The ‘Best Qualified’ – for What? The place of affirmative action in a mission-focused New Zealand law school admissions policy

BY Ken Mackinnon*

Introduction

Each year there are a significantly greater number of applications to the five New Zealand Law Schools than can be accommodated in the LLB programmes within those schools. It follows that the schools must select some applicants and reject others. This rationing of places is done at the beginning of the LLB degree programme, at the end of the first year, or both. Without the intense public debate that would accompany such a practice in the United States, all five of the New Zealand law schools have adopted some variation of affirmative action policy with respect to selecting applicants for admission.

The concern of this paper is whether and to what extent race or ethnicity can be a legitimate factor in admitting students to law school. By considering the American debate on (race-based) affirmative action in the light of recent developments in California, and looking at the New Zealand context, I want to suggest that, while some justifications for affirmative action such as those based on reparations are not defensible, there is a valid place for measures which have an affirmative action effect in law school admissions processes in New Zealand. What is argued for is

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1 The development of my thinking in this area has benefited greatly from feedback on papers presented at the 1999 meeting of ANZELA and at a Waikato Law School staff seminar in 2000. My thanks to those involved.

2 In addition to those who study for the LLB degree and the LLB with Honours, there are a number of students who undertake double or ‘conjoint degree’ programmes. For present purposes they are treated together.

3 The paper draws on the academic literature, statutes and case law of New Zealand and of the United States, on interviews conducted in selected Californian law schools, the handbooks and prospectuses of the New Zealand Law Faculties and Law Schools, and on my experience as Admissions Committee convenor at the University of Waikato, New Zealand over nine years. Interviews were carried out during 1999 at Boalt Hall Law School (UC Berkeley), Stanford University Law School, Hastings College of Law, Golden Gate University Law School, McGeorge School of Law (University of the Pacific), and UCLA Law School. Three of these are public institutions and three are private. Both administrators and faculty were interviewed. Literature was also obtained from Lincoln School of Law, Sacramento (a private night school) and information provided by other higher education institutions (such as two CSU campuses and several Community Colleges) in California is also drawn on.
not 'hard' affirmative action, in that no one would be admitted solely 'because of their race' and no one would be excluded because of their race. The focus is on selecting students who can contribute to the school's educational and social goals (nowadays termed the 'mission' of the school), but the paper goes beyond that to consider the attracting of particular sorts of student through active recruitment and support for them while at law school. Attracting, selecting and supporting the students whose qualities and characteristics match with the achieving of these goals will, indirectly, cause a greater presence of 'minority' students in the law schools and in the occupations and professions they join on graduation. While some of the arguments set out below may have wider application (for example in employment policies), this paper does not pretend to provide either a theory or a model of affirmative action in general.

Although personal factors influenced strongly the choice of law schools as a focus for this study, they are a particularly appropriate focus for discussion of affirmative action for a number of reasons.

The first is that several of the key American cases on affirmative action and racial discrimination relate to law schools.4 No doubt one of the reasons for this is that admission to law school is highly selective and the number of qualified applicants far exceeds the places available. Consequently difficult choices have to be made in determining who is to gain entry.

But the frequency of law schools as defendants may have as much to do with the nature of what they teach. Many of the concepts used in discussing affirmative action are the concerns of jurisprudence and law. Law and law schools are, therefore, more than contingently connected to the 'justness' of society. They have a special responsibility for subjecting both the substantive and procedural issues raised to rigorous analysis and criticism, and for proposing alternative models.

Equally, applicants who aspire to be law students are likely to have an existing interest in 'justice', 'rights', and 'compensation', and in the way that law relates to these – and, perhaps they simply have a litigious predisposition! Sensitised to these concepts, a 'minority' applicant to law school who believes the admissions policy is 'unjustly' excluding minorities will be more than averagely inclined to challenge it; if a 'majority' applicant believes his or her 'right' to a place is trampled by a preference for minorities, then he or she too will challenge.

Finally, law schools are avenues not merely to legal knowledge, but also to power and to the means of changing society. This happens directly through legal action in the courts but also indirectly through the disproportionate influence (informal as much as formal) that the legal profession has on the legislature, government and policy-makers. Thus entry to law school is particularly important for minorities as a means of access to positions of power in society.

As a result, the American law journals are replete with symposia proceedings, analyses and critiques, case-notes and 'Special Issues' on affirmative action, which prove a useful starting point for considering affirmative action in New Zealand.

However the histories and contexts of the American and New Zealand systems of legal education are sufficiently divergent that not only can the practices of one system not be immediately transferred intact to the other, but a comparison forces participants in each system to re-evaluate their own practices and assumptions.

One important difference between law schools in America and those in New Zealand is that whereas law is an undergraduate programme in New Zealand (in which respect it mirrors Australia and the UK), it is a graduate programme in the US. This makes an enormous difference in terms of the nature of the pool of eligible applicants and the level of discretion available to admissions officers. If holding a BA degree or equivalent is a prerequisite for entry to an American law school, only that percentage of the population who have graduated in higher education (and therefore only those who can afford – in terms of time, etc., as well as finances – a very lengthy period in higher education) can achieve a legal education and the rewards which generally follow.5 This assertion has to be tempered however by the existence, in California, but not nationwide, of law schools which are not accredited by the American Bar Association or the Association of American Law Schools. A

4 Swett v Painter 339 US 629 (1950); DeFunis v Odegard 416 US 312 (1974); Hopwood v Texas 78 F 3d 932 (5th Cir 1996); Grutter v Bollinger No. 97-75928 (E.D. Mich.) (currently on appeal).

5 Hence, for example, Martin Trow's criticism of affirmative action that it merely transfers privilege from one elite to another: Trow M, 'Comments on Bowen and Bok's The Shape of the River' (1999) 135 Public Interest 64.
private law school such as Lincoln Law School, which is accredited by the Californian Bar but not the ABA, does grant admission in certain circumstances to applicants who have not completed an undergraduate degree. Its aim is to provide cheap access to legal education for working people in Sacramento. Nevertheless, because of its unique nature, it would be misleading to use Lincoln as a comparator for the New Zealand law schools.7

What the graduate nature of legal studies in the US does also mean is that there is a stronger presumption that graduates will be entering the profession; in contrast the LLB degrees in New Zealand have – or can have – wider aims (with a higher proportion of the students enrolled in them treating them as a general degree).

It is ironic, therefore, that whereas in New Zealand only a holder of an LLB degree can obtain entry to the legal profession, in a few remaining states of the US, it is possible to gain entry by passing the state Bar examinations without first having obtained a law degree. Nevertheless the holding of a JD degree and the status of the university which conferred it effectively determine entry into and success in the higher echelons of the profession.

As yet there are no private law schools in New Zealand, whereas four of the seven visited in California are. Nevertheless, even if there were private providers in New Zealand, the main pieces of legislation affecting affirmative action, the Education Act 1989, and the Human Rights Act 1993, apply to both private and public sectors. In California, in contrast, Proposition 209, which outlawed the use of affirmative action in respect of race and certain other attributes, covers public institutions only. The consequence – that there are some respected universities (eg Stanford University) which are able to practise affirmative action and others (such as UC Berkeley) which cannot – has a distorting effect on the admission figures and practices of each group.

In view of the importance placed on the mission of law schools in the discussion that follows, it is worth noting the variation in purposes of the Californian law schools, particularly the private ones. For example, Stanford University emphasises research and a broad, liberal curriculum while Golden Gate University focuses on commercial law electives and Lincoln University has a minimalist professional training mission. At least thus far, New Zealand law schools have not sought to differentiate themselves to the same extent.

A further obvious difference between the two systems – that the US is federal while New Zealand is not – does not directly affect the debate except in so far as the US Constitution enshrines certain rights and, consequently, the technicalities of Constitutional interpretation often dominate the discussion in the US rather than the merits of the substantive issues. On the other hand, the Treaty of Waitangi in New Zealand, entered into in 1840 by the British Crown and certain of the indigenous Maori people of Aotearoa-New Zealand, is beginning to be seen as setting parameters for, and giving direction to, governmental actions.

Perhaps, however, the import for present purposes of the Treaty is that ethnic relations are considered generally in New Zealand to be bicultural rather than multicultural. Maori have a special status as the indigenous people, tangata whenua, as against all other ethnic groups collectively. That may give rise to a bicultural version of affirmative action rather than the more usual multicultural version. United States affirmative action programmes tend to identify particular ethnic and racial groups for special treatment.4 Having said that, occasional references can be found in the US literature which attribute a unique status to African-Americans/black Americans as former slaves, while similar claims can be made for specific native American tribes, and, in California, vis a vis the Chicanos whose part of Mexico was appropriated by the US as the spoils of war.5

Despite the differences between California and New Zealand, the issues raised over affirmative action in the American setting are not alien in New Zealand, and it is informative to evaluate the much more extensive American literature. However, any actual affirmative action policy will be ‘context-specific’.6

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6 A limited number of students who do not meet the requirements of a Regular Student may be considered for admission as Special Students at Lincoln Law School based on their maturity, life experience, intellectual ability and aptitude for law study,' Lincoln Law School, 1999-2000 Catalog (Sacramento: Lincoln Law School, 1999) at p 9.

7 It has no full time staff, no day time classes, and no research capacity, for example.

8 These are usually African-Americans, Hispanic-Americans, Native Americans, and, sometimes, Asian-Americans.


Affirmative action

The term 'affirmative action' dates back to the 1960s and came to prominence through a number of executive orders issued by President Lyndon Johnson between 1965 and 1967, requiring those who contracted with government to go beyond merely not discriminating by taking positive (affirmative) action to assist minorities in employment decisions. In educational settings, affirmative action occurs where special consideration is given – usually in admission decisions – to an (otherwise qualified) individual on the grounds that the individual is a member of a disadvantaged or minority group.

There is a vast US literature on race-based affirmative action in education, much of which arises from the 1978 Supreme Court case of Regents of the University of California v Bakke in which Allan Bakke (a white student who failed to gain a place in medical school, though minority applicants who were less qualified academically did gain places set aside for them) successfully argued that the quota system favouring minority applicants which the University of California Medical School at Davis used was unconstitutional.

Since Bakke, higher education institutions have continued to employ affirmative action, but more indirectly (sometimes covertly). They have done so by taking race into consideration among other factors, when allocating places. But in the past couple of years, even these policies have been challenged and in some cases outlawed. In California, the huge multi-campus University of California changed its admission policies in 1995 (with effect in graduate schools including Law in 1996, and then throughout the remainder of the University in 1997) so as to eschew racial considerations. Shortly afterwards, in a referendum vote on 'Proposition 209', the people of California outlawed the use of 'race, sex, color,

ethnicity or national origin' as admissions criteria in public institutions. In Texas the Court declared racial affirmative action – however indirect – to be unconstitutional. Other states are starting to follow suit, and proponents of affirmative action are on the defensive.

Justifications put forward for affirmative action seem to be reducible to three groups: those looking to correct or compensate for past disadvantage; those concerned with distributing current burdens and benefits 'justly'; and those more teleological arguments which are concerned with achieving certain educational, social or ideological goals in the future.

'Corrective Justice'

The first group of justifications is premised on conceptions of 'corrective', 'retributive' or 'restorative' justice.

(A) Competition perfecting

Heslep suggests starting with a minimalist form of corrective justice. He distinguishes between 'indicator' standards (grades, scores, etc) and 'substantive' standards (the skills, knowledge and character habits which the grades are supposed to reflect). While normally there is considered to be a sufficient correlation between the two, in some cases further information becoming available may necessitate a 'correction' to the indicator standard. For example, the applicant may have been ill during preparation for secondary school exams, the school lost its specialist teacher in one of the subjects during the academic year, or some other factor may mean that the 'indicator' grades are not a true reflection of the applicant's ability or potential. Although this process is compensating (in the sense of 'making allowances') for disadvantage, it is not properly viewed as affirmative action, since it applies to any individual who has a specific case for special consideration and not only to members of a 'preferred group'. It is termed 'competition perfecting'. It is open to an applicant to argue that he or she has been disadvantaged because of race but, if so, evidence of that disadvantage must be shown in relation to that individual and the admissions committee need to be confident that but for the disadvantage, the applicant would have made the grade.

Sindler, supra note 11, at p 13.
(B) Reparation

A much stronger form requires that members of groups that have been disadvantaged by historic discrimination be compensated by receiving preferential treatment in admissions decisions. While that idea may seem fair, it is almost impossible to implement fairly in practice. The first issue is determining which disadvantaged groups are to be selected as recipients of reparation. Historically, disadvantage, discrimination and deprivation have not been restricted to particular racial groups (although they may have experienced a disproportionate amount).

The second difficulty is that, at the level of admissions to university, it is individuals who gain and lose, but neither the giver nor the loser has necessarily been involved in the discriminatory wrongdoing. Just as it is unclear why Allan Bakke or any other specific applicant should bear the cost of compensation which is owed, if at all, by all those who are in a dominant position in society, so it may also be that the particular minority group individual who gains a place through this process has not personally been significantly disadvantaged (though his or her grandparents, say, may have been). While it may be conceded that all members of minority racial groups – even those individuals who appear to be successful in the modern society – have experienced some sort of discrimination or stereotyping, it is not always clear that it warrants this form of compensation. Nor is it clear that it is the role of a university to correct the wrongs of the past (except possibly where it has been that institution which has discriminated).

Similarly, there are clearly individuals and groups within the 'majority' who have not gained any advantages, but who, rather, might be thought to be in need of special assistance themselves if they are to overcome the social and economic disadvantages that they are experiencing. Unfortunately, it is often these disadvantaged individuals who, by missing out on places in higher education, are likely to bear the cost of compensating the minority for the racial disadvantages they have experienced. For an approach that bases itself on justice, it is ironic that affirmative action as corrective or compensatory seems doomed to operate unfairly; this approach to affirmative action 'will entail some mismatch between wrongdoers and cost-bearers, and between beneficiaries and victims'. 17 I do not believe, therefore, that a reparations argument is sufficient to justify affirmative action. Indeed it is the failure of this argument to convince which has brought about the backlash against affirmative action in the United States and is just as likely to happen in New Zealand. Perhaps a fairer way to provide reparation through the education system would be for society as a whole to increase the places or funding for disadvantaged individuals in general, by means of progressive taxation.

In New Zealand, there are other mechanisms for compensating Maori for the wrongs of the past. Recent years have witnessed multi-million dollar compensation packages for tribal groups whose lands were confiscated by governmental agencies. The Waitangi Tribunal was set up as a grievance procedure for these purposes and the Government has additionally negotiated major settlements with Ngai Tahu in the South Island and with Tainui around the Waikato Region. With some of the settlement funds, Tainui have established a number of scholarships and educational foundations. The need for compensation can, I believe, be met more fairly and effectively by these types of arrangement than would be achieved through affirmative action.

Distributive Justice

A second grouping of justifications focuses on the appropriate allocation of current burdens and benefits.

Past discrimination has a ... role to play in this model, but compensation for past wrongs is not the main concern ... Rather, distributive justice focuses on present inequality; the past is relevant as an explanation of current inequalities ... but is not directly part of the justification. 18

It is widely accepted that public benefits (such as places in higher education) should be distributed according to one of the standard criteria of justice – rights, needs or merits. 19 The first of these, rights, has been picked up as group rights by Ronald Fiscus. 20 The second, distribution on the basis of needs, does have a role in higher education when financial and educational support for individual students is allocated, but that is separate from the question of justifying the admission of an applicant. 21 The third criterion, merit or deservingness, is the one that has been traditionally used to allocate places in university.

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21 Cf s 31 of the Human Rights Act 1993, which permits otherwise discriminatory actions if they are designed to assist persons or groups who 'need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community'. However, further analysis reveals this to be a form of goal-based justification rather than a free-standing needs based one.
(A) Rights and Proportionality

While it may well make sense to argue that an applicant who meets the current stated criteria for admission to a university or law school has, thereby, an entitlement or ‘right’ to that place, a more extensive assertion by an individual of some sort of natural or human right to a place in higher education cannot be sustained — not, at any rate, as an enforceable right against a particular institution: the most that can be granted is that each has an equal right to compete for a place on one’s merits. Fusic develops a rights argument on a different plane. He assumes that African-Americans as a group have a right to the resources, burdens and benefits of society proportionate to their population. He invites us to accept that in a society that had been always free of race discrimination, the proportion of higher education students who were African-American would be the same as the proportion of African-American in the country’s population. Therefore, if the number of African-American students is less than the proportion would dictate, a white student occupying a place that should properly be an African-American place is not entitled to that place. He (or she) suffers no loss if that place is reallocated to a ‘less qualified’ African-American student. Indeed the white student who gets a place that would, under proportionality, be an African-American one is benefiting unjustly from past racism. The solution is to set aside the appropriate proportion of places for the minority applicants.

Of course neither Fusic’s assumption that all races are academically equal and would therefore have a proportionate number of university places in a just society nor his assumption that all disciplines are inherently equally attractive to all races, are universally accepted. Indeed, in New Zealand, there is a growing demand among Maori for the resources to set up their own culturally appropriate institutions in health provision, social services, and education. There are now at least three Wananga recognised by the Government and having a status equivalent to that of a university, and Te Wananga o Raukawa confers a Bachelor of Maori Laws and Philosophy degree. But in any event, there are, at the practical level, a number of difficulties with Fusic’s approach. While he restricts its use to race, the logic of the approach suggests it should be applied to all minorities, leading to a logistical nightmare of trying identifying their respective proportions and applying them in a matrix. There is also a problem of what is the appropriate baseline for the proportions (local, national, the high school leaver cohort, etc).

23 Fusic’s arguments, which he rightly describes as based on distributive rather than retributive justice, are closer to the principles of unjust enrichment than to the doctrines of tort law.

A further issue has arisen in recent years which puts into question Fusic’s approach: particularly in California, Asian-Americans are ‘over-represented in the university admission figure by factors of between 4 and 14’. Fusic’s argument that over-represented whites are there because they are effectively taking advantage of historic discrimination against other groups and that they consequently have no moral claim to the places can hardly apply to Asian-Americans who (a) are a tiny minority and (b) probably have been themselves the victims of historical discrimination rather than its perpetrators. It does not seem fair to restrict their entry numbers to higher education to correspond to their percentage of the overall population.

There is little support in the US for Fusic’s ‘hard’ affirmative action approach. Quite apart from the ruling in Bakke that it is unconstitutional, it is thought to fail both fairness and effectiveness tests. Despite Fusic’s assertion that a white applicant who is denied a place has no claim to that place, he does not deny that it is only because of that applicant’s colour that he or she loses out. The applicant has not been treated fairly as an individual but discriminatorily as a cipher. Although Fusic’s immediate aim of proportionality is achieved merely by allocating places proportionately, there is a danger that the longer-term effect may be as likely to exacerbate racial discrimination as to alleviate it. The reasons for this are potential labelling (by themselves as much as by others) of the ‘preferred’ applicants as ‘second-rate’, and the possibility of ‘white backlash’.

(B) Merit: the ‘best qualified’

It has been individual academic merit which universities in modern times have claimed to use as their chief admissions criterion (though other factors are taken into account either openly or covertly). Affirmative action may seem to fly in the face of allocating places according to merit, but this need not be the case.

In fact, measures or evaluations of merit are commonly used in two senses. One sense is to look at past performance and to recognise that people who have achieved (or got close to) a pre-determined goal or standard are meritorious as a result of having applied the appropriate skills, personal qualities or abilities effectively. Merit in this sense may deserve reward. In a second sense, we determine people (eg candidates for a job or applicants for a university place) to be meritorious because they have the attributes necessary for doing an activity which is still to be done. Being identified as meritorious in the first sense does not necessarily mean a person is meritorious in the second sense, unless the possession of the qualities needed for the future activity is what is evidenced by the past achievement.

Allocating places at law school falls into the second category. Being selected for a place at law school is not primarily a reward, not primarily backward looking, but rather a forward looking granting of an opportunity to those who are considered to be 'best qualified' or most able to make something of that opportunity. The focus is on the potential of the applicant. An admissions committee allocating law school places on merit is expected to treat merit as a purposive or 'functional notion'.

There is a temptation for admissions committees to equate the two senses of merit identified above, and to use evidence of past merit in the form of academic records and grades as (perhaps the only) evidence of (or at least predictors of) future performance. Admission on the basis of past academic record has the advantage for admissions committees that it is a relatively simple procedure of applying set (quantitative) criteria to specific cases and yet carries an aura of objectivity. But it rests on a number of assumptions. It is assumed that merit can be quantified, that it can be standardised, and that past grades are sound predictors of future merit.

Certainly it is possible to devise tests which measure and rank skills, ability and knowledge, and to rank candidates according to the degree to which these are demonstrated in the results of these tests. What is less clear is whether these tests have wider significance beyond their own results and whether past grades are invariably accurate indicators of the generic skills and capacities that are needed for legal study or legal practice.


Past grades may not always reflect academic ability. Test results can reflect inappropriate skills – such as rote-learning of material which is forgotten within a short period following the test, or the acquisition of exam technique. Similarly a law student in New Zealand who has gained entry on the basis of an A Bursary score may have done so by taking mainly scientific and mathematical subjects. This is no guarantee of his or her nascent ability to interpret statutes, write opinions, ascertain facts from clients, negotiate a settlement of a dispute, or argue in court.

Secondly, even if prior grades are accepted as accurate proxies for academic merit, the bald figures of the academic record are not necessarily fair. A student's genuine ability in a subject is not always reflected in the grade obtained. The opportunities to perform well in secondary school exams vary from one school to another. For example, a rural school may be unable – perhaps because of lack of resources; perhaps because of lack of student demand – to teach a particular language. Pupils wishing to take that subject, and having to do so by correspondence, may be thought to be at a disadvantage as compared with others at a well-resourced school which provides teaching and support in that subject on site. Pupils in disadvantaged areas may have little access to books or computer resources. Similarly, certain schools put considerable more effort into coaching their pupils in techniques of national exam success than others.

While the extensive American research on predictors of university success is not conclusive, it does raise sufficient doubt about the accuracy and utility of past grades and standardised tests that it would be inadvisable to rely exclusively on them as predictors of ability to succeed at law school. Surveying recent work in the area of past academic performance and standard tests, Sturm and Guinier report research findings showing such measures to be poor indicators of university performance. In particular they under-predict the achievements of minorities. They conclude:

These tests, which are used to predict future performance based on existing capacity or ability, do not correlate with future performance for most applicants, at least not as a method of ranking those 'most qualified'. These tests and informal criteria making up our 'meritocracy' tell us more about past opportunity than about future accomplishments on the job or in the classroom.

30 This is a wider problem than the exceptional case which can be dealt with through 'competition perfecting' (see text accompanying footnotes 15, 16 above). Rather what is of concern here is systemic unfairness.
32 Ibid at 957.
In a major and much cited study, Wightman, following the 1990-1 cohorts of law applicants to 173 US law schools through their degrees, found that the correlation between test scores (in the national Law School Admission Test) and law course grades declines after first year law and that the entry scores are poor predictors of eventual graduation. 33 She nevertheless believes that there is sufficient positive relationship between undergraduate grades combined with standardised tests and law school outcomes as to justify the retention of these records and tests as one, but only one, element in the admissions process. 34 Similarly Duncan and Wojciechowiski-Kibble report in relation to the UK (where the vast majority of law students have come directly from secondary school) that:

[although A-levels are poor predictors of ultimate performance on Law Degree courses, they do correlate positively, particularly in respect of young students. There is thus some justification for their use by admissions tutors in respect of school-leavers, although little for the importance which is attached to them. Their failings as predictors are more serious in respect of mature students. 35]

The literature in both America and Britain points to concerns that are particularly relevant to this paper’s focus on affirmative action for ethnic minorities. Underperformance by some groups in the standard measures seems to be due not simply to lack of opportunity but also to the narrow cultural base of the performance measures. In a heterogeneous society, standardised tests may be more attuned to the way of thinking of one group and less attuned to other groups and cultures whose relative disadvantage in this respect may be reflected in lower scores, despite their having an equivalent natural ability. While an early study found that ‘standardized’ tests such as the Scholastic Aptitude Test (SAT) may be a sound predictor of grades in college, its authors came to the conclusion that a major

factor was that college grading and college life were just as oriented to a narrow western culture as the tests. 36 The contention that standard tests have an inherent bias favouring the dominant culture has been firmly reinforced by further work in the 1980s and 1990s. 37

It appears, then, that, for a number of reasons, the traditional measures of academic merit can operate as a self-fulfilling prophecy for members of a particular category of people – those whose characteristics have been used to shape the tests or examinations. However, others, such as minority group members or mature students, who are effectively eliminated by exclusive use of such criteria, could in fact achieve success in law school if given the chance. In failing (in a technical sense) the non-standard student, standardised testing fails (in a wider sense) to do what is required of it, the identifying of potential ability. Alan Freeman puts it at its strongest:

Every one of us who has internalized meritocratic norms is complicit in the subtle reproduction of relations of domination through the ‘neutral machinery’ of ‘equality of opportunity’. 38

Furthermore, despite the link between a strong academic record and success in university examinations, it may be that neither is an accurate indicator of ability, competence or potential as a legally educated person in the workforce and community.

All legal educators know that the quantitative measures can predict performance on law school examinations only on a crude level. ... To state categorically, therefore, that the higher the combined LSAT and college grade average is, the ‘better qualified’ the applicant necessarily is, even for law school ‘success’, is clearly unwarranted, for this factor deals with rough probabilities and not certainties in individual cases. To equate law school success with success in practice is also a dangerous proposition, for law school education, as it now exists, is best geared to training in the analytical and research skills required of practitioners. It does not train effectively in the skills of advocacy, counselling,

33 Wightman L, ‘The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions’ (1997) 72 NYU LR 1 at 35 (though she does point out that ‘[a]cademic difficulty is not the only reason that some students failed to graduate from law school’, financial considerations being a major factor). These findings replicate the conclusions of a smaller, focused study at Pennsylvania Law School: Guinier L et al, ‘Becoming Gentlemen: Women’s Experiences at One Ivy League Law School’ (1994) 143 U Pa LR 1.


drafting, negotiation, client relations, fact investigation and preparation which are also of prime importance in practice. ... The quantitative predictors, in view of the range of skills needed by a practitioner, are simply not good enough to be the sole basis for admission to law school.39

The dissonance between what is learned at law school and the needs of the profession may not be as great in the modern New Zealand law school as Griswold suggests. Nevertheless it is clear that the desired graduate attributes are unlikely to be apparent in the academic records of many high school leavers. The Bursary scores they have are not closely tied to the skills and attributes of the modern lawyer.

What can be concluded, however, is that while the use of past grades is a convenient way to select law students, it may exclude potentially strong performers and may include some students with limited aptitude. Expanding the admissions criteria beyond the use of past grades should not be seen as derogating from an ideal, as making exceptions. For any institution, choosing fairly, "on the merits", means selecting applicants by criteria that are appropriate to the purposes of the organisation. For colleges and universities, using broader criteria than grades is a more effective and appropriate method for choosing academically qualified applicants who not only give promise of doing well academically, but who also can enlarge the understanding of other students and contribute after graduation to their professions and communities.40

In general, the benefits in time and administrative resources accrued from mechanizing the admission process are lost when the consequences of overreliance on test scores and grades are evaluated. From a measurement perspective, relying exclusively, or even primarily, on test scores and grades calls upon the test to do far more than it was designed to do. From an educational perspective, it far too narrowly defines the goals and mission of an institution of higher learning. And from a diversity perspective, overreliance on test scores, with or without additional consideration of grades, results in predictable and measurable discrimination.41

It is worth noting in passing that the practice of universities in the US has long abandoned fidelity to a policy of purely academic meritocracy. As one American college president put it,

39 Griswold E, ‘Some Observations upon the DeFunis Case’ (1975) 75 Col LR 512 at 515
41 Wightman L, supra note 34 at 98-9.

Admissions committees go beyond the past academic records and test scores of applicants. For example, the Boalt Hall Law School policy document reads:

Yet numbers alone are not dispositive. The Law School considers other factors as well for all applicants. For example, substantial consideration is given to letters of recommendation, graduate training, special academic distinction or honors, difficulty of the academic program successfully completed, work experience, and significant achievement in nonacademic activities or public service.42

The Texas statute passed in response to the Hopwood case disallows ethnicity as a factor in admissions but permits seventeen others, including:

(1) academic background; (2) socioeconomic background; (4) bilingual proficiency; (7) extracurricular obligations, including employment, child-raising, or other similar factors; (9) whether the applicant resides in a rural, suburban, urban, or central city area; (11) performance on standardized tests in comparison to students from similar socioeconomic backgrounds.43

What may be more surprising is the statistic that more white students gain entry to Harvard College through special admissions programmes as "legacies" – that is, as the children of alumni – than do the total number of African-American, Hispanic, and Native American students taken together, including those admitted through the regular admissions programme and those admitted through the special admissions programmes for the disadvantaged.44

43 Faculty Policy Governing Admission to Boalt Hall, adopted April 22, 1996.
45 Lamb JD, ‘The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale’ (1993) 26 Colum JL & Soc Probs 461 at 504. See also Fetter J, Questions and Admissions: Reflections on 100,000 Admissions Decisions at Stanford (Stanford: Stanford UP, 1995) chs 4, 6, where the admission of less-qualified athletics scholarship holders and children of alumni is treated as an accepted aspect of admissions, and where the role of wealthy donors is acknowledged. In New Zealand, the Human Rights Commission has ruled that Hamilton Girls High School was in breach of the Human Rights Act in giving enrolment priority to the daughters and grand-daughters of former pupils: New Zealand Herald, Monday 19 March 2001, A7.
While both educational research and the practice of universities suggests that the role of academic records and tests should be severely restricted, the rhetoric of the debate about affirmative action stills puts a high premium on merit. Unable to rely on the traditional quantitative measure of merit, and afraid of being seen to down-play merit by bringing in additional values (far less abandoning it, as Freeman advocates) some liberal educationalists offer a redefinition of 'merit' in such a way that it no longer excludes minorities but rather acts as a justification for affirmative action:

Above all, merit must be defined in light of what educational institutions are trying to accomplish. In our view, race is relevant in determining which candidates ‘merit’ admission because taking account of race helps institutions achieve three objectives central to their mission - identifying individuals of high potential, permitting students to benefit educationally from diversity on campus, and addressing long-term societal needs.66

What Bowen and Bok (both former Presidents of Ivy League universities) appear to be attempting here is to provide three justifications for treating race as a criterion of merit. They want to retain academic ability (which may have been concealed in previous testing) within 'merit'. Yet simultaneously they desire to broaden the idea in two seemingly distinct ways: firstly, by considering applicants as meritorious in so far as they bring various qualities to the learning environment; and secondly, by ascribing merit to someone who contributes to goals beyond the university. However, what are presented as three justifications are, in practice, intertwined aspects of the same argument.

In identifying academic merit, it is necessary to employ evidence that may be less quantifiable than prior grades. Each applicant must be considered as an individual, focusing on future potential rather than the past record. Once the tyranny of the academic record is broken, it makes sense to include non-academic factors in an evaluation of an applicant's potential. Of importance are generic skills and personal qualities, evidence of which may be revealed in work experience or even in 'life experience'. Thus an applicant who has overcome a severe physical disability to get within the pool of eligible applicants, or one who is returning after leaving formal education early for family reasons, may have the determination to succeed where the high grade school-leaver falters and drops out after first year. Implicit in this broader conception of merit is that these skills and qualities are valued because of the potential they reveal. But ‘potential’ is not self-referential. It is impossible to identify without asking about its purpose(s). Therefore an admissions committee must be clear as to why these particular attributes are important and for what purpose.

66 Bowen WG and Bok D, supra note 34 at p 278.

If a law school is to use nonacademic (or academic) information in its admissions process, it should develop an articulated rationale for doing so. ... a school should define its institutional goals or missions and then determine the qualities that admitted students should possess for the school to achieve those objectives.67

It is doubtful that race in itself can be relevant here, without further justification: despite the significant statistical correlation between race and educational disadvantage, belonging to a minority group is not evidence of a particular individual’s hidden potential. The most that can be said is that an applicant’s membership of a minority race should prompt the admissions committee to be especially vigilant for a discrepancy between past performance and potential, and for other indicia of potential. Bowen and Bok’s first rationale for redefining merit to include race – that it reveals potential – must fail, if only because it is incomplete. In contrast, their second justification for treating race as an aspect of merit has more widespread support: admitting minority students to law school does increase educational diversity.

**Educational and Social Goals**

**(A) Diversity**

Obtaining the educational benefits that flow from a racially diverse student body was a justification for affirmative action that gained the approval of Mr Justice Powell in the Bakke case and is the most widely stated rationale for affirmative action among Californian law schools. Because higher education is concerned with ‘the robust exchange of ideas’, the legitimate aims of the university will be best served by having a heterogeneous population, and achieving this may be a consideration in the admissions process.68 Students educated in diverse classrooms learn to think in deeper and more complex ways, and are better prepared to become active participants in a pluralistic, democratic society.69

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68 Elizabeth Anderson points out the importance to research of 'knowledge claims' being exposed to the fullest range of criticisms and perspectives, and from that argues for universities to recruit diverse staff and students. (Anderson E, 'The Democratic University: the Role of Justice in the Production of Knowledge' in Paul EF et al, The Just Society (Cambridge: CUP, 1995). However ideas can be evaluated and challenged from outside the institution in which they originate, and the student body is not usually the first source of critique. This part of the paper thus confines itself to value of diversity in the teaching-learning nexus.
Many studies have confirmed the educational value of diversity. In addition to formal teaching processes, students can learn through observing and listening to both the brighter and weaker of their fellow students, and from the different perspectives and experiences of others. They acquire new information and also re-evaluate their own assumptions. As a consequence, Neil Rudenstine, President of Harvard University claimed that a diverse student body is as much an educational resource as a university's academic staff, library and laboratories.

Certainly if the purpose of education is merely to transmit received doctrine, the presence or absence of classroom diversity may not be important. However, knowledge is not static and uncontestable: new knowledge that emerges must be tested and challenged. Tertiary students are expected to acquire more than settled wisdom: they develop skills, both intellectual and practical, they learn to evaluate knowledge claims, to reinterpret, to apply knowledge to new situations. It is generally accepted that these processes are assisted by having different perspectives and experiences presented to them.

Students learn not only from books and teachers but also from each other, and in a milieu where all think alike, no challenge and no new ideas readily emerge.

But if diversity is valued for the variety of experiences and perspectives that are shared, the question must be asked whether some differences should be valued more highly than others, and if so, for what reason. Some affirmative action policies in the US and in New Zealand have listed certain groups or categories of persons whose difference has to be taken into account, while remaining silent about other groups. Valuing educational diversity 'for its own sake', or at least as providing a more stimulating educational milieu, suggests that these policies should be extended so that there is diversity of, say, religious and political beliefs, socio-economic class, geographic origins, and so on. Indeed George Sher argues that limiting affirmative action to certain groups reveals the diversity rationale as a merely a façade for a reparation scheme at the expense of current majority group members.

Pursuing the logic of educational diversity-for-its-own-sake reveals a further weakness. If it is difference that constitutes the value that a particular applicant brings to the educational process, the 'difference value' of each individual would seem to diminish as others with the same characteristic are admitted. A 'solution' would appear to be to limit the numbers of each group so that representatives of more diverse groups can be admitted. But diversity in this form can lead to tokenism whereby one or two representatives of each characteristic are admitted. This in turn gives rise to moral concerns about using people in such a way, just as with the use of individual white applicants to compensate for societal discrimination. There is, too, a danger of stereotyping, of assuming that there is a single 'black view' or a unified women's perspective. The heterogeneity within minority groups needs to be taken cognisance of, along with the many similarities between members of minority and majority groups.

The issue then becomes one of determining how far diversity is to be pursued, in terms of which minorities are to be selected, and whether in particular ratios, and why. The results can become arbitrary as certain characteristics are chosen while others are not, unless there is an ulterior rationale for selecting particular characteristics – ie, unless a social goal is being served. If the argument is simply that the world into which the law graduate will be entering is a diverse one and the graduate should be acclimatised at law school to operate in such an environment, then the school should not limit the special consideration it gives in admissions decisions to only certain categories of 'difference'. Rather, an applicant should be able to make a case ('even if only in a blank space on the applications form') for special consideration on the grounds of any 'unanticipated traits that are relevant to the goal of educational diversity' which he or she displays. The rationale is one that supports richness of diversity and not any particular pattern of diversity.

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49 Gurin P, ‘Expert Report’ in University of Michigan, The Compelling Need for Diversity in Higher Education (Ann Arbor: University of Michigan, 1999) at p 2. Gurin, a Professor of Psychology, is reporting empirical research findings, later relied on in the University of Michigan’s submissions in Grutter v Bollinger.

50 Ibid. See also Asin A, 'Diversity and Multiculturalism on the Campus: How Are Students Affected?' (1993) 25 Change 44.

51 Rudenstine N, Diversity and Learning, A Report to the Board of Overseers (Cambridge, Mass: Harvard University, 1996).

52 Following the Hopwood decision, the presidents of 62 major research universities signed a statement affirming the importance of diversity to the learning process, and defending race-conscious admissions policies. see Liu Q supra note 17 at 411.


54 Sher G, 'Diversity' (1999) 28 Philos & Pub Affairs 85. That this allegation is unfounded (in any event in respect of some policies) should become clear in the next section of this paper.


56 Blasi V, ‘Bakke as Precedent: Does Mr Justice Powell have a Theory?’ (1979) 67 Calif L R 21 at 49, 50.
It is quite a different argument from that advocating proportionality of representation.57

Even if one agrees that some of the favoured minority students are less qualified in the academic sense than those who could have been admitted had only the test grades been taken into account, the very presence of minority students at the university is important. If university education is understood not only in a narrow professional sense but also as a means of learning about one's own society and as a practical study in community life, diversity in the student body becomes an important condition of the quality of education.58

The case for accepting diversity as enhancing education is a strong one. Education itself occupies a special position in social policy because of its transformative nature – it is a process which changes people and creates opportunity. While knowledge is a good in itself, it is also a means to other goals. Affirmative action in university admissions is sometimes proposed as a way of opening up opportunities for the achievement of such goals. However, perhaps because Powell J’s opinion in Bakke rejected affirmative action for the purpose of increasing minority graduates in society as a whole, discussion among American legal academics of affirmative action’s social goals is less developed than that concerning diversity in the classroom. The argument for diversity used by Powell in Bakke – and the reference point for almost all subsequent debate on the issue – was premised, ironically, on a narrow conception of a uniform function for the university.

The Bakke Court and the national debate that has swirled about the case have not seen the whole problem. The Court, therefore, accepted ‘comparative merit’ as the principal criterion for admission to state professional schools, and ‘educational diversity’ as the principal reason for deviating from that criterion. Attention to the long-term interests of the individual applicant and to the larger concerns of the society would have refocused issues and broadened the Court’s perspective. Such attention in the future would lead to more rational state policies that affect access to the professions and to admissions policies that promote and support those policies.59

59 Henkin L, ‘What of the Right to Practice a Profession?’ (1979) 67 Calif LR 131 at 140. Henkin advocates that states should set the goals and ‘admissions policies for professional schools should be tailored, articulated, and carefully administered to achieve these goals’.

That different universities might have different missions was not discussed. While educational diversity is a valid rationale for widening admissions criteria, it is only half the answer.58 Neither merit nor diversity as criteria for distributing law school places can be understood without reference to the ‘societal goals’59 not only of education but of each particular law school: ‘The objective of the selection process is a function of the ‘mission’ of the particular Law School’.52

(B) Mission

While, historically, the purposes of universities have varied markedly, with vocational training being emphasised in some periods and locations, the transmission of general culture being the focus in others, and the creation of knowledge through research occupying attention in yet others, a relatively homogenised conception of the modern western university is becoming dominant.52 The modern university is increasingly seen in Clark Kerr’s famous phrase as ‘a multiversity’.54 Thus a higher education institution today is likely to have a plurality of functions. Talcott Parsons grouped these loosely into four: production of specialist knowledge through research and the training of the next generation of researchers, education of generalists (liberal education), contributing to the intellectual life of society at large, and training for ‘applied professions’.55 All of these are also legitimate functions of law schools, though the emphasis in each school will vary. Twining explores a number of models for law schools and then, for the purposes of discussing the future of English legal education, singles out three possibilities: ‘a professional [ie vocational] school, an undergraduate liberal arts department, and a multi-functional institution concerned with the study of all aspects of law at a variety of levels’.56 Each of these conceptions (and no doubt some others) could be found in thinking about legal education within New Zealand. Consequently, as these models are adapted for putting into practical

53 Thus assertions such as ‘Affirmative action is the means, and the end is diversity’ (Perloff R & Bryant F, ‘Identifying and Measuring Diversity’s Payoffs’ (2000) 6 Psychology, Public Policy and Law 101 at 104) are misleading. For an attack on treating diversity as the end point of affirmative action, see Sher G supra note 54.
54 see Bowen and Bok, supra note 24.
effect in particular institutions, significant variations in functions and focus are bound to emerge, each law school having distinctive 'profile'. These differences become reflected in the aims, content and methodologies of the teaching programmes of the schools, even where there may be a core syllabus, as in the New Zealand LLB degrees.

There is no suggestion here that every law school has to have the same social goals - quite the reverse. The community will be best served by having graduates with different specialist skills and knowledge, different emphases and perspectives. Each higher education institution will have its own features, its own emphasis - with, needless to say, education as a core. Just as each university identifies its own specific mission, so do the schools and faculties within it. The mission defines its purposes and focus and differentiates it from other schools. A sense of the variation possible among law schools can be gained from a survey of ABA accredited law schools in the United States, carried out by Gordon Butler in 1999. While Cornell focuses on producing 'well-rounded lawyers', Northern Illinois places greater emphasis on 'developing practical competence', the University of Dayton law school has a religious mission, St Thomas University school of law has a special commitment to 'South Florida's Hispanic and Black communities' and

The mission of Northwestern University School of Law is to lead in advancing the understanding of the law and legal institutions, for furthering justice under the rule of law, and in preparing students for productive leadership, professional success and personal fulfillment in a complex and changing world.

These goals and missions (and the resultant admissions policies) should not be thought of as arbitrary. Although identified by the institution itself, the mission is

67 The terminology of university profiles, in currency for some time in Australia, has been adopted in New Zealand by the Tertiary Education Advisory Commission: see Shaping a Shared Vision (Wellington: TEAC, 2000). However differentiation between law schools is as much a practical necessity in a more competitive education market.

68 An interesting example of an institution with a particular focus is the National University of Ireland at Galway, which has, by statute, a special commitment to the Gaeltacht. Its employment policies give preference to Irish speakers who are invited to demonstrate their proficiency through a university administered test.


70 Ibid at 243.

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responsive to the various stakeholder groups that have an interest in its activities, and in particular its students and their prospective employers.71

The concept of stakeholders appeared in the literature of management theory as long ago as the 1960s, was seen to have particular expilcatory application in relation to public and third sector organisations, and has gained renewed popularity through the Stakeholder Capitalism rhetoric of Mr Tony Blair's 'New' Labour Party in Britain. Freeman and Reed provide a useful broad working definition of a stakeholder:

Any identifiable group or individual who can affect the achievement of an organization's objectives or who is affected by the achievement of an organization's objectives. (Public interest groups, protest groups, government agencies, trade associations, competitors, unions, as well as employees, customer segments, shareowners and others are stakeholders, in this sense.)72

Inevitably, the degrees of power and influence (which may be economic, voting or political) exerted on the organisation by each of these stakeholders will be unequal, and factors outside the control of the organisation may alter the relative power of the various stakeholders. However what the organisation can do within limits, beyond any empirical stakeholder analysis which is undertaken, is adopt a more normative approach in determining both the manner in which and the extent to which each stakeholder interest should be taken into account. In some cases, participation in the governance of the organisation will be necessary; in others, the simple provision of information will be appropriate: in yet others (eg competitors), the need is to be responsive to, rather than owing any responsibility to, their stakeholding interests.73

Applying this stakeholder analysis to the provision of legal education in New Zealand, staff and students are joined as stakeholders by such diverse interests as employers including - but not restricted to - law firms, the New Zealand Law Society, the judiciary, taxpayers acting through Government Departments and Ministries, the public as consumers of legal services, the Maori community,


73 Gray R et al, Accounting and Accountability: changes and challenges in corporate social and environmental reporting (London and New York: Prentice Hall, 1997).
publishers and suppliers of teaching resources, others within the universities, other law schools, the Association of University Staff, and so on. Overlaid on that are further sub-groups which might, for example, categorise students or customers of legal services according to gender or ethnicity. Each law school will have slightly different stakeholder groups and will respond differently to them.

The graduate attributes desired by these stakeholders will affect what it is that the law school is trying to achieve in its LLB programme and in turn the admissions committee will select its students in a purposeful way. Thus if a law school has a commitment to service a minority community, in the way that St Thomas University law school does in Florida, there are qualities (perhaps linguistic ability rather than racial or ethnic affiliation itself) which will be looked for in applicants to that school, which may be less important in, or absent from, the criteria used for entry to another law school. A corollary of the differentiation among law school missions is the variation in admissions criteria:

An admissions committee is free to set nonacademic qualifications within three principled bounds. Each nonacademic qualification must be (1) publicly defensible, (2) related to the purposes to which the university is publicly dedicated, and (3) related to associational purposes that are themselves consistent with the academic purposes that define a university as such. These three criteria leave ample room for different universities to count different characteristics as qualifications (and to weigh the same characteristics differently), depending on their particular associational purposes.51

It is likely that the New Zealand law schools would all choose Twining’s multifunctional role for themselves. Although all will have some students taking the degree without any intention of entering the profession, preparation for the legal profession will be a central concern of the school. The knowledge, skills and values that the profession determines, through the Council of Legal Education, as essential will outline one of the ‘graduate profiles’ that the schools will be seeking to achieve. Of course, ‘the profession’ itself is changing and restructuring. Even if a law school is simply to serve the profession, what was wanted by way of graduate attributes in the late Twentieth Century is not necessarily the same as those attributes important for the Twenty-first. Thus the Task Force on Lawyer Competency of the American Bar Association recommended that

[In admitting students, law schools should consider a full range of the qualities and skills important to professional competence. Those law schools that admit students almost exclusively on the basis of a relatively mechanical index of law

But, even in a law school focused on the legal profession, the best law graduates will be broadly educated, socially aware and reflective. In any event, it is not self-evident why only the most able academically should deserve to benefit from legal education. On that principle, only Olympic-standard swimmers should have the use of the university pool and someone who merely desires a little healthy exercise should be excluded. It is unnecessary to show that excluded minority applicants would be the very best lawyers before it can safely be asserted that the low participation and success rates of minorities in higher education represent a serious loss of educational potential for individuals and for wider society (quite apart from any issues about discrimination).

It is no longer, if it ever was, an appropriate function of law schools merely to reproduce a professional elite. In the mass higher education system of the twenty-first century, the mission of law schools must be sufficiently broad to satisfy the interests of various stakeholding groups, including public, private and voluntary sector employers, the government, potential clients, and the students themselves, each seeking a particular combination of graduate attributes. Especially in those common law countries where law is an undergraduate education, and where a significant proportion of law graduates do not enter the profession, there is a high degree of consensus that the LLB should take the form of a liberal education involving more than the learning of legal rules, doctrine and skills.80

The response of each law school, weighing up the needs and expectations of its own stakeholders and societal goals in the form of a more or less articulated and unique mission, will legitimately shape not simply what is taught but the sorts of applicants it should be admitting and the attributes of its graduates. Recognising the intertwining of these elements, Maria Tzannes calls for what she calls proactive admissions policies, which will not simply react to market demand but will – as part of a law school mission – help shape legal practice and shape society. She points out that admitting students to law school is not simply about getting the numbers right:


2000 An Admissions Policy is exactly that, an Admissions Policy, not merely a procedure. As a policy, decisions must be made based on values, judgement, equity, access and the ‘mission of the Law School’.81

It should not be a surprise, then, if one law school rejects a particular individual who would easily gain entry to another since such decisions are influenced by the law schools’ divergent social aims. Merit is neither self-defining nor self-revealing; it is an ever-changing concept that is historically, socially, and institutionally contingent – and often contested. It is impossible to define merit without asking what kinds of institutions we want to have and for what purposes.82

Without employing the fashionable language of mission statements or stakeholder interests, this approach was well-summarised by Hathaway in 1984:

I believe that faculties should adopt explicit goal-oriented admissions policies. … Ideally, value-oriented admissions criteria should result from soul searching by a law faculty to define its particular role in meeting perceived social and legal needs. While undoubtedly the policy here advocated is highly subjective, its strength lies in both its candor and its imposition of social accountability on law schools. Gone is the guise of objectivity that masked the use of criteria of questionable predictive worth and equity. Rather, this goal-oriented admissions policy requires a law school to struggle to define its objectives, enunciate them, hold its goals up to the scrutiny of the bar and the public, and realize them by creating opportunities for legal studies for individuals able to carry them out. As professional schools, law faculties bestow more than knowledge or diplomas on their graduates; to a very real extent law schools determine the composition of a group that plays an important and privileged role in society. As such, it is high time that law schools substitute social accountability for pretended objectivity as the cornerstone of the admissions process.83

Nevertheless, despite the case against over-reliance on grades, despite the arguments for going beyond diversity for its own sake, an advocate of using a mission-based admissions policy must counter a traditional objection to goal-

81 Tzannes M, supra note 62.
based theories – that they should not be endorsed if they trample over putative individual rights.

**Persistent concerns**

**(A) ‘Innocent victims’**

By far the strongest argument that opponents of affirmative action have offered is that affirmative action harms or discriminates against individual members of a majority grouping who would have had a place (or a job) if it were not for the affirmative action. Furthermore these individuals are being penalised for past societal discrimination which they as individuals did not perpetrate. They are the innocent victims of affirmative action. This is a strong objection. If a person misses out on a place or loses his or her job\(^4^8\) for no other reason than that he or she was not a member of the preferred minority, it is difficult to avoid the conclusion that he or she has been unfairly discriminated against. But such cases must be rare and can be avoided. Instead, the merits of each applicant should be looked at and minority status is only one among the considerations. An applicant who is not admitted because his or her aggregate of attributes is not as great as those of another should not be seen as having their rights over-ridden either by less meritorious candidates or by social goals. It is worth repeating that no one has a pre-existing right to a place: any ‘entitlement’ must arise out of the application of the criteria to the individual cases that present themselves to the admissions committee. The mission of the school will shape what these criteria are. An individual who might have been admitted under another criterion (such as past academic record) has no grievance if the school applies consistently a different set of criteria which does not suit the applicant as much. He or she is not an ‘innocent victim’ – not because he or she is guilty, but because he or she is not a victim.

**(B) ‘Positive discrimination’ as positive harm**

There is a school of thought that holds that affirmative action has only benefited that small proportion of minority groups who are already performing well in the majority culture and would succeed even in an environment free of affirmative action.\(^8^5\) This view is reinforced by analysis of the effects of banning affirmative action at the University of California. Although there is no dispute over the fact that minority numbers at Berkeley have dropped (especially in the Law School),\(^8^6\) there has been an almost corresponding increase at campuses such as Irvine and Riverside. This is known as ‘the cascading effect’:\(^18\) Trow argues that therefore there has been no significant loss to minority students by abandoning affirmative action (at least not as significant as the damaging effects of affirmative action). Cohen reports that retention figures (the ‘drop-out rate’ being twice as high for Black Americans as Whites in undergraduate degrees) show that minority students have not prospered when admitted to the higher status institutions, so they may be better off at the lower levels.\(^8^7\) This thesis misses a number of points.

The first is that there are minority students who do drop off at the bottom of the cascade: thus the total of minority students benefiting from higher education or legal education is less. Secondly, the lower retention rates may be the result of faults (lack of support, or even discrimination) in the institutions, rather than the result of students not coping with a standard of work that is too high. In any event, the racial difference in retention rates almost disappears in law schools where the dropout rates are consistently lower.\(^8^8\) In order to have gained admission in the first place, students need to have been very committed. What is of most concern however is that cascading (and also the reliance of ‘historically black’ institutions, such as Howard Law School) may lead to ‘ghettoisation’ and race-based stratification of society, taking America back to a state of affairs which predates even the now discarded doctrine of ‘separate but equal’. It begs the question of why Riverside is good enough for minorities but not for whites and ignores the status of education as a ‘positioned good’. Major law firms in New York, for example, often recruit almost exclusively from a narrow range of leading law schools: failure to get into one of these elite schools may well effectively exclude a student from consideration by these firms.\(^8^9\)

A related objection is that affirmative action exacerbates racial divisions, leads to the beneficiaries of it being labelled (even by themselves) as second-rate and causes a backlash.\(^9^0\) While this may be true in some ‘tokenistic’ forms of affirmative

\(^{4^8}\) See, for example, *Firefighters Local Union No 1784 v Scott* 104 S Ct 2576 (1984) and *Wygant v Jackson Board of Education* 476 US 267 (1986) where there were ‘affirmative action’ policies of selecting longer-serving white employees for redundancy rather than recently hired black employees.

\(^{8^5}\) Trow M, supra note 5.

\(^{8^6}\) Between the Fall 1996 intake and the Fall 1997 intake, the admissions figures for African-Americans dropped from 20 to 1, for Hispanics from 26 to 14, and for Native Americans from 4 to 0: Weng GK, ‘How Stella got her Character’ (1998) 13 Berkeley Women’s LJ 19 at 20.


\(^{8^8}\) See Wightman, supra note 33; Bowen and Bok, supra note 34. See also text accompanying note 103.

\(^{8^9}\) Bowen WG and Bok D, supra note 34 at p 100.

\(^{9^0}\) Sowell T, supra note 27 at p 113.
action, such as quotas where race is the sole consideration, there is no evidence that it applies where race is only one among several factors used to enable the admission of well-qualified minority applicants. It is a criticism that only holds good where different criteria are being used in the same competition for places. It is doubtful true that only a relatively privileged few within any community will have an opportunity to even apply for law school and that therefore affirmative action will not do much for the most disadvantaged among, say, marginalised urban Maori. Neither broader goal-based admissions criteria nor targeted scholarships will instantly produce total equality of opportunity. However that is not a reason for refusing to take steps in the right direction. This much is acknowledged by one of the leading opponents of affirmative action in Australia:

...since those who benefit from a preferential hiring program are likely to come from the top of the minority or female distribution, a preferential hiring program based on compensatory justice can be criticized for favouring those who are least in need of preferences and have been least disadvantaged by past social discrimination. This criticism, however, is not valid with regard to forward-looking arguments. The recruitment and selection of the least disadvantaged minority members and women is consistent with arguments that seek to justify a preferential hiring program on the ground that it will result in greater overall social utility. In fact, if the legitimacy of preferential hiring lies in maximizing the average or collective welfare, then the absence of a tight fit between past societal discrimination and present disadvantage becomes irrelevant.91

Appropriate affirmative action

Thus while it has not been possible to explore all the subtleties of the arguments, the foregoing discussion suggests that some affirmative action is legitimate; some is not. The key is to view education, not as a grievance settling mechanism, but as a forward-looking purposive activity. When selecting students, it is appropriate to consider what a student will bring to that activity and what that individual and the community will gain from his or her participation. This argument does not, however, confer legitimacy on whatever affirmative action policy a university happens to prefer. Rather

an institution must demonstrate that its race-conscious admissions policy is part of a larger strategy to reap the educational benefits of diversity, and that the strategy, whatever its content, is carefully designed, internally consistent, and guided by educational objectives.92

92 Liu G, supra note 17 at 440.

While it is essential that the goals of a law school be firmly educational in a broad sense, these educational objectives are not simply the production of academically able graduates, but, rather, will look beyond the graduation ceremony to the ever-changing expectations of the institution's stakeholders. The pluralistic type of law school that now exists in New Zealand needs to be sensitive to the various stakeholders without being 'captured' by any one particular view, interest or ideology. The school must identify and justify its particular mission and have an admissions policy that is designed to help achieve that mission. However the admissions decision itself is only a part of an integrated strategy, one that pays attention to those students with the selected attributes before and after the admissions decision too. As the American experience shows, affirmative action may have as important a role in assisting a law school to achieve its mission through pre-admission and post-admission activities as at the moment when one applicant is selected over another.

Pre-admission

A factor in the California system which can assist in the achievement of diversity goals is the well-articulated transfer system from community colleges through to degree awarding institutions. Thus a student without strong SAT scores or a mature student returning to study can gradually work up through the system, taking credit with him or her. Unfortunately research indicates that the transfer system does not operate as effectively as it might. It appears that having reached community college, most minorities do not progress on to degree-awarding four year institutions – despite the course credit opportunities.

The expansion of community colleges was seen as a way of addressing the needs of nontraditional students without compromising the standards of four-year institutions. Critics have argued that this two-tier system allowed the four-year colleges to evade the responsibility of recruiting minorities, relegating it to the two-year colleges. The objective of recruiting from the two-year to four-year colleges was, to a large extent, never realized.93

The pattern is repeated at the end of the undergraduate degree in terms of transfer to law school. In each of the six law schools where interviews were conducted, the percentages of African-Americans and of Hispanics are below their percentage representation in the Californian population, the only exception being Stanford in relation to African-Americans.

The transfer system is backed up by targeted recruitment activities known as ‘outreach programs’ at each level of the higher education system. It is possible to view recruitment targeted at particular minorities as affirmative action. This is especially so if it is developed into a bridging programme in which minorities are given assistance to bring their skills up to the standard needed for admission. While these involve expenditure on a minority, they do not directly harm others. But even these efforts can be open to challenge:

Until recently, outreach and counseling programs were not viewed as controversial. In California, however, [the legislative change produced by Proposition 209] has been read as eliminating outreach and counseling plans where they target participants based on race, sex or ethnicity.84

Nevertheless these activities are widespread. In 1997-8, the UCLA School of Law began developing its outreach programme so as to make it more effective but also less open to criticism. The School has sought and obtained private sponsorship for what is rather grandly called a Law Fellows Outreach Program. It is targeted at undergraduates from socio-economically and educationally disadvantaged backgrounds. It is designed both to encourage them to enter law school and also to ‘increase the competitiveness of disadvantaged Fellows for admission to the law school’. Saturday seminars are held at the law school to familiarise students with legal concepts, materials and skills. Law student mentors are appointed to keep in touch with the Fellows and preparation classes for the LSAT are conducted. Indeed, much greater contact (including personal visits by students and alumni) is maintained with intending applicants in the Californian universities generally than in New Zealand. While New Zealand people might be more likely to view these ‘hard sell’ activities as intrusive, there seem to be no such qualms about targeted recruiting (for example visits by Maori law students and graduates to Maori boarding schools). Additionally there are ‘bridging programmes’ for non-school-leaving potential students, including ones focused on Maori and aimed at increasing study skills within a context of substantive subjects. There is scope for a greater articulation between courses in polytechnics and the LLB programmes in universities. Similarly students could be required to take foundational courses in subjects where they are weak, simultaneously with their first year law subjects.

84 Oppenheimer DB, supra note 12 at 932. cf Finke, writing in 1989: ‘Although a discussion of legality of support programs is beyond the scope of this article, I do not believe that the programs I describe raise any serious legal questions.’ Finke C, ‘Affirmative Action in Law School Academic Support Programs’ (1989) 39 JLE 55 at 56 fn 6. See also Adams M, ‘The Last Wave of Affirmative Action’ (1998) Wis L 1395, who points out (at p 1403) that these ‘non-preferential forms of affirmative action are ... inclusive, pro-competitive, and consistent with the equal protection principles embodied in the constitution’.

Admission

There are two main approaches to affirmative action at the point of admissions decisions. One possibility is to use a quota system whereby places are set aside for particular minority groups. This allows an institution to achieve diversity and preferred proportions of the student population in a straightforward, explicit and speedy way. An immediate objection is that this has the effect of positively excluding non-minority students from specific places, which may then be taken up by ‘less-qualified’ minority students. The non-minority student’s right to compete for the place is sacrificed simply because he or she is not of the preferred race or gender. Particularly since race cannot normally be changed, the result is perceived as unfair to the rejected applicant, operating as a form of racial discrimination and serving to emphasise the very differences it is trying to overcome in the long run. As such, it can create resentment and a backlash among the previously dominant group.

Additionally, it can be ineffective if the now-preferred group label themselves as second rate in so far as they are in the school only because of a quota or preferential treatment and not on their merits. Such labelling may, consciously or not, be endorsed by the institution.85 Similarly others, including prospective employers, may label them as second rate and 'discount' their achievements, preferring to employ those who have made their achievements 'through their own efforts'. Indeed African-American Thomas Sowell objects that affirmative action undermines the value of every achievement of minorities:

[It creates the impression that the hard-won achievements of these groups are conferred benefits.86

There are therefore both moral and practical objections to affirmative action by means of quotas. Since the Bakke case, quotas have been unconstitutional in the

85 This is neatly illustrated by the criteria for entry to one of the New Zealand Law Faculties: 'The 425 places for $10,001 The Legal System for Part I will be allocated as follows: General admission quota: 331 places, to be filled by the best-qualified applicants. Maori quota: Up to 49 places ... etc.' University of Auckland, Faculty of Law Student Handbook 1997 (Auckland: University of Auckland, 1997) at p 63. Clearly it follows that those in the Maori or other quotas cannot be 'the best qualified'. This phraseology is no longer used in the current handbook.

86 Sowell T, supra note 27 at p 129.
United States. However they are employed in a majority of the New Zealand law schools, primarily for Maori, but some for mature students, and so on.

An alternative approach to affirmative action in the admissions process is similar to medical triage. All applicants are considered together. It is usual for a committee to be established to consider applicants so that, for example, attributes of an applicant not weighted as highly by one member can be picked up by another. Committees usually comprise both academic and administrative staff, but at several US law schools there is also student representation on selection committees. Those who would not succeed in the course are declined. Those applicants whose academic ability is of such a high level that there could be no doubt that they will excel academically at law studies are admitted. There remain those in a middle group who could get through the degree, perhaps with some effort and some assistance, but who are more numerous than the remaining places available in the school.97

Now the committee must look for additional reasons to select some of them but not others. The ‘extra’ that one applicant has over another (who in terms of academic qualifications may be an equal) need not be academic, but could instead be to do with experience, attitude, contribution to the school’s diversity.

When the Committee on admissions reviews the large middle group of applicants who are ‘admissible’ and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on the farm may tip the balance in other candidates’ cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.98

Conceivably this could be a fairly formal points-based system, or more subjective and impressionistic. It is worth noting that it is possible for an applicant declined first time to go away and gain better grades or more experience, giving them a second chance in a way that a racial quota system could not. For the person is declined, not because he is white, but because compared with the other applicants, he at present has less to offer. I believe therefore that while a quota system is unjust (and therefore particularly inappropriate for a law school), the same charges cannot be laid against this ‘Harvard model’ of affirmative action.99 Between 1978, when Bakke was decided, and 1996, when the Regents prohibited its use, a version of this was the method used in the University of California law schools. It continues to be used in the private Californian law schools and in at least one New Zealand law school.

What is now being considered in the Californian public sector is the use of proxy characteristics for race. While it is not possible to equate racial minority status and socio-economic deprivation in either California or New Zealand, there is a high correlation. A law school which can assist low income applicants is therefore likely to be assisting a disproportionate number of racial minority members. For this reason several Californian law schools are looking to socio-economic status as a (very rough) proxy for racial classification. This is then backed up by generous scholarships and funding arrangements. But again this is to oversimplify the obstacles to access for economically deprived minority students. They, especially if they are a little older, may have significant family responsibilities; they may need to be earning and the effective opportunity costs of attending university may be higher than for the white middle-class high school leaver. Therefore, I think it is significant in terms of accessibility that Stanford and the three UC law schools do not admit students on a part-time basis, though this is done at Golden Gate, and McGeorge, while all students at Lincoln are part-time.

In March 1999, a new approach to admitting minority students at the undergraduate level was adopted at the University of California. Previously the top 12% of Californian school-leavers were able to gain a place at the University. A high proportion of these came from a narrow band of more elite schools. The new approach is trying to attract a similar total percentage but one that is distributed differently. Now the top 4% of every high school is entitled to a place. It is hoped to thereby attract students from schools that traditionally had no one or only a few in the overall top 12%. Since many of these schools are predominantly Hispanic, African-American or poor, it is hoped that such students will gain access to UC in unprecedented numbers. In practice, location is being used as a proxy for race in an attempt to maintain classroom diversity.

In varying degrees the New Zealand law schools employ affirmative action in admissions. The majority use quotas; Waikato uses the Harvard method. The latter appears to be particularly successful in raising the percentage of Maori law students, but that may be more a result of the post-admissions environment.

97 It may be that the high academic grade students are not separated from the “possibles” and all are rated together using the multiple criteria.
99 The recent passing of Proposition 209 in California which outlaws ALL racial, ethnic and gender affirmative action is thus to be regretted.
It may be wondered whether selecting students according to the attributes and qualities that are desirable for the overall mission is affirmative action at all. Once it is realised however that affirmative action need not be about making exceptions to existing practices and standards, but about achieving change in such a way that disadvantage is removed, then the rethinking of admissions criteria in the way that has been suggested is, in fact, an immensely effective form of affirmative action.

**Beyond admission**

It is a mistake to concentrate exclusively on recruitment, admissions procedures and numbers. Just as important is what happens after the student has been admitted. If the institution truly wishes to achieve a social goal, then the minority applicant students need to succeed at university. There is little to be gained in admitting students who then fail and are thrown out at the end of their first year.

The important issue becomes how to ensure that the minority students succeed. One possibility is to make allowances for them in the grading of assessments. Such an approach would be consistent with the reparations and with the proportionality justifications for affirmative action. There are at least a couple of reasons why it is not acceptable, particularly in a law school. Firstly, the law school is attesting to the world at large that its graduates have met a certain standard and are competent to convey property, defend clients and set up corporations. In New Zealand, this is reinforced by the external assessment of examination scripts by fellow academics in other law schools. It would be a fraud on the public to slip through students who fall below that standard. It would also undermine the social goal being sought: for the minority students – all the minority students – would be labeled as inferior, the very outcome that the policy is trying to counter. Thirdly, it would be unfair on the other students who earn their high marks. Finally it would, I believe, show the institution up as having failed as an educator.

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106 As Dean Rusk, former US Secretary of State put it: ‘I must confess that I feel affirmative action is most appropriate at the door marked ‘entrance’. I have some concern about how far we can go at the door marked ‘exit’ in our education system. I don’t believe that I would want a surgeon to take out my kidney with boxing gloves because my surgeon was a woman or a Chico. ’ Rusk D, ‘Preferential Treatment: Some Reflections’ in Blackstone and Haslep, supra note 15.

107 Justice Douglas made this point in *DeFunis v Odegaard* 416 US 312 (1974): ‘A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disproached, that Blacks or browns cannot make it on their individual merit.’ Quoted in Sindler, supra note 11 at p 270.

However, having admitted diverse students to law school for sound goal-based reasons, academics need to alter their pedagogy and assessment. If it is being claimed that society needs lawyers and law graduates with a variety of skills and not just traditional ‘book learning’, then the content of courses and the way they are taught and assessed needs to be suited to these learning objectives. This is not to be seen as ‘dumbing down’ but reorienting all aspects of the degree to realise the qualities that are sought in the graduate.

...a teacher may not realize that affirmative action challenges not only the measures of intellectual ability, but the very conception of it. If that challenge is correct, pedagogic strategies that were effective before affirmative action, given a distribution of intellectual ability traditionally conceived, may no longer be effective with classes that are indeed ‘equally’ able, because the institution’s understanding of ability has changed but the teacher’s has not. ... Our pedagogy therefore ought to demand no less of our students than it used to. At the same time however, it may have to become demanding in a different way, because what we understand as intellectual ability ought to have changed.108

Instead, what is needed is to make the institution a welcoming and supportive place for minorities, one which ensures that the maximum benefit be derived from the transformative process which is education. This can be done in the curriculum, in the administrative systems, in facilities which are provided and in academic support systems. It is important to have minority staff, both academic and administrative, and a minority Students Association with its own room, and scholarships for minority students. It might be argued that minorities then receive disproportionate attention and resources and that this is a form of discrimination. To an extent this is true, but on the other hand the institution and staff are committed to educating all its students and this will inevitably involve spending more time and effort with some rather than others. And in the end, all the students gain from the enriched learning environment that results. It may well be that post-admission support (and the resulting increased attractiveness of the institution for prospective minority students) is as effective as admissions quotas in bringing about the goals of affirmative action. The American literature on retention suggests that retention rates can be noticeably improved by such factors as offering a pluralistic curriculum, creating a critical mass of minority students, identifying role models, academic support programmes, and social activities which permit the

students to meet with staff outside classroom teaching encounters. There is a variety of approaches in the Californian law schools.

In addition to the ‘Law Fellows Outreach Program’ which prepares students for legal study (and which has the effect of a continued strengthening of skills), UCLA Law School has developed a number of support programmes, some for minority students to ‘reduce the alienation they may experience at a mostly white professional school’; others for (any) students who are falling behind in their grades. Golden Gate University Law School runs a tutorial support system which is initially targeted at minority first year students but which ‘converts’ at the end of the first semester into a support system for all students ‘at risk’. Approaches elsewhere can be quite different: neither Stanford nor Boalt Hall (Berkeley) Law Schools provide formal academic support (in the belief that students who succeed in getting in are all sufficiently academically skilled that these are unnecessary). However at Stanford, great emphasis is placed on social support for minority students, each ethnic grouping having support persons. Additionally diversity issues are discussed in semi-formal settings within the residences. Cultural events are organised often involving the ethnic communities from the area around the University. At Berkeley, administrative staff are employed to develop cultural awareness and sensitivity among teaching staff. For example, the traditional teaching method in American law schools, the interrogatory ‘Socratic method’ would be particularly intimidating to Muslim women. Despite these efforts, they all appear to adopt a monocultural or assimilist approach in that student aspirations and the criteria of their success are assumed to be within a majority white paradigm. The possibility of trying to empower students within their minority culture (for example, by conducting law classes in a minority language) was, in interviews, only mentioned at McGeorge Law School.

A feature of a couple of the Californian law schools – and one which was particularly emphasised at Stanford – is the existence of funds not simply to support needy students while at university, but also to have a goal-based social effect. Where a graduating student enters low-paying public interest employment, the law school will assist that student with loan repayments and the loan may even be ‘forgiven’ in some of the schemes. The aim is to encourage students to move into ‘a non-profit organization or governmental agency which renders representation to persons who could not otherwise obtain such services’. This appears a much better approach to social goals than the assumption which was invoked in the Bakke case to justify affirmative action at the admissions stage, namely, that only minority group doctors would service minority communities and should gain entry to medical school for that reason.

In New Zealand too, there is growing awareness that the successful achievement of affirmative action goals is as much dependent on post-entry practices as on the admissions policy. In 1999, for the first time, the percentage of Maori students at Waikato Law School (27%) exceeded the percentage in the regional population. Since there are no quota places, unlike at Auckland and Victoria University of Wellington for instance, and race is only considered as one consideration among many in the admissions process, this achievement must be attributed to other factors. The answer lies in the public perception of Waikato Law School as particularly welcoming to and supportive of Maori students. This perception has a good deal of truth to it and has led to Waikato becoming the law school of first choice for many academically able Maori students. There are Maori support tutors; there are significant numbers of Maori staff; there is a Maori Law Students Association; there is a policy enabling the writing of assignments in Maori; there are Maori concepts discussed in the courses; and now there is a self-perpetuating critical mass of Maori students. Thus in Waikato’s case, issues of recruitment and admissions are secondary; well qualified Maori students choosing to come to Waikato obviate many of the difficulties which other law schools encounter in recruiting and in admissions policy.

Clearly, improving educational opportunities for ethnic and racial minorities must become more than an objective of the admissions office. It must become an institutional priority.

The legal framework in New Zealand

The legal position in New Zealand is similar to the pre-Bakke days in California. There is no doubt that the Education Act 1989, s 224(6) authorises affirmative action (including, possibly, quotas):

103 Astone and Nunez-Womack, supra note 93 at pp 64 - 79.
105 The only visible minority language literature was found at community colleges. The inference drawn is that minority language (such as Spanish) is an obstacle to be overcome rather than a gift to be celebrated.

106 McGeorge School of Law Catalogue 1998-99 at p 91.
107 Astone and Nunez-Womack, supra note 92 at p 99.
Where—

(a) The maximum number of persons who may be enrolled at an institution in a particular course in a particular year is determined by the Council of the institution under subsection (5) of this section; and

(b) The number of eligible persons who apply for enrolment in that course in that year exceeds the maximum number so determined—

the Council may, in the selection of the students to be enrolled, give preference to eligible persons who are included in a class of persons that is under-represented among the students undertaking the course.

What does that section mean? The term ‘under-represented’ is a relative or comparative term. The class must be under-represented as against some standard. But no guidance is provided as to what that standard is. It is unlikely simply to mean ‘in a minority’. A plausible interpretation (harkening back to Ficus’ approach) is that a class is under-represented if the proportion of its members is less than its proportion in the local or possibly national population. This fits with one of the duties imposed on the councils of higher education institutions by s 181 of the statute: to encourage the greatest possible participation by the communities served by the institution with particular emphasis on those in the communities who are under-represented among the student body. An alternative is that a class is under-represented if there are insufficient numbers to produce and sustain diversity in the classroom. Yet again, under-represented could be interpreted as insufficient for the achievement of a mission objective, or a goal of social equity within the professions or trades being served by the qualification. In other words, this appears to be a general enabling section granting a wide discretion to higher education providers. The statute provides little here except an assurance that a university may use criteria that are not exclusively academic in selecting students for a course with limited places. It seems compatible with the distributive and the goal-based, but (possibly) not the compensatory, approaches to affirmative action.

The qualifier ‘eligible’ presupposes the achievement by the applicant of a minimum academic threshold before he or she can be considered under the subsection, but otherwise quotas and the Harvard method of selection are permissible.

But it does not follow that it is safe for an institution to admit, for example, only women to an engineering course to counter past discrimination, or resident Chinese to an education course because there is a need for more Asian teachers in a specific location. There is other legislation which deals with the equal treatment of minorities – the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990. The former lists as unlawful various grounds of discrimination, such as race, gender, age, marital status, etc. Section 38 relates specifically to qualification-conferring bodies, s 40(a) to training bodies, and s 57 to educational establishments. Section 57 reads

It shall be unlawful for an educational establishment... or any person concerned in the management of an educational establishment or in teaching at an educational establishment,—

(a) To refuse or fail to admit a person as a pupil or student; or

(b) To admit a person as a pupil or a student on less favourable terms and conditions than would otherwise be made available; or

(c) To deny or restrict access to any benefits or services provided by the establishment; or

(d) To exclude a person as a pupil or a student or subject him or her to any other detriment,—

by reason of any of the prohibited grounds of discrimination.

But a specific exception is granted

S 73. Measures to ensure equality—

(1) Anything done or omitted which would otherwise constitute a breach of any of the provisions of this Part of this Act shall not constitute such a breach if—

(a) It is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this Part of this Act; and

108 The reference to ‘sustain’ is to acknowledge the psychological need of an individual minority member for the support of similar colleagues in a setting in order to avoid isolation.

(b) Those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.\textsuperscript{110}

These sections have been considered by the Complaints Review Tribunal in a case concerning Nelson Polytechnic\textsuperscript{111} and by the Race Relations Conciliator’s office in relation to Wanganui Polytechnic\textsuperscript{112}.

The first arose out of restrictions on admission to a Fishing Cadet course at Nelson Polytechnic. The Polytechnic reserved four out of fourteen places in the course for Maori and New Zealand resident Pacific Islanders, when it was first offered, and all fourteen in the second offering. This then is a classic example of a quota excluding applicants from consideration for a fixed number of places on the sole ground that they are not members of a targeted minority group. The Polytechnic was held in breach of the Act. Section 73 did not protect it because anyone relying on s 73 needs to make out a case for its use, and the Polytechnic simply failed to produce any evidence that it applied. (Indeed no appearance was made on behalf of the Polytechnic.)

It is not so clear that the use of the ‘Harvard method’ would be in breach of s 57, since selection is based on an aggregation of factors including race, but it probably does fall foul of the law by virtue of s 65 which prohibits indirect discrimination.\textsuperscript{113} Thus higher education institutions using either method will need to show that it is justified under s 73:

This means that education providers … must have a reason for adopting affirmative action programmes rather than apply them because they seem like a good idea.\textsuperscript{114}

But the Tribunal has left open the choice of which justifications for affirmative action (e.g., corrective or goal-based) may be employed under this section. Interestingly, a further provision, s 19 of the New Zealand Bill of Rights Act 1990, has slightly different wording:

\textsuperscript{109} For discussion of this section, see Joychild F, ‘Affirmative Action – ‘Measures to Ensure Equality’’ (1996) 1 HR Law & Practice 218.
\textsuperscript{110} Amalai Fishing Co Ltd v Nelson Polytechnic [1996] NZAR 97.
\textsuperscript{111} Osborne and Jakobsen v Wanganui Polytechnic (Unrpt, Race Relations Conciliator A3, 3 September 1998).
\textsuperscript{112} See Northern Regional Health Authority v Human Rights Commission [1998] 2 NZLR 218.

\textsuperscript{105} Northern Regional Health Authority v Human Rights Commission (supra note 112) lends support to this approach.
affirmative action in New Zealand. The perverseness of this interpretation is revealed if it is applied to the admissions process (rather than post-admission support). It appears to permit a separate LLB programme for Maori students, for example. Yet, it rejects affirmative action preference for, say, Maori applicants to an existing law school, because there are other applicants who would also need affirmative action if their applications were to succeed. Similarly, it may prohibit targeted recruitment (or ‘outreach programs’). It may prohibit the hiring of a Maori support person unless all other groups have equivalent support persons. It suggests that it is permissible to have a separate course for Maori but not an additional revision session for them in a ‘mainstream’ course. It also forecloses a debate that has yet to be concluded in this country over whether there should remain a special place for Maori as tangata whenua in New Zealand society, and if so, whether that would be in a bicultural or a multicultural framework.

There is some dissonance between the enabling sections of the Education Act and the more restrictive provisions of the human rights legislation. There may also be a dissonance between the human rights legislation and the practices of the universities and polytechnics, and between the human rights legislation and the approach to affirmative action advocated in this paper. This tension reflects the relative paucity of debate about affirmative action in New Zealand as compared to the United States. It would be surprising if, as looks to be increasingly the case in the US, affirmative action were rejected in New Zealand. Affirmative action policies are widespread within New Zealand higher education institutions. But the two cases discussed above leave the status of these policies unresolved. Legal academics are well placed to – and have a special responsibility to – initiate a long overdue debate about affirmative action in New Zealand higher education, one that is informed by the various rationales for and objections to affirmative action; and the different forms in which it can operate.

Conclusion

The experience of affirmative action in California and New Zealand law schools leads to the conclusion that the appropriateness and success of any given affirmative action policy depends on the justification that is being offered, the process of implementation and the circumstances of the law school which implements it. Not all affirmative action policies are good; not all of them are bad.

However, where the legitimate educational and social goals of a particular institution call for it, the recognition in an admissions policy of a diversity of attributes and skills may well have an affirmative action effect. There is no injustice in actively seeking out, allocating places to, or allocating resources to, those applicants who, when evaluated individually, display the combination of qualities that can best effect those goals. They are the most deserving; they are the best.

116 Little reassurance can be gained from the Conciliator’s Press Release of 3 September 1998: ‘While the positive discrimination provisions entitle a provider to target a particular group who are demonstrably disadvantaged, it [sic] does not entitle a provider to offer courses on less favourable terms to different ethnic groups with similar needs in the same course.'