks, the Bell Curve, and the Bar Exam*, NBA Magazine 26 (Mar./Apr. 1996) (arguing that the importance attached to passing the bar on the first try has been unnecessarily inflated); see also Stephen P. Klein, *Bar Examinations: Ignoring the Thermometer Does Not Change the Temperature*, N.Y. Bar J. 30 (Oct. 1989) (describing eventual pass rate rather than initial pass rate as the best indicator of access to the profession).

22. Thernstrom, 15 Const. Comm. at 33 (cited in note 2) (emphasis omitted).

23. Linda F. Wightman, *LSAC National Bar Passage Study*, LSAC Research Report (Law School Admission Council, forthcoming).

required 6 attempts, although there was one who required seven. Among the passing black examinees, 222 required more than one attempt. Among those, 69 percent passed on their second attempt and 93 percent passed by the third attempt.

An important distinction, and one that has unfortunately been blurred in the lay reporting of the findings, is the comparison of pass rates between predicted admission decision groups. Both the results and conclusion sections of my report are very precise about those outcomes. Specifically, the text states "the data show a statistically significant relationship and a small effect size for Asian American, black, Hispanic, and Puerto Rican students, a statistically but not practically significant one for white students, but no relationship between the two variables for American Indian and Mexican American students."[24] "The same data also show that for most, but not all, ethnic groups, there is a statistically significant relationship between passing a bar examination and predicted admission to law school."[25] These are important data, and the perspective from which they are viewed is also important. First, the data do not find a significant relationship between predicted admission and bar passage within every ethnic group. Second, among those groups where the relationship is significant, the effect size—that is, the strength of the relationship after it is corrected for sample size—is of a magnitude that is typically considered a small effect. The small effects were of sufficient size to be considered of practical significance, not just an artifact of a very large sample size, but were not close to the magnitude of an effect that would be considered a medium effect. On the one hand, these are not differences about which legal education or the legal profession should be complacent. It is a pass rate that is too low when evaluated from the perspective of loss of minority law school graduates to the profession. Nearly 11 percent of the black examinees in this study group failed the first attempt at the bar and never attempted it again. They represent nearly half of those in the failed category. These findings identify an area requiring further study. Legal educators need to understand why these graduates did not return, and use that information as they counsel and prepare future graduates to enter the profession. The findings about single attempts also raise questions, however, about the utility of bar passage as a criterion in evaluating the success of admission decisions. How many of those graduates

24. Wightman, 72 N.Y.U. L. Rev. at 39 (cited in note 1).
25. Id. at 52.

who did not attempt the bar a second time did so because passing was not necessary to entry or success in their chosen career?

More importantly there is a positive and encouraging message in the data that cannot be ignored. Among those who would not have been provided an opportunity under a test-score-and-grades-based admission model (or a model that produced similar outcomes) nearly three quarters met the criteria for entering the profession. How should we interpret the achievements of those students who entered law school with a less solid academic background and who persevered and succeeded? What is the response to those law schools that identified characteristics of those students that indicated potential despite their lower academic credentials, and then provided the education and support to aid them in reaching their potential? Should they be chided for taking a risk or applauded for their success? Through one lens, the glass is clearly three-quarters full and the answers to these questions are straightforward.