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Reflections on Diversity

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Increasingly, over the past decade, many voices have clamored for heightened diversity in legal education, while others have sharply criticized the relevance, legality, and legitimacy of diverse representation as an appropriate component of the educational enterprise. The debate has taken various forms, and sometimes has evoked historical stereotypes and heightened fears of disenfranchisement and racial and ethnic biases. The intensity of the debate continues to increase with challenges to admissions policies and practices of major public institutions, as recently evidenced with respect to the Supreme Court's consideration of the University of Michigan's policies at both the undergraduate and the law school level.

The Supreme Court identified the broad constitutional parameters of affirmative action in *Grutter* and *Gratz,* but little clear practical guidance has emerged to aid in the admissions process.[1] Such guidance may be particularly relevant in light of the Court's view that any race-conscious admissions policies must be necessarily "limited in time." Therefore, the Court has created an important opening for the development of admissions policies that consider diversity factors, yet has simultaneously cautioned that those policies must have an "end point."[2] What appears noticeably absent from the dialog are empirical observations from the field. The purpose of this essay is threefold: (1) to offer some observations about why diversity, as properly understood and defined, does make sense from an educational perspective; (2) to dispel some misconceptions about diversity's role and relevance in legal education; and (3) to suggest a multifactored approach for admissions practices in the spirit of *Grutter* and *Gratz.*

Although the principal constitutional contours of acceptable practices have now been established by the Court, the admonition to admissions professionals to engage in more individualized evaluation of candidates does raise challenges of implementation and application. Some insight from practice may prove useful in using an effective multifactor balancing test. The "flexibility" praised by Justice O'Connor in *Grutter* must still be applied.[3] In that vein, various misconceptions may remain regarding law school admissions. Empiri-

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1. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).
2. *Grutter,* 539 U.S. at 337.
3. *Id.*

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cal observations from practice may contribute to the dialog so that admissions professionals can incorporate considerations of diversity in achieving educational benefits.

These observations are born of my service over a number of years in working extensively with the admissions process and reviewing thousands of applicant files from across the country and internationally. The experiences of any one individual or group, of course, are not necessarily universal nor always the best model for other groups. But empirical insights about the admissions process and evaluation of applicants may help others to establish and to apply policies in a coherent manner. I am not offering these comments as a guide for all universities because different interests may be more pronounced or challenging depending on a litany of factors in a given institution. Public schools certainly may face different challenges than some private schools. Economic considerations, geographic and demographic factors, and programmatic emphases also may affect the perspective of schools as they identify their mission.

Let us hope that more voices offering data and insight about practices and challenges will help to create workable solutions for the future. Many other legitimate and difficult issues—some considered in other contributions to this volume—still remain beyond those discussed here.

Matching Diversity with Admissions Policy

One of the most significant challenges facing a law school is crafting admissions policies and procedures that match its institutional mission and goals. The problem exists on the policy level of defining diversity and in establishing methods to achieve it. Assembling a diverse class begins with melding an institution's perspective about diversity with a myriad of other goals, including academic quality and financial resources. As definition occurs, misconceptions may arise regarding the relevance of statistics and whether "objective" standards can coexist with diversity goals.

Consider a school whose faculty begins by taking the goal of admissions to be stocking a classroom with well-credentialed, high-LSAT-scoring students. What happens to all of the other possible programs offered and supported by the school? Does that goal properly advance the best learning environment in the classroom? The critical factor that should drive admissions is to seek students who will ultimately make a contribution, whether during law school or after graduation as members of society. A contribution, in this sense, must necessarily be multifaceted and allow for innumerable differences. What makes good constitutional sense for equal protection purposes also makes educational sense because individual contributions collectively energize the learning environment for the group. In *Grutter* Justice O'Connor cited with approval the "highly individualized, holistic review" of each person's file.[4] The Court stressed the constitutional and educational benefits of a functional or policy-based approach to admissions decisions. The *qualitative* evaluation of individual applicants, then, should be combined with quantitative calcula-

4. *Id.* at 330.

tions for the most comprehensive evaluation of each applicant. Admissions professionals should understand that one aspect of making accurate predictions and succeeding at constructing a class involves looking carefully at the entire application file of each candidate.

Close scrutiny of a file may reveal, for example, that someone has a distinguished record of leadership in undergraduate or postgraduate work, yet perhaps has a slightly lower cumulative grade point average than would otherwise be desirable. The admissions policy should legitimately take that leadership record into account when evaluating the complete file, possibly making a reasonable projection that the applicant may continue leadership in various law school activities. Some students survey the landscape of officially sponsored organizations and seek to create their own vision for service. For example, at my institution one Hispanic student initiated a major public service outreach program for junior high school students, and an African-American student established a mentoring program to aid undergraduate minority athletes in their studies. Such initiatives bring credit to the institution and also benefit society through individual service. They can inspire others to see public service as an important attribute of the public life of a legal professional.

Further, a statistically driven admissions policy may at first appear appropriately aspirational for achieving quality standards while meeting financial needs, but on further examination various deficiencies emerge. Every educational institution must work within budgetary limits, and schools obviously want to have not only a representative class but one with academic excellence. Schools are rated, in part, on the perceived quality and strength of such academic profiles. Objective statistics, such as LSAT scores and undergraduate grade point averages, are considered by various national ratings services in assessing where schools should rank relative to one another. Indicia of greater undergraduate success, as measured by such criteria, suggest a correlative ability to succeed in legal studies and predict success on bar examinations. The very nature of legal education involves significant classroom discussion and interaction, which may be more dynamic and energized with talented students who are engaged in the process.

The problem, though, is that qualitative factors also play a significant role in the classroom dynamic. Statistics alone do not guarantee work ethic or enthusiasm, nor do they provide completely reliable predictors of actual performance. Many specific legal issues, such as important constitutional, environmental, or civil rights debates, necessarily reflect society's values and the historical judicial temperament responding to public interest. If the student body lacks diversity of views on those issues, effective examination and critical perspective may be lost. How could a meaningful discussion of racially restrictive covenants take place in a first-year property course if no minorities are engaged in the discussion? What difference does it make to involve women in the discussion of equal protection issues involving gender discrimination? What is not needed is a specific quota of persons with a specific gender or racial identity, but rather a significant representation of various segments of

society to participate in meaningful and critical discussion of important issues in order to enhance and elevate the quality of the dialog.

A proper beginning point, then, for every serious educational institution should be to critique all of its programs by asking what are its primary and secondary goals. Goals do not exist in the abstract or a vacuum; they arise from an examination of the place of each institution in society. Not all law schools need to have the same mission statement. Rather, institutional goals may vary widely, reflecting budgetary, historical, geographic, and public interest considerations.

Some philosophical and pedagogical values are widely shared, though. For example, most educators would probably agree that learning the law involves understanding process as well as principles. Further, most would suggest that the educational experience of professionalism should be infused with an overriding sense of ethical responsibility to clients, the judicial system, and the public. In *Grutter* Justice O'Connor recognized the benefits of good citizenship and its relevance in considering the benefits of a diverse student body.[5] Accordingly, only when the institution recognizes that ethics play a central role in delivering instruction do courses in professionalism become integrated into the curriculum both formally and informally in critiquing legal doctrine. Similarly, when schools recognize that skills training should be more developed throughout the process in order to prepare graduates to effectively serve their clients, a response occurs in the curriculum. Institutions should examine their mission statements carefully and evaluate seriously how diversity may advance the mission.

Often a significant deficiency with respect to understanding the beneficial role of diversity is that it may not be seen as relevant to advancing the educational mission of the institution—typically because the mission itself has not been clarified. One of the foremost lessons to emerge from *Grutter* is that educational institutions should articulate the reasons why diversity promotes their educational objectives in a tangible way. For example, several articulated benefits that were effectively approved by the Court were promoting understanding among races, breaking down stereotypes, and enhancing classroom discussion and learning outcomes.[6] Further, the Court recognized that exposure to diverse viewpoints within the educational environment prepares students for entry into the workforce and society itself as productive citizens and leaders.[7]

The clarification of how diversity advances the institutional mission also allows more effective evaluation and monitoring of whether diversity objectives are being attained. If universities simply rest on *Grutter* as the final answer for all issues of integrating diversity concepts into higher education, they are in danger of failing to incorporate those principles into the fabric of the admissions policy and the life of the university itself.

5. *Id.* at 2340.
6. *Id.* at 2339–40.
7. *Id.* at 2340.

The first lesson from *Grutter* should be to thoughtfully consider the mission of the institution in specific terms and to evaluate how a diverse student body can advance that mission. Mission, of course, may be multifaceted and may incorporate both micro and macro considerations of public interest and more individualized factors. In the same way that schools may take the role of imbuing ethics within the fabric of the curriculum, they may consider how providing legal access and representation to cross-sections of society affects the structure of the institution itself. In short, without an initial definition of mission, diversity itself lacks a sufficient reference point for guidance and implementation.

A second lesson from *Grutter*, as well as from empirical observations in the field, is that the most important guidepost for evaluating applicants is whether they will make a contribution to the university environment and to society. The evaluation of qualitative factors, such as leadership, becomes not just an optional exercise; it takes on central importance in the admissions calculus.

Statistics and Zero-Sum Analysis

Another significant challenge in implementing admissions policy is to project numerical yields in order to meet the planned enrollment for the institution. Within that basic construct lies another potential problem for considering diversity factors. For example, what if an admissions policy reflects the belief that the selection of one student who has a lower statistical profile necessarily precludes an offer of admission to another student who may have superior statistics? This argument assumes that admissions policies are essentially a zero-sum game and that a precise number of positions are expected and mandatory. Anyone who has dealt with admissions policies, though, understands that institutions typically deal with projected target ranges and corresponding formulas of offers and yields to achieve those goals rather than mathematical precision.

Various practical considerations animate admissions policies at any educational institution, such as ensuring that a sufficient number of students matriculate to satisfy budgetary needs. Many institutions employ numerical quantitative ranges for an entering class, drawing upon historical yield patterns for enrollment projections. A long list of factors may affect actual enrollment figures, such as the availability of scholarships and loans, family issues, health, and job-related matters. The relevance and unpredictable nature of all of these variables render admissions an inexact science. That "science" is obviously partially based on objective projections, but also usually takes into account the human factors and the ability of the admissions staff to understand and respond to the dynamics of the marketplace.

Consider the following hypothetical. Assume that State University Law School generally receives 1,000 applications annually, has a total student body of 500, makes 300 offers, and expects to admit 170 students in an entering class. Included in the 500 total student body will be some transfer students who replace the expected attrition. Consider the 300 offers. The assumption based on historical trends and data may be that approximately 30 percent of nonresidents and 65 percent of residents will typically accept an offer of

admission, which together will yield roughly 56 percent. Some years, though, 180 students may accept admission while in other years perhaps 165 actually matriculate. Such differences may be attributable to numerous factors, such as the economy and the job market, the reputation of the school, the availability of financial aid, the prominence of the undergraduate college, and the competition from peer institutions.[8]

The relationship of this illustration to the issue of diversity in law school admissions is twofold. First, it demonstrates that the entire admissions process inherently depends on educated guesswork and predictions based on historical trends and models. Numerical estimates of potential yields are not an exact science. Second, and related to the first, the system of admissions does not contemplate that a precise number of students will certainly matriculate. Rather, an acceptable range of student enrollment generally is sought. If a few additional students matriculate in a given year, their presence will not upset the admissions applecart, nor will they be denying another student the opportunity for admission.

Another observation is that every school uses some index or quantification of LSAT and undergraduate grade point averages in order to do some statistical evaluation of candidates. That said, though, schools vary considerably in the methods used to evaluate the relative weights of LSAT and GPA. The Law School Data Assembly Service operates as a clearinghouse to furnish the information to its member institutions based upon the criteria and formulas that the schools supply. How does this translate into evaluation of candidates?

Consider the following hypothetical. Assume one student, Shevon, has a 4.0 (4.0 scale) undergraduate GPA and scored 150 on the LSAT. Another student, Darius, has a 3.2 GPA but a 165 LSAT score. They both apply to three schools, each with different weighting of test scores and grade point averages.

If School A uses a 50/50 percent weighting of these two scores, both students will have virtually the same index score as furnished by LSDAS. But if School B weights the scores with more emphasis on GPA, say 60 percent, Shevon will be considered the stronger student statistically. If School C places greater emphasis (say 60 percent) on the LSAT, Darius will be the statistically superior applicant.[9] In short, the three schools see the applicants as having three different statistical scores simply by virtue of the mathematical methodology each school uses. The admissions decision on the two students may be affected by the extent that the respective schools employ specific index factors in their decision making.

8. These suggested annual differences in class yield are actually quite modest as recent illustrations may be seen where some schools plan on enrolling 180 students but learn that 240 accept offers and actually matriculate.

9. Since the LSAT is the only uniform comparison tool for national applicants, more schools tend to give greater emphasis in their indexing formulas to that score in relation to a candidate's GPA. That said, though, the index is typically treated as an initial screening tool rather than as an automatic device to admit or deny applicants. The LSAC specifically cautions schools to employ qualitative and comprehensive analysis of applicants rather than using mechanical statistical models for final decision making. The LSAC states, "Use of cut-off LSAT scores below which no candidate will be considered is explicitly discouraged in the LSAC Cautionary Policies."

Although other factors also come into play as the respective committees review the applicants, the so-called "objective" statistics really do not have national uniformity but instead reflect local practice. Some may contend, of course, that it doesn't matter what method a school uses, so long as it is perfectly fair and consistent within its own system. That statement is partially correct, but still does not entirely recognize that the objectivity of indexes is somewhat misleading because the school itself has established parameters that will affect the outcomes significantly.

Suppose an evaluation of the applicant pool feeding into a particular school revealed that a statistically significant percentage of minority applicants tended to have higher grade point averages than LSAT scores. If those applicants are then evaluated by the objective criteria established by School B in the earlier hypothetical, they will be ultimately ranked higher than under the criteria used by School C. Further, each school submits year-end grade performance information to the LSAC, which then provides "correlation" studies showing whether the LSAT score or the undergraduate GPA served as the better prediction of actual law school performance. If a school looked at the correlation study and learned that the GPA was twice as accurate in predicting performance as the LSAT, perhaps it should amend its index calculations to reflect that weighting.

Several observations emerge from these factors, most notably that nothing is a perfect predictor of law school success. Schools may significantly influence the outcomes of their "objective" criteria solely through the way they request information on their applicant pool from LSAC. In short, the appearance of perfect fairness using objective numbers is actually misleading. Any admissions tool, such as statistical indexes or correlation studies, should be placed in a larger, multifactor context. The essence of a properly crafted admissions policy should be to engage in a comprehensive review of the quantitative and qualitative characteristics of each applicant.

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The methodology for effectuating admissions decisions in legal education involves a complex array of factors. The recent Supreme Court guidance with respect to the relevance of race-conscious considerations provides a starting point to help institutions of higher education formulate their policies and practices with the inclusion of diversity considerations. The challenge for all institutions is to have meaningful evaluation of diversity factors on three levels. First, each institution should evaluate its mission and the relevance of diversity to achieving that mission. Second, schools should endeavor to develop comprehensive yet flexible admissions policies and procedures that contain a multifactor set of both qualitative and quantitative factors to evaluate applicants. Finally, schools should spend the time and institutional resources to apply those factors in a meaningful way, consistently monitoring their own practices, to achieve a diverse and academically excellent class. If they do so, the public interest will be served, talented candidates will gain access to quality legal education, and the progress of the law will continue as the dynamic of the learning environment will be enhanced.