

DIVERSITY TRENDS AND CURRENT ISSUES

by Kent D. Syverud

Editor's Note: This article comes from Kent D. Syverud's portion of the session "Diversity Issues" at the 2009 NCBE Annual Bar Admissions Conference held on April 23–26 in Baltimore, Maryland.

I am honored to speak about diversity issues at the annual conference of the National Conference of Bar Examiners. I will stick to stating the facts as I know them, highlighting the latest successes and challenges facing anyone who believes, as I do, in both testing *and* the goal of racial diversity in our law schools and our legal profession.

TESTING A RACIALLY DIVERSE STUDENT POPULATION

Let me start with the obvious.

Each of us in this room, whether we be legal educators or bar examiners, relies on test results in making important decisions about people. We test future lawyers before they come to law school (including on the LSAT), during law school, and after law school (on the bar exam and the MPRE). We use these tests because they are valuable and useful within limits. The LSAT, for example, gives law schools a standardized way to compare applicants from a bewildering array of educational backgrounds—from nuclear engineering majors at community colleges to fine arts majors at Stanford, from homeschooled kids to students at small sectarian colleges and from abroad. Our testing regime grows

out of the at times maddening pluralism of our system of primary, secondary, and higher education in which no one government agency sets curriculum, evaluation, or course of study for more than a small fraction of our applicants. In that system, there is real value, and real information to be gathered, in giving the same test to people from wildly diverse educational backgrounds. And that test, whether the LSAT or the bar exam, gives every applicant the chance to compete and be compared with applicants from the most privileged backgrounds and schools.

The problem, of course, is that you can rely on tests too much for making decisions well beyond their intended purposes. And the problem is also that on almost all of our tests—the SAT, the LSAT, exams in law school, the bar exam—there is a persistent and significant score gap between, on the one hand, white and Asian American test takers, and on the other, African American and Hispanic test takers. How do we employ tests for their helpful uses in the face of that score gap and, in particular, in the face of a persistent underrepresentation of African Americans and Hispanics in the bar?

The data in Table 1, drawn across a number of years, are illustrative of that underrepresentation. Table 1 shows that African Americans make up

Table 1: Percentages of U.S. and Various Education Populations

Gender/Ethnicity	U.S. Population, 2006	Bachelor's Degrees Conferred, ^a 2005–2006	Applicants to ABA-Approved Law Schools, Fall 2008	Matriculants of ABA-Approved Law Schools, 2008	J.D. Degrees Conferred, 2005–2006	Lawyers, 2007
Male	49.3%	42.5%	50.3%	52.8%	51.9%	67.3%
Female	50.7%	57.5%	48.9%	47.1%	48.1%	32.7%
White	67.3%	72.4%	63.5%	69.9%	70.8%	88.5%
Black	12.4%	9.6%	11.3%	7.3%	6.2%	4.8%
Hispanic	15.0%	7.2%	9.3%	8.2%	6.8%	4.2%
Asian/Pacific Islander	4.5%	6.9%	8.6%	8.3%	7.9%	2.5%
American Indian/ Alaskan Native	0.8%	0.7%	0.9%	0.8%	0.8%	—

Source: Law School Admission Council. Reprinted with permission. Original data on U.S. population from U.S. Census Bureau, Population Division (NC-EST2006-03). Original data on bachelor's degrees conferred from National Center for Education Statistics' DIGEST OF EDUCATION STATISTICS: 2007. Original data on applicants to and matriculants of ABA-approved law schools from Law School Admission Council. Original data on J.D. degrees conferred from American Bar Association, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (2008). Original data on lawyers from U.S. Census Bureau, 2007 CURRENT POPULATION SURVEY.

Note: Persons whose ethnicity is identified as Hispanic or Latino may be of any race.

^aBachelor's degrees conferred by degree-granting institutions.

12.4% of the population, 11.3% of applicants to law schools, 7.3% of matriculants in law school, 6.2% of J.D. degree recipients, and 4.8% of lawyers. The numbers are similar for Hispanics, with this group accounting for 15% of the population but only 4.2% of lawyers.

ADDRESSING THE DISPARITIES: TWO EXTREME SOLUTIONS

What do we do about these disparities, and how do we adjust testing to account for them? This has been a major, if not *the* major, challenge for more than 20 years.

Let me note two extreme solutions to this challenge:

1. Ignore test disparities and underrepresentation and rely on test scores as the exclusive, definitive definition of merit and therefore the sole basis for any decision in admissions to law school or the bar. The unstated premise of this solution, and of attacks on diversity, is that the LSAT is a complete definition of merit. We might take this approach in other areas. For example, you could rank all takers of the bar exam by their raw scores, from top to bottom, and select the very top scorers for the judiciary, the next scorers for top legal practices, and so on, ignoring diversity or any other factors bearing on employment decisions. Sounds extreme, right? Sounds a bit like Japan, right (for those of you familiar with the Japanese bar exam)? Before we cast aspersions on the Japanese, we should note that it also in some ways

sounds like American law schools and our use of the LSAT exam in admissions in 2008.

Figure 1 shows that the number of applicants to ABA-approved law schools has changed relatively little since 1998. We were at just under 80,000 applicants back then, we went way up to just over 100,000 in 2003, and in 2008 we were back to just over 80,000. During the same period, the number of matriculants in law schools increased by more than 4,000. These numbers should logically suggest that the median LSAT scores at American law schools should be the same today as in 1998—or even lower, given that there are now more matriculants and that median scores among test takers are unchanged. But in that period, what has happened to median LSAT scores at American law schools? They have gone way up.

At Vanderbilt University, where I was dean for eight years, the median LSAT score in 1998 was a 162 on a 180 scale; today it is a 168—a significant increase. Almost every other law school has experienced the same increase in its scores, even though the pool of applicants has not changed that much.

2. The other extreme, besides ignoring the score gap, is to ignore the tests—to assert that because of the score gap we should not use or rely on the tests at all, or should find a test that manifests none of the systematic disparities that are rampant in our educational system. Get rid of the LSAT, get rid of the bar exam, replace them with devices that show no disparities by race. This is what the aggrieved white firefighters in New Haven, Connecticut, claim is what has happened with their test for promotion

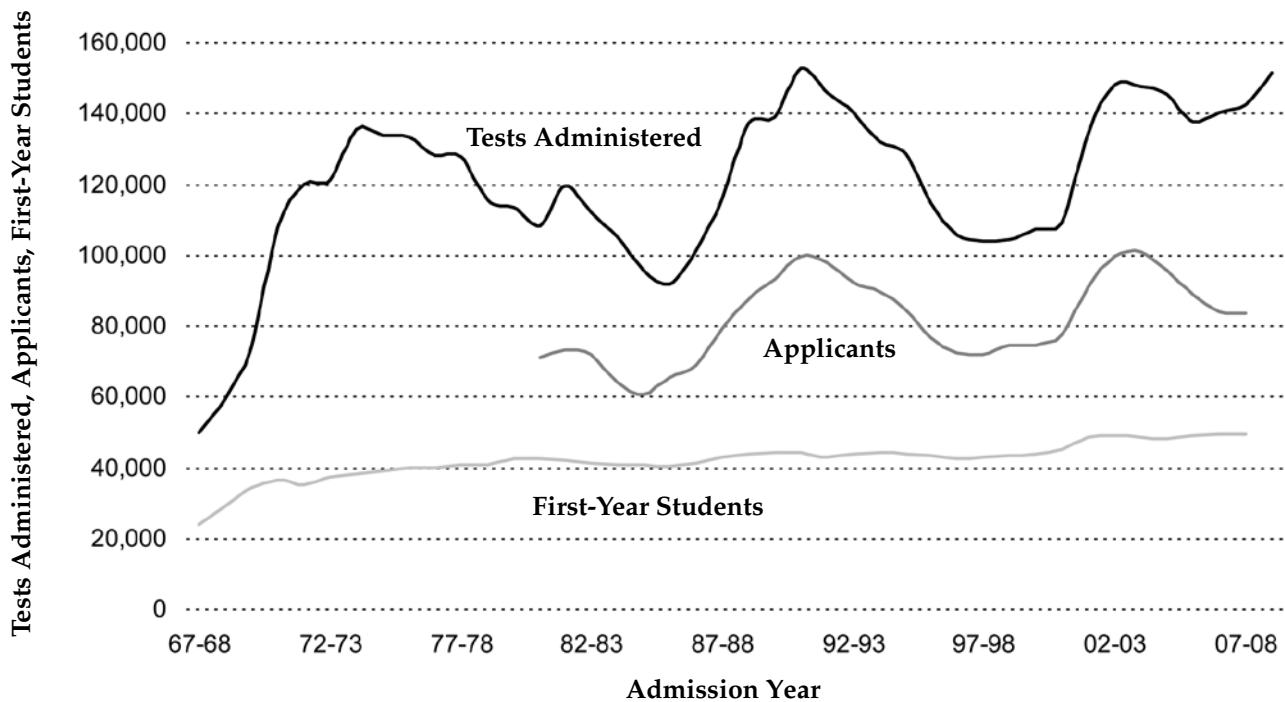


Figure 1: Tests Administered, and Applicants and First-Year Students at ABA-Approved Law Schools, 1967–1968 through 2007–2008. (Note: Due to changes in data collection methods, ABA-approved law school applicant data beginning in 1999–2000 is not directly comparable to prior applicant data.) (Source: Law School Admission Council. Reprinted with permission.)

to lieutenant, a case now being argued before the Supreme Court and awaiting decision in *Ricci v. DeStefano*.¹ The facts in that case are complicated, but I just use it as an illustration of the extremes of abandoning tests versus making them the be-all and end-all of admissions decisions.

Either extreme is, in my view, a disaster, and we who rely on tests have to walk a tightrope on which we avoid the abyss of test overuse on one side and the abyss of abandoning psychometrically useful assessment on the other. How are we doing on the tightrope walk in 2009?

2009: A CHANGING LANDSCAPE

What a difference a year makes.

One year ago, the world was very different.

One year ago, one of the *top* policy initiatives of our secretary of education and our civil rights commission was to investigate law schools and the ABA, the accrediting authority for law schools, to prevent them from doing too much to enhance diversity and address the underrepresentation of blacks and Hispanics in the legal profession.

One year ago, we expected ballot initiatives banning affirmative action in education to pass in five more states (Nebraska, Colorado, Missouri, Oklahoma, and Arizona).

One year ago, the economy had not yet declined and overtaken public focus on affirmative action to shift it to the costs of and access to higher education.

Most important of all, one year ago, our president was not a manifestly analytical and competent African American lawyer from a mixed-race family and a diverse educational environment.

Today, we can expect that neither the Department of Education nor the Civil Rights Commission is going to push us off the tightrope toward ignoring diversity concerns in higher education. The ballot initiatives banning affirmative action succeeded only in Nebraska, and were voted down in Colorado and kept off the ballot in other states, including at least one where the public did not provide enough signatures. The economy, for the moment, has deflected attention away from admissions to financial aid as the key issue. And our president doesn't even have to talk about the value of diversity in the legal profession because he manifests it every day just by doing his job.

TODAY'S CHALLENGES IN ENCOURAGING DIVERSITY IN HIGHER EDUCATION

So what are the new challenges in 2009 in walking the tightrope between overuse of tests and abandonment of tests in pursuit of diversity? I'd like to highlight them.

First, the economy. Our economic downturn is not having even effects on all parts of our society. There is every reason to believe that economic hard times will have a more dramatic impact on Hispanic and black families, particularly in the context of decisions about paying for higher education. Loan burdens are on average heavier for black and Hispanic students. Family wealth is smaller and the risks of the current economy are that the small gains we have recently seen in diversity will dissipate in the percentage of applicants, as shown in Table 2, in the number of matriculants, as shown in Figures 2 and 3, and ultimately in the number taking the bar exam. Access to higher education for underrepresented minorities is getting harder, and that will ultimately affect the bar. I am relieved that this

Table 2: ABA-Approved Law School Applicants by Ethnic Group as Percentage of Total Applicant Population, Fall 2003 through Fall 2008 (end of year, based on preliminary final applicant volumes)

Ethnic Group	Fall 2003	Fall 2004	Fall 2005	Fall 2006	Fall 2007	Fall 2008
American Indian/Alaskan Native	0.8%	0.8%	0.8%	0.8%	0.9%	0.9%
Asian/Pacific Islander	8.3%	8.6%	8.4%	8.2%	8.4%	8.7%
Black/African American	10.8%	10.8%	10.5%	10.6%	10.9%	11.3%
Hispanic/Latino	4.4%	4.7%	5.0%	5.1%	5.6%	5.8%
Chicano/Mexican American	1.6%	1.6%	1.5%	1.4%	1.4%	1.5%
Puerto Rican	1.8%	1.7%	1.8%	1.7%	1.9%	1.9%
Other	4.8%	4.7%	4.9%	5.0%	5.1%	5.1%
White/Caucasian	65.2%	65.1%	65.9%	66.1%	64.9%	64.0%
Not Indicated	2.4%	2.1%	1.2%	1.0%	1.0%	0.9%

Source: Law School Admission Council. Reprinted with permission.

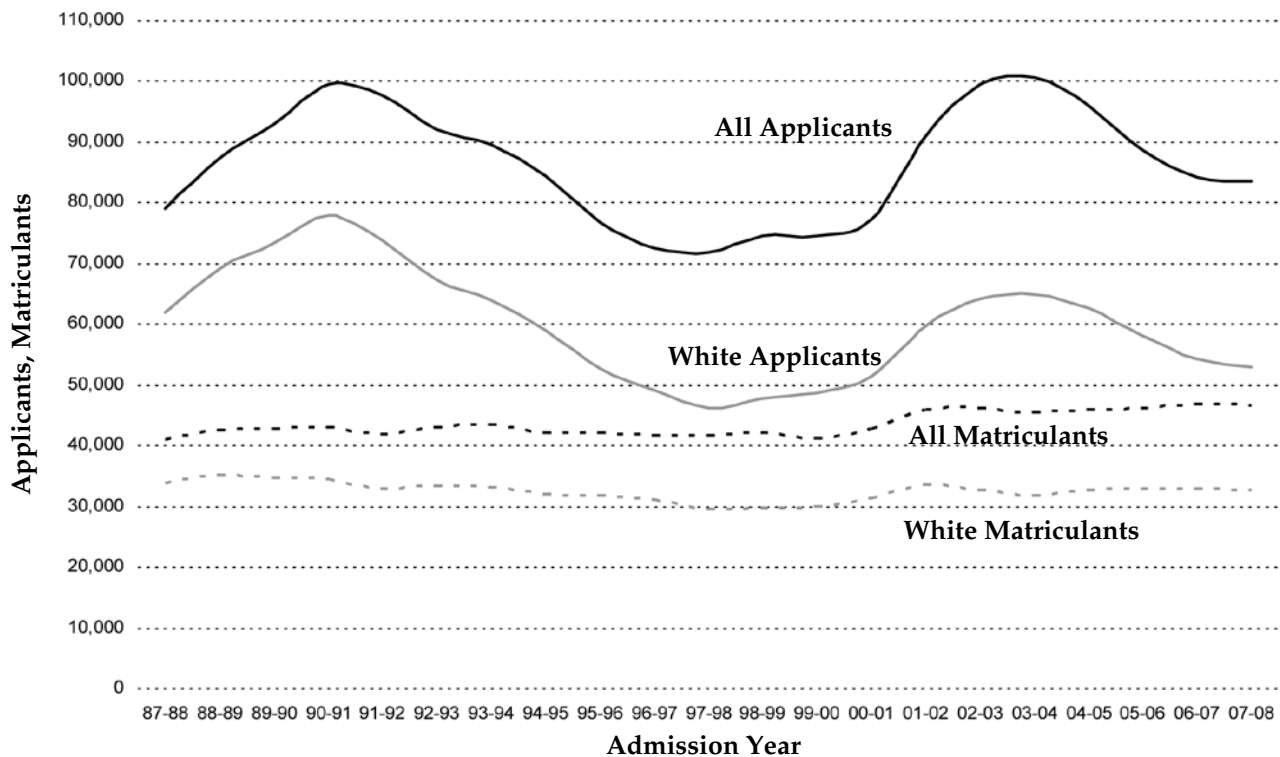


Figure 2: All and White Applicants and Matriculants at ABA-Approved Law Schools, 1987–1988 through 2007–2008 (based on applicants who provided their ethnicity). (Note: Due to changes in data collection methods, ABA-approved law school applicant data beginning in 1999–2000 is not directly comparable to prior applicant data.) (Source: Law School Admission Council. Reprinted with permission.)

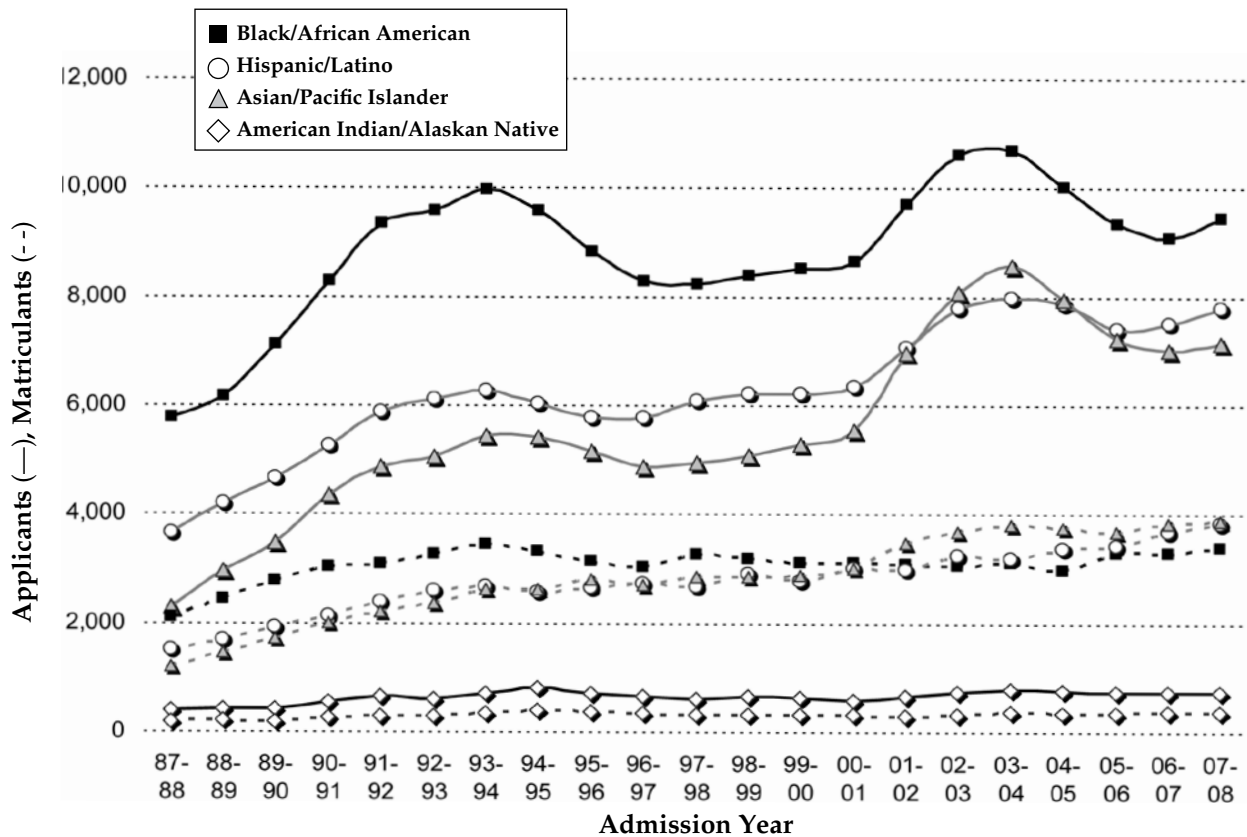


Figure 3: Minority Applicants (—) and Matriculants (- -), 1987–1988 through 2007–2008 (based on applicants who provided their ethnicity). (Note: Due to changes in data collection methods, ABA-approved law school applicant data beginning in 1999–2000 is not directly comparable to prior applicant data.) (Source: Law School Admission Council. Reprinted with permission.)

issue, rather than fine-tuning affirmative action, is now a Department of Education priority.

Second, the continued importance of rankings and their resulting influence on diversity in American law schools. The 2009 U.S. NEWS & WORLD REPORT rankings became widely public on April 24. Law schools continue to moan and wail about them while guiding an ever-increasing number of management decisions around how they will affect the rankings. Rankings arguably determine who gets admitted, who gets financial aid, which teachers get hired, what program students are steered toward—be it part-time, full-time, or LL.M.—and which state’s bar exam students are encouraged to take, and when. All of these decisions are increasingly driven by the

rankings. Even a new and different law school in one of our most diverse states, funded with public and private money and led by legal educators who are deeply committed to diversity, is today designed to enroll students whose LSAT scores fall within a high band so that the school can meet its public goal of being ranked in the top 20. I speak of UC–Irvine.

In this rankings environment, many schools are in practice leaving diversity as a second priority. U.S. NEWS’s rankings include a chart on law school diversity (available at <http://www.usnews.com/articles/education/best-law-schools/2009/04/22/law-school-diversity-rankings-methodology.html>). I point this out to you not because Washington University in St. Louis has finally made its appear-


ance on this list. I point this out to you because, as far as I can tell, nobody in legal education seems to pay the slightest attention to this particular ranking in making decisions. We have a long way to go before rankings do not keep displacing most of the progress possible on diversity—and rankings, remember, have test results (LSAT, bar exam) as a major component.

Third and finally, I caution us in 2009 to beware the extreme of abandoning tests out of concern for diversity. With the departure of the Bush administration, there is a danger of swinging to another extreme.

Malcolm Gladwell, the dynamic author of *BLINK* and *THE TIPPING POINT*, has a new book out called *OUTLIERS: THE STORY OF SUCCESS*. One of its main themes is that tests are bad at predicting success in employment. He argues, for example, that Rick Lempert's study of University of Michigan law grads shows that LSAT scores and undergraduate GPAs have "zero/zip/nada" correlation with success as a lawyer.

That's an exaggeration of what Lempert found. I suspect Gladwell might make the same exaggerated argument with respect to our bar examining results if he could obtain data identifying the ranked score of each applicant and then compare it against measurable indicia of performance as a lawyer.

This sort of popular book can lead the public and decision makers to some bad decisions—to abandoning the LSAT or the bar exam, for example, in favor of other forms of testing and assessment that have their own defects and fail to do what a properly used LSAT or bar exam does well. What they do well, in my view, is not rank from top to bottom every applicant; what they do well is identify individuals at high risk of having difficulty performing the work

required in law school and in the legal profession. That is helpful information for law schools and bar authorities if used in a careful and nuanced way—by someone who understands the risks and worries about the abyss on both sides of the tightrope walk. I hope all of you, all of us, will hold on to that understanding. 

ENDNOTE

1. *Ricci v. DeStefano* (129 S.Ct. 2658) was argued before the U.S. Supreme Court on April 22, 2009, and decided on June 29, 2009. The case concerned an examination for promotion to lieutenant, given to firefighters, the results of which were thrown out when only white firefighters and one Hispanic firefighter qualified for promotion. As one of the majority holding for the white firefighters, Justice Kennedy stated in part that "city officials lacked strong basis in evidence to believe that examinations were not job-related and consistent with business necessity" and that "city officials lacked strong basis in evidence to believe there existed equally valid, less-discriminatory alternative to use of examinations that served city's needs but that city refused to adopt." Justices Ginsburg, Stevens, Souter, and Breyer dissented.



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