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Out-of-the-Box Dialog

***491 DIVERSITY IN LEGAL EDUCATION: A BROADER VIEW, A DEEPER COMMITMENT**

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"Diversity" is prominent among the values law schools embrace today. Since the Supreme Court's decision in *Regents of the University of California v. Bakke*, educators have become increasingly committed to enrolling a student body representing a diversity of backgrounds and perspectives. From the hospitable language of admissions brochures to the array of programs for outreach and retention, law schools have put in place a variety of measures for accomplishing this aim. Historical data on enrollments show that through such efforts over the past twenty-five years law schools have made enormous strides toward realizing their goal.

Despite those strides, in taking up our charge to think "out of the box" on the issue of diversity in law schools, we started with the premise that overall there is much room for progress. In fact, the latest enrollment figures show that law schools have fallen short of complete success, particularly with regard to minorities. [FN1] And many law students find that their school's hospitality seems to end with the last page of the recruitment brochure. Even with women enrolled in numbers nearly equal to men, for example, women continue to report encountering a hostile environment once they enter law school. The trend away from affirmative action in some jurisdictions and the circuit split created by the Sixth Circuit's ruling in *Grutter v. Bollinger* have contributed to the challenge that law schools face in creating a diverse student body and ensuring that all students are truly welcomed.

*492 To date, the quest for diversity has been largely consumed with producing a student body roughly reflective of the demographic makeup of the community at large. The strategy reflects the expectation that from the larger (and more representative) presence of historically underrepresented students, institutions would naturally evolve over time and structurally adjust to the greater diversity. As discussed in the sections that follow, this approach has not been entirely successful in legal education. Most law schools have had great difficulty in meeting their goals for a diverse student population. There has been less attention, moreover, to the failure of law schools to create a learning environment in which diversity thrives--an environment conducive to the intellectual development of all law students.

We suggest that a more comprehensive approach is necessary to fulfilling the commitment to diversity and meeting these goals. Inviting a diverse group into an unyielding institution will not advance the goal of diversity, even if all those invited make an appearance. The quality of the interactions that these women and minority students, faculty, and administrators experience once inside is as much a part of achieving diversity as ushering them through the door.

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The diversity that law schools strive for today must instead envision much more than a student body that adequately reflects the larger community. The next step in law schools' quest for diversity must involve a shift in perspective and orientation. This is not to say that law schools should abandon the vision of a school population reflective of the nation's diversity. Rather, schools must come to view diversity as synonymous with excellence in legal education. New challenges faced by the profession, including competition, globalization, and the demands of our increasingly complex and dynamic society, will require that "diversity" be a multidimensional concept. It should represent, in part, law schools' embrace of structural, curricular, and pedagogical innovation. While the law school admissions committee scrutinizes the enrollments, the administration's attention should be on creating conditions in which the diversity of students and faculty is not just welcomed and solicited, but actively fostered. Diversity must become the thriving norm.

Much needs to be done before that norm is achieved. The paucity of Latinos and African-Americans in the legal profession, for example, is a severe disservice to the administration of justice. The impediments to full participation that many women report in law schools belie the numerical gains of women in the legal profession. The future of the legal profession demands that law schools do better.

Background

Law schools have grown to take seriously their role in transforming our society and nation into a place where equal opportunity exists for all. From affirmative action and outreach to academic support programs, law schools have employed a variety of strategies to reverse the historical exclusion of women and people of color from their institutions, and to ensure the academic success of those enrolled. These efforts have resulted in some impressive *493 gains in the number of women and minorities entering the profession. Yet, at the same time, neither group has successfully achieved a satisfying presence or full parity in the profession. The following statistical overview, while necessarily brief, gives a sense of the complexity of the task to which law schools have set themselves over the last thirty years.

Statistical Overview

In 1971, 12 percent of the entering law school class were women, and 7.4 percent were people of color. By 1995 those figures had jumped to 45 and 21 percent respectively. [FN2] Comparing the composition of bachelor's degree recipients with the composition of those admitted to law school in the fall of the same year allows for another rough measure of progress. A bachelor's degree is the basic credential for admission, and about 25 percent of the law school applicant group applies for admission in the fall of the year in which they graduate with a B.A. or B.S. degree. In 2000, the most recent year for which these data are available, minorities represented 22.5 percent of all those earning bachelor's degrees. [FN3] The percentage of minorities earning bachelor's degrees that year was thus roughly proportionate to the percentage of minorities enrolling as first-year law students that fall.

Comparing rates of admission--the percentages of applicants admitted-- allows for yet another perspective. While there is significant variation from year to year, the admission rates of Native Americans, African-Americans, and Hispanics are consistently lower than for whites and Asian-Americans, and the difference has grown since 1990-91. [FN4]

Given those figures, it is not surprising that the most recent data show that the rate of increase in minority enrollments is slowing. Their share of the entering law school class increased by only .3 percent from 1995 to 2001. [FN5] This brought minority students to 21.2 percent of all first-year students in ABA-approved J.D. programs (as noted above, very close to the percentage of bachelor's degrees awarded to minorities). Moreover, neither women nor minorities have fully integrated into the legal profession. Both are distributed disproportionately in less prestigious positions and earn less than their white *494 male counterparts. Research by the National Association for Law Placement shows that in 2001 only 15.8 percent of the partners in law firms were women, and only 3.6 percent were people of color. [FN6]

In the legal academy the numbers are similarly lopsided. While 66.1 percent of all lecturers and instructors are

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women, only 23 percent of full professors and 13 percent of law school deans are women. Women make up 46.5 percent of associate professors and 49.4 percent of assistant professors. [\[FN7\]](#) While the increasing numbers of women seem to suggest that they will soon be better represented in the academy, experience has shown that progress for women fails to meet statistical projections. [\[FN8\]](#)

Progress for people of color is even slower in coming. Minority faculty constitute 11.4 percent of full professors, 24.1 percent of associate professors, and 26.5 percent of assistant professors. Just 8.1 percent of law school deans are members of a racial or ethnic minority. [\[FN9\]](#) Women of color have made the fewest inroads into the positions that command top salaries and wield the greatest influence. Only 5 percent of deans and full professors are women of color, and only six federal appellate judges, as of the year 2000, were women belonging to a minority racial or ethnic group. [\[FN10\]](#) The figures make clear that there is still a long way to go before women and minorities are fully integrated into the profession.

The Pipeline

The explanation for the relative lack of diversity in the profession is complex and to some extent contested. A later section of this paper will discuss the legal developments that have heightened the challenge for admissions committees striving for diversity. Yet the problem is greater than the threat to race-conscious admissions. Along the pipeline leading to the profession are other identifiable obstacles to achieving diversity in law schools.

Probably the greatest challenge for law schools seeking diversity, aside from legal threats to affirmative action, is the disparate access of minorities, the poor, and the geographically isolated to an education that provides adequate preparation for the rigors of law school. Minorities are more likely to reside in poor communities and attend resource-starved schools that are not well *495 equipped for preparing students for college. [\[FN11\]](#) And children in poor and isolated communities may be exposed to few, if any, positive role models in the legal profession. The absence of role models for such youth makes it far less likely that a profession in law will occur to them as a career goal, and if it does, that goal may seem too unrealistic to pursue.

The consequences of these disadvantages are lower high school graduation rates, fewer college graduates, and dwindling numbers of qualified law school applicants. This process is well illustrated by statistics from our last census year. While minorities made up 34 percent of those within the 20-24 age range in 2000, they represented only 22.5 percent of those earning bachelor's degrees. Thus, a leading cause of the underrepresentation of people of color in the profession can be traced to their lower numbers of college graduates.

The challenge is further complicated by another emerging imbalance. A recent article in the Chicago Tribune reported: "Women outnumber men on campus nationally for the first time but the gap is particularly striking among blacks. Whereas women now comprise about 55% of overall undergraduate enrollment, black women outnumber black men about two to one." The article began by citing a Justice Policy Institute study concerned with "the black inmate explosion over the past two decades" that said, "By 2000, black male numbers grew to 791,600 in prison but only to 603,032 on campus." [\[FN12\]](#)

Minority youth who overcome social disadvantage to succeed in high school and college, and who aspire to becoming lawyers, may even then be averted from their goal by institutions that rely inordinately on LSAT scores in their admissions decisions. All ABA-approved schools use the LSAT to meet the ABA Standards for the Approval of Law Schools, which state that schools must require their applicants to take an admission exam to evaluate the applicant's capability to succeed in law school. In practice law schools use the LSAT score--most often in conjunction with undergraduate GPA, and sometimes with other variables--to gauge the likelihood of an applicant's academic success in the first year. [\[FN13\]](#) The exam has a role in frustrating the effort for diversity, because minority students generally score lower on it than white students, and those most starkly underrepresented also earn the lowest scores.

In response to the exam's critics, the Law School Admissions Council, the test's administrator, has clarified what it considers to be the exam's proper role in law school admissions. [\[FN14\]](#) The LSAC has disavowed the exam's ability to predict anything other than first-year grades, or to test anything other than reading and verbal reasoning,

skills important to succeeding in law school. *496 While maintaining that the exam is the single best predictor of first-year grades, the LSAC has cautioned schools against placing undue weight on the exam in light of what it considers its limited legitimate uses.

If we were to accept the LSAT's value for the narrow purpose for which it is designed, the crucial question would then be whether first-year performance is sufficiently related to professional success to justify the weight schools place on the scores in the admissions process. The University of Michigan School of Law has studied this issue, and its findings are instructive. The school found that had its admissions "been determined entirely by LSAT scores and UGPA, most of the minority students who graduated from Michigan would not have been admitted even though the measures that would have worked to exclude them seem to have virtually no value as predictors of post-- law school accomplishments and success." [FN15] While this study speaks definitively only about the Michigan law school, it should prod law schools to reconsider the logic of using a criterion in admissions that, even when combined with UGPA, has minimal ability in absolute terms to predict first-year law school grades, and may have next to no value in predicting professional success--the value of greatest ultimate importance to students, the profession, and the public interest.

U.S. News and World Report, which uses the median LSAT score of a law school's students to compute its influential annual law school rankings, contributes to the popular misconception that the LSAT measures academic merit. The deans of many law schools have publicly denounced the magazine's ranking methods, but U.S. News is certain to publish the rankings as long as they are popular with the public, meaning continued pressure on law schools to admit students with higher scores. This dynamic compounds the challenge of admitting a diverse law school class.

The Law School Experience

Once in law school, many women and minority students encounter the same types of barriers that exist in society at large. The ABA Commission on Women in the Profession has reported on the hostile law school environments often created by peers, teachers, and administrators who cling to stereotypes or even engage in racial or sexual harassment. [FN16] In light of such findings, it is not surprising that women, and particularly women of color, are less likely to participate in the classroom and are more likely to report feeling isolated or alienated, even by the language and culture of the law itself. When women do participate, the study showed, they are less often recognized for their contributions, and their comments are more likely to be devalued. Similarly, female teachers of color experience harassment by their own students. These incidents impede learning, affect retention, and could discourage future students from applying to law school or accepting offers of admission. Law student *497 attrition is significantly higher among minority students, especially in the first year. In 2001, 12.1 percent of all minority students left in their first year of school, compared with 9 percent of all students. [FN17] A more refined analysis reveals significant differences in graduation rates by race. In the class that entered in 1998 and graduated in 2001, the graduation rate for Asian-American and Pacific Islander students was 89 percent; for white students it was 90.3 percent; for Hispanics other than Mexican-Americans and Puerto Ricans, 86.1 percent; for African-Americans, 76.5 percent; for Puerto Ricans, 87.9 percent; for Native Americans, 75.1 percent; and for Mexican-Americans, 76.9 percent. [FN18]

Finally, those who make it through law school have to clear the last hurdle--the bar exam. A 1998 study comparing bar passage rates revealed significant differences across ethnic groups, especially in the outcomes for first-time exam takers. A majority of those who didn't pass the exam at first try repeated the attempt, and the differences across ethnic groups diminished in a comparison of the eventual pass rates. Still, the correlation between race/ethnicity and passage rate remained statistically significant. The eventual passage rate for whites was 96.7 percent, while it was 91.9 percent for Asian-Americans, 88.4 percent for Mexican-Americans, 89.0 percent for Hispanics not of Mexican or Puerto Rican heritage, 82.2 percent for Native Americans, 79.7 percent for Puerto Ricans, 77.6 percent for blacks, and 91.5 percent for those in the "other" category. [FN19]

The Developing Legal Landscape

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The challenge law schools face in striving for and maintaining diversity is compounded by the developing legal landscape. In its 1978 ruling in *Regents of the University of California v. Bakke*, the Supreme Court shifted away from the common belief that affirmative action programs played an essential role even in nonremedial integration efforts. In *Bakke* the Court declared use of inflexible quotas impermissible but found the state's interest in diversity in higher education to be compelling. The Court's plurality decision set the stage for a split among the circuits as to the validity of nonremedial affirmative action programs. In the *Hopwood* decision the Fifth Circuit refused even to acknowledge diversity in education as a compelling state interest, leading to the 1997 Texas mandate that all its public universities employ race-neutral criteria in admissions. Voters in California and Washington state, and the governor of Florida, have instituted their own measures to ban affirmative action in their respective states. The impact on minority representation in graduate education *498 in these jurisdictions has been devastating. Following enactment of California's Proposition 209 and SP-1, enrollment in the University of California law schools dropped from 7.5 percent in the previous four years to 2.2 percent for African-Americans, from 13.4 to 7.2 percent for Latinos, and from 1.4 to .7 percent for Native Americans. In the most recent development, in May 2002, the Sixth Circuit upheld the race-conscious admissions policy of the University of Michigan's law school.

The dismantling of affirmative action in some jurisdictions, and the fear that the Supreme Court will grant certiorari to the Michigan plaintiffs in order to narrow the current interpretation of *Bakke*, are reason alone for law schools to review their approaches to attaining diversity. A Supreme Court decision eliminating affirmative action would undoubtedly diminish minority enrollments. In that event, law schools will need to investigate alternatives to race-conscious admissions policies to achieve the diverse student bodies they desire.

Making Diversity a Priority

The current state of affairs should already prompt law schools to engage in a more ambitious commitment to attaining a diverse student body, faculty, and administration. It is common knowledge that "minority" status will soon become a misnomer in this country. Indeed, population projections indicate that within fifty years our nation will be very close to a true plurality. This fact alone suggests several important reasons for law schools to reevaluate where they rank diversity on their list of priorities. These reasons are not new to law school administrators and educators. But the most compelling among them deserve to be restated here.

- As the fastest-growing population in the U.S., minorities are also the most disadvantaged educationally and economically. Improving minority access to professional degrees will ensure continuing national competitiveness in the global market.

- Diversity has a strong positive impact on educational experience. A student's exposure in law school to classmates with a variety of experiences and perspectives develops her cultural competence and intellectual dexterity, qualities vital to graduates entering our fast-changing and increasingly diverse profession and society. As Bowen and Bok have said,

Both the growing diversity of American society and the increasing interaction with other cultures worldwide make it evident that going to school only with "the likes of oneself" will be increasingly anachronistic. The advantages of being able to understand how others think and function, to cope across racial divides, and to lead groups composed of diverse individuals are certain to increase. [\[FN20\]](#)

- *499 • The full potential of women to contribute to our nation's economic life remains unrealized. Law schools have a role in shaping the profession, and society, into a realm of greater equality by graduating women leaders confident in the value of their contributions.

- A recent study suggests that, like medical students, minority law students more often go on to serve the same populations from which they come. Increasing diversity within the profession can help to elevate historically underserved communities and thereby contribute to the strength of our nation's economic and social life. [\[FN21\]](#)

- Finally, not least among these reasons is public confidence in the fairness of our system of justice. As stated by the ABA Diversity Committee,

The need to diversify the legal profession is not a vague liberal ideal: it is an essential component of the administration of justice. The legal profession must not be the preserve of only one segment of our society. Instead, we must confront the reality that if we are to remain a government under law in a multicultural society, the concept of justice must be one that is shared by all our citizens. [\[FN22\]](#)

The private sector is already far ahead of the legal profession in recognizing diversity as an essential element in

educational and professional excellence. [\[FN23\]](#) Many corporations, particularly the larger companies, actively foster diversity within their ranks. The American Corporate Counsel Association, in fact, has gone a step further in launching a campaign that specifically targets the firms that represent their companies. Its Statement of Principle, to which many corporate legal departments are signatories, states in part:

Our companies conduct business throughout the United States and around the world, and we value highly the perspectives and varied experiences which are found only in a diverse workplace. Our companies recognize that diversity makes for a broader, richer environment which produces more creative thinking and solutions In making our respective decisions concerning selection of outside counsel, we will give significant weight to a firm's commitment and progress in this area.

The higher value placed on diversity in some areas of the corporate world, born of experience and proving itself in the marketplace, is making a delayed entrance into the legal profession and educational institutions. In fact, a law school intending to fully integrate that value may find that it will require *500 nothing less than a full reorientation of its efforts. A shift in focus that places diversity at the forefront of the law school's mission may be the crucial first move.

Achieving and Retaining Diversity

Accumulating evidence substantiates both the practical experience of educators and the Supreme Court opinions holding that diversity and academic excellence are complementary rather than competing virtues. Yet most law schools have failed to organize their institutions and design policies to take advantage of that knowledge. Placing diversity at the forefront of the law school's mission will directly challenge the assumptions that underlie traditional legal education. It may mean that schools will have to reexamine accepted definitions of merit. It will certainly require that law schools find ways to combine the goals of diversity and educational excellence into a single pursuit. In this way, a true appreciation of diversity's rewards can be an impetus for devising creative programs, courses, and curricula that allow law students to more freely reap its benefits.

There are proven tools for achieving and retaining diversity. After exploration, many law schools may adopt one of the programs that are tried and true, while others will choose to devise individual approaches best suited to their own needs and goals. What follows is a nonexhaustive list of projects and programs, all successful, that range from the novel to the familiar.

Conditional-Admission Programs

Conditional-admission programs are variously organized, but they most commonly target applicants with less competitive credentials who have other qualities indicating their strong potential for performing well in law school. The applicants are admitted into the fall class on the condition that they first complete successfully a course or program held in the summer. The curriculum may focus on substantive law or the basic skills necessary to succeed in law school, or both. At least thirty-one law schools have summer conditional-admission programs.

The Council on Legal Education Opportunity, a nonprofit project of the ABA's Fund for Justice and Education, has a similar program that is not school specific. Its six-week summer institute is an intensive program that assesses students' capacity to succeed with a curriculum that focuses on developing their abstract thinking and their abilities to synthesize and analyze. CLEO's strong reputation in the legal community has helped it successfully place 6,000 underrepresented students in ABA-accredited law schools since 1968. CLEO's law school partners have supported the program through financial contributions and by assisting with the institute's curriculum, hosting its participants, and admitting its graduates. Ninety percent of all CLEO participants are placed in an ABA-accredited law school the following fall.

The Pre-Law Summer Institute is yet another non-school-specific program that specifically targets Native Americans and Alaska Natives. Although some of its participants have been required to attend by the law schools to which *501 they've been admitted, it is not strictly a conditional-admission program. It is an eight-week program that models itself on the first semester of law school, so it serves as a law school preparatory course for students who

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want to gain an edge by familiarizing themselves with the substance and methods of legal education before classes begin. Not of least importance, participants from across the nation form relationships with each other, becoming part of a network of Native American lawyers at graduation.

An even more individualized and certainly out-of-the-box project is under-way in the province of Nunavut in Canada. To address the need for native Inuit attorneys in the North, the University of Victoria and Nunavut Arctic College have partnered with the Akitsiraq Law School Society to develop the Akitsiraq Law School. [\[FN24\]](#) The law school is a one-time program that will deliver a legal education to its students over four years in their own social, cultural, and geographical environment. Students benefit from a high student-faculty ratio; they are taught by law faculty from the University of Victoria and other universities, as well as local legal professionals. The curriculum covers standard law school courses that in some cases bring in relevant additional material, such as Inuit traditional law. Other classes specifically tailored to the program may include community justice, the Nunavut Land Claims Agreement, and Northern resources law.

While some jurisdictions in the United States cannot implement such racially specific programs, law schools in any region may have something to learn from the spirit of innovation that makes them a success. Most schools still have the freedom to partner with diversity-enriching summer institutes. Others will have to more thoughtfully structure programs to cultivate diversity in ways that don't offend the law of their jurisdiction.

Alternative Admissions Strategies

Law schools should explore admissions models that give balanced weight and attention to numerical indicators and qualitative factors. The Law School Admissions Council is developing admissions models that show promise. Its research report entitled *Crafting an Incoming Law School Class: Preliminary Results* proposes a method for selecting an incoming class referred to as "constrained optimization." [\[FN25\]](#) The model requires the school to define its goals and to determine accordingly the characteristics it wants in its incoming class. A computer program can then assemble the optimal admit pool from a larger pool of applications. The report cautions against the misconception that this model would eliminate the work of an admissions committee. Its advantage over the ranking system most admissions offices use today is its ability to select an optimal admit pool based on preselected characteristics. This model, when fully developed, could help in creating greater diversity within the admit pool and among actual matriculants.

***502** Some law schools may want to consider or revisit other admissions strategies that allow for better incorporation of nonquantitative selection criteria. Interviewing, for instance, has been a traditional component of the admissions process in medical schools and many business schools, and in law schools in other countries such as England. The medical school admissions interview has been the subject of validity research to determine how it is best structured and used for that process. An interview structured to reduce the chance of interviewer bias, and fine-tuned so as not to be too burdensome an undertaking, could be a valuable addition to law admissions.

Another alternative to help prevent overreliance on quantitative measures is the institution of comprehensive review in admissions. In 2001 Texas implemented comprehensive review, also called the "whole person" approach, in graduate admissions. Under the Texas law, eleven factors may be considered in the admissions process, including the student's academic record, socioeconomic background, and "the current comparative availability of members of that profession in the applicant's region of residence while the applicant attended elementary and secondary school." The applicant's admissions exam score "may not be used in the admissions or competitive scholarship process ... as the sole criterion for consideration of the applicant or as the primary criterion to end consideration of the applicant." [\[FN26\]](#)

Outreach

As this paper has previously noted, diversity cannot be accomplished solely by changing law school admissions practices. Encouraging and preparing more students to set their sights on law school will be a crucial component of any program to achieve diversity. Both the ABA President's Advisory Council on Diversity and the

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AALS/LSAC/ABA Joint Committee on Racial and Ethnic Diversity are directing their resources to study of the pipeline problem. The ABA President's Council, for example, administers the Legal Opportunity Scholarship Program, receiving thousands of applications for a small number of scholarships. It has developed a mentor program between scholarship recipients and young lawyers in their communities and is developing pilot projects to encourage students of color to enter the law. The focus of these national organizations is heartening. It is hoped that their work will encourage others to develop fresh approaches to outreach and mentoring programs.

The Color of Justice, a program designed by the National Association of Women Judges, is an example of a successful program that reaches out to minority high school students from disadvantaged backgrounds. African-American and Latino female high school students have spent a day with minority women judges, lawyers, and law students to discuss career paths and the admissions processes for college and law school. Events have been held in Missouri and New Jersey, and the program is expanding to other states.

Law schools should actively participate in such programs and create programs of their own. They might take note of the work of the National Advisory Council for Minorities in Engineering, a nationally based nonprofit corporation *503 that undertakes a more comprehensive effort coordinating outreach, mentorship, and academic enrichment programs. The NACME also supports outreach, recruitment, and retention through grants to engineering schools with strong track records in minority retention. Another project it has helped to establish targets students at a young age through more than forty autonomous community-based precollege engineering programs. In addition to outreach, law schools should actively advocate for efforts in education to prepare students from kindergarten through college to live and work in a diverse world. Law school administrators should consider not only how they can incorporate principles of inclusion within their own institutions, but also how they can support such initiatives in elementary schools through undergraduate education. For example, law schools could encourage undergraduate schools to prioritize diversity by factoring into admissions decisions the diversity of an applicant's alma mater.

Law schools must continue to recruit women and people of color for faculty and administrative positions. These positions are integral to the development of future attorneys and the quality of legal education. It is crucial that students have access to role models and mentors who reflect a range of backgrounds and experiences. Faculty and administrators must share a commitment to formulating creative approaches to the issues and opportunities that will arise as diversity increases in the law school, society, the client base, and the judicial system.

Pedagogy and Curriculum

A law school that truly institutionalized diversity's values would more naturally foster pedagogical and curricular innovation. Its faculty, recognizing the educational benefits of diversity and motivated by its potential for their students, would be more inclined to construct situations to optimize those benefits. Methods such as problem-based learning and working in teams, common to both medical schools and M.B.A. programs, might then make headway in legal education.

Conservative pedagogical theory prevails in the law school classroom. This is most evident in the reluctance to depart from the Socratic method, which, as traditionally practiced in law schools, is meant to groom students for an adversarial role. Arguably, however, the lawyer-as-adversary model better reflects the notions of popular culture than the reality of law practice today. According to a 1991 publication by the ABA Young Lawyers Division, most lawyers spend more time in client contact, research and memo writing, and negotiation than they do in courtroom activities. [FN27] Supplementing classroom teaching with more discussion and collaborative work could better include students whose natural learning styles are undervalued by traditional legal pedagogy and promote the development of practical team-oriented skills.

The diversity so far cultivated in the legal academy has invigorated legal scholarship and rounded out the traditional curriculum. Scholarship in critical *504 race theory and feminist legal theory, in large part the work of minority and women scholars, has served as an entrée through which perspectives historically neglected in legal analysis have gained recognition.

The scholarly contributions of critical legal theorists raise issues that the legal establishment must contend with.

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They have enhanced traditional legal analysis and provoked insights into the ways in which the law reflects the values of the culture that produces it. Similarly, feminist legal analysis has made major contributions to the development of substantive law. Reforms in the law of rape in the United States in the late 1970s and early 1980s, for example, can be tied to the reemergence of the women's movement in the 1970s, its coincidence with the sudden increase in women entering the legal profession, [\[FN28\]](#) and the publication of feminist legal analyses of rape law. Until rape-shield statutes were widely enacted, the common law allowed the defense to introduce evidence of the victim's prior sexual history at trial to defeat the element of her nonconsent. As a consequence of the statutory reforms, the feminist critique and its role in shaping the law are now commonly incorporated into the basic course in criminal law. In addition, students can enroll in such courses as Race and the Law and Feminist Legal Theory, now common staples in the law school curriculum. When today's law students study how the insights of people of color and women have upset assumptions preserved and perpetuated in centuries-old law, they are the beneficiaries of yesterday's path breakers.

The 1992 study commonly referred to as the MacCrate Report could also contribute much to an administration interested in developing a curriculum appropriate to a more diverse student body. [\[FN29\]](#) The report's Statement of Skills and Values sets forth those skills and values "with which a well-trained generalist should be familiar before assuming ultimate responsibility for a client," including problem solving, factual investigation, counseling, and resolving ethical dilemmas, as well as the more traditional professional skills of legal research, analysis, and reasoning. The report encourages schools to use the statement to develop methods for teaching the skills and values differently or more extensively than their current curricula permit. Infusing the law school curriculum with more practical skills could support a student body with diverse interests and talents, and produce versatile students prepared to practice in a variety of settings.

It must be acknowledged that, in practice, further departures from the traditional curricular offerings in the form of clinics, and courses in skills and legal theory, are bound to heighten the tension between the aims of legal educators, bar examiners, and employers. Aside from the educational program, *505 the exam is the most onerous of the requirements for admission to the bar. In most states, however, the exam's multiple-choice and essay testing methods, and the often arcane substantive law it covers, have little apparent relationship to the skills and knowledge that would demonstrate a candidate's qualification for law practice. Moreover, the topics covered on the exam make up a large part of most law students' actual curriculum. In practice, the exam constrains curricular offerings, especially in smaller law schools.

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As public servants, as stewards of our political and legal institutions, and as corporate counselors and deal makers, lawyers must be versatile and culturally competent leaders. A diverse learning environment is an essential component in preparing students for these roles. For many law schools, achieving greater diversity will require them to revise their mission and conduct a large-scale review of their policies and orientation.

At the very least, the process will entail taking a fresh look at admissions policies and any discrete programs specifically designed to increase diversity. In reality the school may not be able to accommodate the kinds of programs and initiatives needed to effectuate that mission without a foundation-level shift in institutional orientation. The law school will need to look outside itself and down the pipeline, and to take a leadership role in alliances with undergraduate colleges and universities, secondary schools, and even elementary schools. Making diversity an institutional priority may also mean exploring more fully the possibility of partnerships with nonprofits and corporations with common goals. Almost certainly it will involve greater incorporation of teaching methods and curricular offerings that enhance students' abilities to succeed in a diverse, dynamic legal profession. Whatever avenues individual law schools choose, it is past time to elevate diversity to a top priority. Fully integrating the values it represents and organizing the law school to pursue that aim will ensure continuing excellence in legal education and the graduation of capable, forward-looking leaders.

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[FN1]. In 2001, 20.6 percent of students enrolled, and 21.2 percent of those entering, ABA-approved law schools were African-American, American Indian, Asian, Chicano, Puerto Rican, or "other Hispanic." See Memorandum from Office of the Consultant on Legal Education, Section of Legal Education and Admissions to the Bar, American Bar Association, to Law School Deans (Feb. 6, 2002).

[FN2]. See American Bar Association, Section of Legal Education and Admissions to the Bar, Minority Enrollment 1971-2001 < www.abanet.org/legaled/statistics/stats.html > (last visited Jan. 20, 2003) [hereinafter ABA Web Site]. Disaggregated by race/ethnicity, the percentages for 1971/2001 are .2/.8 for American Indians and Alaska Natives, 4.9/7.7 for African-Americans, .7/6.8 for Asians and Pacific Islanders, 1.2/2.0 for Chicanos/Mexican-Americans, .1/.5 for Puerto Ricans (excluding those enrolled in Puerto Rican law schools), and .2/3.4 for other Hispanics.

[FN3]. In 2000, 77.5 percent of all bachelor's degrees were earned by whites, 9.0 percent by blacks, 6.3 percent by Hispanics, 5.5 percent by Asian/Pacific Islanders, and .7 percent by American Indian/Alaska Natives. See Bachelor's degrees conferred by degree-granting institutions, by racial/ethnic group and sex of student: 1976-77 to 1999-2000, U.S. Department of Education, National Center for Education Statistics, Higher Education General Information Survey. Degree and Other Formal Awards Conferred surveys, and Integrated Postsecondary Education Data System Completions surveys <<http://nces.ed.gov/pubs2002/digest2001/tables/dt268.asp>> (last visited Apr. 2, 2003).

[FN4]. Minority Databook, eds. Kent D. Lollis et al. (Newtown, 2002).

[FN5]. See ABA Web Site, *supra* note 2.

[FN6]. See National Association for Law Placement, Women and Attorneys of Color at Law Firms--2001 <<http://www.nalp.org/nalpresearch/mw01sum.htm>> (last visited Jan. 20, 2003).

[FN7]. See Association of American Law Schools, Last 6 Years: Women Faculty in Directory of Law Teachers <<http://www.aals.org/statistics/T2A.htm>> (last visited Jan. 20, 2003).

[FN8]. Deborah L. Rhode, The Unfinished Agenda: Women and the Legal Profession, a report of the ABA Commission on Women in the Profession 14 (citing Cynthia Fuchs Epstein et al., [Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession](#), 64 *Fordham L. Rev.* 291, 356 (1995)); Kathleen E. Hull & Robert Nelson, Divergent Paths: Gender Differences in the Careers of Urban Lawyers, *Researching Law*, Summer 1999, at 1).

[FN9]. See Association of American Law Schools, Last 6 Years: Minority Faculty in Directory of Law Teachers <<http://www.aals.org/statistics/T2B.htm>> (last visited Jan. 20, 2003).

[FN10]. See Rhode, *supra* note 8, at 21.

[FN11]. See Thomas B. Parrish & Christine S. Hikido, Inequalities in Public School District Revenues, NCES 98-210 <<http://nces.ed.gov/pubs98/inequalities/index.html>> (July 1998); Do Districts Enrolling High Percentages of Minority Students Spend Less? NCES 97-917 <<http://nces.ed.gov/pubs/97919.html>> (Dec. 1996).

[FN12]. Clarence Page, When Prisons Lure More than Colleges, Chic. Tribune, Sept. 1, 2002, at 9.

[FN13]. Lisa C. Anthony et al., Predictive Validity of the LSAT: A National Summary of the 1995-1996 Correlation Studies 5, LSAC Research Report No. 97-01 (Aug. 1999). This report is consistent with past correlation studies in finding that "the median validity coefficient for the LSAT alone is .49." A higher coefficient (on a scale between -1 and 1) means greater predictive validity. Converting this figure into a percentage may yield a more familiar description of this relationship: given an applicant's LSAT score, an admissions committee can predict with 24 percent certainty the applicant's first-year grades.

[FN14]. Philip D. Shelton, Admissions Tests: Not Perfect, Just the Best Measures We Have, Chron. Higher Educ., July 6, 2001, at B15.

[FN15]. David L. Chambers et al., [Michigan's Minority Graduates in Practice: The River Runs Through Law School](#), 25 *Law & Soc. Inquiry* 395, 402 (2000).

[FN16]. Commission on Women in the Profession, American Bar Association, *Elusive Equality: The Experiences of Women in Legal Education* (Chicago, 1996).

[FN17]. Data provided by David Rosenlieb, data specialist at the ABA Section of Legal Education and Admissions to the Bar. In the same year 5.2 percent of second-year minority students withdrew compared to 4.0 percent for all second-year students, and 1.0 percent of third-year minority students withdrew compared with .7 percent of all third-year students. Among minorities, almost half of all students who left at any point during the three years of law school left for academic reasons.

[FN18]. These figures have been computed from the statistics posted by the Section of Legal Education and Admissions to the Bar, at ABA Web Site, *supra* note 2.

[FN19]. Linda F. Wightman, LSAC National Longitudinal Bar Passage Study 32 (Newtown, 1998).

[FN20]. William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 279 (Princeton, 1998). See also Gary Orfield & Dean Whittle, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in *Diversity Challenged*, ed. Gary Orfield with Michal Kurlaender, 14-16 (Cambridge, Mass., 2001).

[FN21]. Chambers et al., *supra* note 15.

[FN22]. Section of Legal Education and Admissions to the Bar, American Bar Association, Report of the Diversity Committee at <<http://www.abanet.org/legaled/committees/diversity-1998.html>>.

[FN23]. The private sector's emphasis on diversity is evidenced by the amicus curae brief that 65 Fortune 500 corporations filed with the Supreme Court in *Grutter v. Bollinger*. The brief can be found at the Web site maintained by the University of Michigan to keep the public abreast of legal developments in the case against it, and abreast of legal and political developments in the area of affirmative action generally. See <http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/Fortune500-both.pdf> (last visited Apr. 2, 2003).

[FN24]. More information on this program is available at <www.law.uvic.ca>.

[FN25]. Peter J. Pashley & Andrea E. Thornton, *Crafting an Incoming Law School Class: Preliminary Results*, LSAC Research Report 99-01 (Newtown, 1999).

[FN26]. [Tex. Educ. Code § 51.822 \(2001\)](#).

[FN27]. See Young Lawyers Division, American Bar Association, *The State of the Legal Profession 1990* at 15 (Chicago, 1991).

[FN28]. Elyce H. Zenoff & Kathryn V. Lorio, *What We Know, What We Think We Know, and What We Don't Know About Women Law Professors*, 25 *Ariz. L. Rev.* 869, 870 (1983). The numbers of women entering the profession increased by more than 150 percent between 1970 and 1980, from 4.7 to 12.8 percent.

[FN29]. Section of Legal Education and Admissions to the Bar, American Bar Association, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development--An Educational Continuum* (Chicago, 1992).

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The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective

*Kevin R. Johnson**

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I. INTRODUCTION

My contribution to this symposium on “The Future of Legal Education” sketches one dean’s thoughts on the case for the importance of diversity in law schools.¹ Let me begin with two questions. In these times, can a truly excellent law school have a homogenous student body and faculty? Can we truly—and do we want to—imagine a top-twenty-five law school comprised of predominantly white men?

Law-school deans at virtually each and every turn receive direction and guidance on how to achieve a more diverse student body and faculty.² Before being selected for the job, most law deans, as well as most other campus leaders, will have had a career in which they were conditioned to express their deep and enduring commitment to diversity. Despite this oft-stated commitment, the racial diversity of law-school student bodies and faculties leveled off in the early twenty-first century.³

Before becoming a dean, I firmly believed—and continue to believe—that racial, socioeconomic, and other kinds of diversity among students and faculty is critically important to ensure excellence at any law school. In my estimation, for reasons outlined in this Essay, diversity and excellence are inextricably interrelated, mutually reinforcing, and well worth striving for by any law school worth its salt.

In an increasingly diverse nation and integrated global political economy, who would want to be a dean assigned the unenviable task of defending homogeneity within a law school to the public, faculty, and students? To the contrary, I have advocated that both student and faculty diversity should be factored into the multivariable formula employed by the

1. I presented this paper at a February 2011 symposium organized by the *Iowa Law Review* on “The Future of Legal Education.” UC Davis law students Joanna Cuevas Ingram, Janet Kim, and Aida Macedo provided helpful research and editorial assistance. Some of the thoughts presented in Parts II and III were adapted from Vikram David Amar & Kevin R. Johnson, *Why U.S. News and World Report Should Include a Diversity Index in Its Ranking of Law Schools*, FINDLAW (Mar. 12, 2010), <http://writ.news.findlaw.com/amar/20100312.html> [hereinafter Amar & Johnson, *Student Diversity*], and Vikram David Amar & Kevin R. Johnson, *Why U.S. News and World Report Should Include a Faculty Diversity Index in Its Ranking of Law Schools*, FINDLAW (Apr. 9, 2010), <http://writ.news.findlaw.com/amar/20100409.html>. In 2010, I served as chair of the Association of American Law Schools (“AALS”) Committee on the Recruitment and Retention of Minority Law Teachers and Students. Portions of this paper were presented at the AALS 2011 Annual Meeting on a program sponsored by this Committee, which included law deans discussing the challenges of diversifying law faculties.

2. See, e.g., AM. BAR ASS’N, *DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS?* 17–24 (2010).

3. See LAW SCH. ADMISSION COUNCIL & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS* 870 (2010 ed. 2009) [hereinafter *ABA-LSAC OFFICIAL GUIDE*] (presenting data of total law-school minority enrollment from 1987–88 through 2008–09).

much-watched *U.S. News & World Report* rankings of law schools.⁴ Those rankings, for better or worse, have a profound influence on the decisions made by law schools as well as the existing incentives for law-school administrators.⁵

This Essay builds on the premise that diversity is highly relevant to evaluating the quality of a law school and the education of its student body. It sketches the arguments for a multitude of diversities—racial, socioeconomic, gender, and more—in order for U.S. law schools in their student bodies and faculties to best achieve their educational mission. Borrowing liberally from the Supreme Court’s rejection of a constitutional challenge to the University of Michigan Law School’s race-conscious admissions program in *Grutter v. Bollinger*,⁶ Part II of this Essay considers the educational benefits offered by a diverse law-school student body. Part III outlines the similar, yet somewhat different, teaching and scholarship benefits that a diverse law faculty brings to a high-quality legal education. Part IV outlines the educational importance of diversity among law students and faculty based on a wide array of experiences, characteristics, and knowledge other than race, and summarizes some of the legal restrictions law schools face in achieving greater diversity. Part V of this Essay discusses the limited incentives for deans and law schools engaged in the active pursuit of diversity among students and faculty.

II. THE EDUCATIONAL BENEFITS OF STUDENT DIVERSITY

The arguments in favor of the benefits of a diverse student body to a legal education are familiar to most lawyers, law professors, students, and university administrators. This Part of the Essay outlines those benefits, with Part III building on that foundation to extend the rationale to faculty.

4. See *infra* Part V. I admittedly am far from the only law-school dean truly committed to diversity among students and faculty. See, e.g., Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011 (2009).

5. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 2 (2009) (attributing increasing law-school fees in part to increased competition for higher rankings among law schools); MICHAEL SAUDER & WENDY ESPELAND, LAW SCH. ADMISSION COUNCIL, FEAR OF FALLING: THE EFFECTS OF *U.S. NEWS & WORLD REPORT* RANKINGS ON U.S. LAW SCHOOLS (2009), available at <http://www.lsac.org/LSACResources/Research/GR/GR-07-02.pdf>; Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 LAW & SOC'Y REV. 105 (2006). But see Rachel F. Moran, Commentary, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383 (2006) (questioning the influence of the *U.S. News* rankings on legal education).

6. 539 U.S. 306 (2003).

A. GRUTTER V. BOLLINGER

As the U.S. Supreme Court has proclaimed, a diverse student body provides a richer learning environment than a homogeneous one for students, who will then be better prepared to succeed and thrive in the incredibly diverse real world of lawyers and clients that is the modern United States, as well as the world. University educators have embraced the dominant modern justification invoked for affirmative action that diversity, racial and otherwise, provides tangible and concrete educational benefits to students. As discussed in this section, this justification served as the basis on which the Supreme Court in 2003 rejected a constitutional challenge to an elite public law school's engaging in carefully crafted race-conscious affirmative action in admissions. The diversity rationale for affirmative action contrasts with the remedial justification for affirmative action—that is, that race-conscious affirmative action is necessary to remedy past discrimination against racial minorities by governmental actors.⁷

In the landmark decision of *Grutter v. Bollinger*,⁸ the Supreme Court, in an opinion written by Justice Sandra Day O'Connor, addressed the constitutionality of the University of Michigan Law School's race-conscious affirmative-action program. The Court found “compelling” the law school's stated goals of having a diverse student body, stating that “[the law-school defendants] assert only one justification for their use of race in the admissions process: *obtaining ‘the educational benefits that flow from a diverse student body.’* . . . The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by [the defendants] and their *amici*.”⁹

The Court lauded the “substantial” educational benefits that flow from a diverse student body.¹⁰ A diverse student body facilitates “cross-racial

7. For in-depth analysis of the differences between the two separate and distinct justifications for affirmative action, as well as their relative significance, see Ronald J. Krotoszynski, Jr., *The Argot of Equality: On the Importance of Disentangling “Diversity” and “Remediation” as Justifications for Race-Conscious Government Action*, 87 WASH. U. L. REV. 907 (2010). The diversity rationale sees a diverse student body as benefiting the legal education of all—including nonminority—students. See David Kow, *The (Un)compelling Interest for Underrepresented Minority Students: Enhancing the Education of White Students Underexposed to Racial Diversity*, 20 LA RAZA L.J. 157 (2010). This rationale is separate and distinct from the claim that affirmative action should be employed to “remedy” past discrimination against racial minorities and thus to benefit those minorities. See, e.g., Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000) (contending that past discrimination justifies remedial affirmative action by the University of California); Richard Delgado, *Why Universities Are Morally Obligated To Strive for Diversity: Restoring the Remedial Rationale for Affirmative Action*, 68 U. COLO. L. REV. 1165 (1997) (making the same basic arguments for the University of Colorado).

8. 539 U.S. 306 (2003).

9. *Id.* at 328 (emphasis added) (citation omitted).

10. *Id.* at 330. For a study on the benefits of diversity to higher education, see Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330 (2002). See also Chris Chambers Goodman, *Retaining Diversity in the Classroom:*

understanding,' helps to break down [enduring] racial stereotypes," and leads to "classroom discussion [that] is livelier" and "more enlightening and interesting."¹¹ In addition, a diverse student body "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."¹² Moreover, the "skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints."¹³

Put simply, the Supreme Court concluded that diversity among the students in a law school generally contributes to a better legal education than that offered by a more homogeneous student body. This has become the conventional wisdom that is warmly embraced by the vast majority of leaders in higher education today.¹⁴

Few could, or do, seriously claim that student diversity can somehow be viewed as an impediment to a high-quality legal education. Even opponents of race-conscious affirmative action tend not to wholly disregard the benefits of diversity but instead generally focus on criticizing the means—the consideration of race and deviation from so-called "color blind" standards¹⁵ and "merit"¹⁶—employed by some law schools in an effort to achieve racially diverse student bodies and faculties.¹⁷ Along these lines, opponents of race-conscious admissions often tend to pit student quality against diversity as either/or propositions, rather than attempt to integrate diversity into the definition of the overall excellence of a student body (and thus of a law school).¹⁸

Strategies for Maximizing the Benefits That Flow from a Diverse Student Body, 35 PEPP. L. REV. 663 (2008) (articulating ways in which law schools can maximize the educational benefits of a diverse student body).

11. *Grutter*, 539 U.S. at 330 (internal quotation marks omitted).

12. *Id.* (quoting Brief for American Educational Research Ass'n et al. as Amici Curiae Supporting Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

13. *Id.* The Court also noted that educational researchers, military and corporate leaders, and others had filed amici curiae briefs in support of the Michigan Law School's claim that the affirmative-action program promoted a compelling state interest by furthering these educational benefits. *Id.* at 330-31.

14. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998).

15. For the classic critique of color-blindness as a remedy to the legacy of racial discrimination in the United States, see Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

16. For critical analysis of the concept of merit, see Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. 1449 (1997).

17. See sources cited *infra* note 82.

18. See Anderson, *supra* note 4, at 1035-36; Wendy Espeland & Michael Sauder, *Rankings and Diversity*, 18 S. CAL. REV. L. & SOC. JUST. 587, 602 (2009); Elizabeth Rindskopf Parker, *A Dean's Dilemma or Lessons in Diversity*, 37 U. TOL. L. REV. 117, 119-20 (2005).

B. *POLICY ARGUMENTS AGAINST RACE-CONSCIOUS ADMISSIONS SCHEMES*

The Supreme Court's decision in *Grutter v. Bollinger* in no way ended the public debate over the propriety of reliance on race in the admissions decisions of colleges and public universities, a subject returned to in Part IV of this Essay. The Court simply held that a carefully crafted, individualized admissions scheme that employs race as one factor among many in an individualized, holistic review of the applications is constitutional.

Universities, of course, are in no way compelled to adopt a race-conscious admissions scheme and can decide for legitimate reasons not to consider race in the admission of students. At least for the time being, the Supreme Court's decision in *Grutter* shifted the place of the debate from the courts to the political arena and the court of public opinion.¹⁹

As a policy matter, a heated debate continues over whether colleges and universities should engage in race-conscious affirmative action even if it is constitutionally permissible. In a much-publicized law-review article, Professor Richard Sander, for example, published a study that he contended showed that affirmative action in operation results in a "mismatch" of the qualifications of African-American students and the rest of the student body at the law school to which they are admitted and enroll.²⁰ The end result, Sander claimed, is that African Americans are less successful academically than they would be if they had attended law schools in which their qualifications were better "matched" to those of their classmates. The corollary of this finding is that black law students, even if they don't know it, would be better off without affirmative action. The Sander study provoked nothing less than a firestorm of controversy, with many informed observers vociferously criticizing the study and its conclusions.²¹

Similar to the assertion that affirmative action allows for the admission and enrollment of minorities less qualified than the general student body, one persistent concern expressed about affirmative action is that the consideration of race in the admissions process stigmatizes racial minorities among their peers as both unqualified and undeserving and thus injures, rather than assists, minority students. U.S. Supreme Court Justice Clarence Thomas, who is African American, has repeatedly, and quite forcefully, voiced this concern.²²

19. See *infra* Part IV.A.

20. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371, 449-53 (2004).

21. See, e.g., David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools"*, 7 AFR.-AM. L. & POL'Y REP. 1 (2005).

22. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part) ("The majority of blacks are admitted to the [University of Michigan] Law School because of discrimination, and because of this policy all are tarred as undeserving.

The claim that affirmative action stigmatizes minority students is hotly disputed. A 2010 study concluded that “[u]nderrepresented minority students in states that permit affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states.”²³ Another study similarly concludes that affirmative action does not stigmatize minority students, but rather that preexisting racial bias stigmatizes them as undeserving and unworthy of admission.²⁴

Responding to policy-based and other concerns, a number of states, including Michigan, California, and Washington, have prohibited the consideration of race in the admissions schemes of their respective public colleges and universities.²⁵ The future vitality of *Grutter v. Bollinger*—and affirmative action generally—also has been the subject of lively discussion.²⁶ Part of that debate has centered on Justice O’Connor’s optimistic suggestion that colleges and universities might not need to utilize race-conscious affirmative action to achieve diverse student bodies in another twenty-five years.²⁷

This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the ‘beneficiaries’ of racial discrimination. . . . The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.”); Christine Chambers Goodman, *A Modest Proposal in Deference to Diversity*, 23 NAT’L BLACK L.J. 1, 62–68 (2010) (reviewing the stigma argument against affirmative action); Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1812 (2006) (arguing that the external stigma of affirmative action contributes to higher attrition rates among African-American associates at law firms).

23. Deidre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1199 (2010) (emphasis omitted).

24. See Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299 (2008).

25. See Bowen, *supra* note 23, at 1202.

26. See, e.g., Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201 (2006); Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577 (2009). Some of the scholarly criticism of *Grutter* has been harsh. See, e.g., Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705 (2008); Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633 (2005).

27. See *Grutter*, 539 U.S. at 343 (“It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” (citation omitted)). For critical analysis of Justice O’Connor’s judicially created twenty-five-year time limit on affirmative action, see Joel K. Goldstein, *Justice O’Connor’s Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83 (2006); Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171 (2004); see also Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 193 (2004) (“Justice O’Connor’s timetable for eliminating race-conscious affirmative action is unrealistic. Racial inequality in conventional measures of merit will persist into the foreseeable future, because this inequality is

* * *

Importantly, a relatively diverse student body does not necessarily mean that during law school, the experiences of women and minorities will be identical to those of white male students.²⁸ The same, of course, is true for minority and women law-faculty members.²⁹ This should not be surprising in light of the fact that different racial groups and women have radically different experiences than white men in just about every other facet of American social life.

Obviously, law schools must be vigilant and make continuing efforts to improve the quality of the learning environment for all students.³⁰ Even with a diverse student body, vigilance by law-school administrators is necessary to create and maintain a nurturing, inclusive community and overall supportive learning environment for all students and faculty. Along these lines, one commentator has contended that the diversity rationale of *Grutter v. Bollinger* requires a careful analysis of the entire law-school curriculum to ensure that it incorporates and reinforces notions of inclusiveness, and thus maximizes the educational benefits of a diverse student body.³¹

In the end, the Supreme Court in *Grutter v. Bollinger* confirmed what had become the conventional wisdom—although one that is not without its critics—that a racially diverse student body contributes to a better learning environment for students and a higher-quality legal education.

III. EDUCATIONAL BENEFITS OF FACULTY DIVERSITY

At least as far back as the long struggle for integration in the public schools that culminated in *Brown v. Board of Education*,³² the United States has been preoccupied with diversity within student bodies. There has been a parallel, often overlapping, discussion and debate of more recent origin about the benefits of diversity within law faculties.

One rather obvious question is whether the rationale for diversity among the student body endorsed by the Supreme Court in *Grutter v.*

part of a much larger dynamic process that produces persistent racial inequality in many areas.”).

28. See Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209, 1278–79 (2005) (finding, based on a survey of law students at UC Davis School of Law, that experiences of women and minority students were significantly more negative than those of white men).

29. See *infra* Part III.C.1 (discussing the need for a “critical mass” of diverse law faculty).

30. See Cassman & Pruitt, *supra* note 28, at 1282–84 (discussing the need for increased diversity among students and faculty to achieve a supportive educational environment).

31. See Dorothy A. Brown, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1, 19 (2006) (“Classroom features that maximize diversity make use of the diverse student body in order to enhance interaction and learning.”).

32. 347 U.S. 483 (1954) (finding that de jure segregation of African Americans in public schools is unconstitutional); see *Sweatt v. Painter*, 339 U.S. 629 (1950) (addressing a constitutional challenge to the University of Texas Law School’s discrimination against blacks).

Bollinger applies with equal force to law-school faculties.³³ In essence, does a diverse law faculty promote a better learning environment for students? I believe that it does.

Among other things, a diverse faculty both (1) measurably benefits the education, broadly defined, of law students, and (2) contributes to rich, cutting-edge legal scholarship. Both of these are important goals that obviously should be included in any law school's pursuit of academic excellence.

A. THE BENEFITS OF FACULTY DIVERSITY TO TEACHING

Although it is somewhat cliché to say it, law students want and need role models.³⁴ This is especially the case for women and minority students, two groups that historically have been systematically excluded from law schools and the legal profession in the United States. A full representation of women in law-school faculties, for example, confirms in the eyes of women law students that they can be effective lawyers, can succeed, and do belong in the legal profession.³⁵ It also can provide similar lessons to women generally, men (including but not limited to other students), and the general public.

Put simply, women faculty members can serve as positive role models to women law students. In that vein, the confirmation to the U.S. Supreme Court of Justices Sandra Day O'Connor, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, the first women on the High Court (and all added since 1981), sent powerful messages to women lawyers, as well as law students, women generally, and men, about the possibility for women to rise to the highest echelons of the legal profession.³⁶

33. See L. Darnell Weeden, *Back to the Future: Should Grutter's Diversity Rationale Apply to Faculty Hiring? Is Title VII Implicated?*, 26 BERKELEY J. EMP. & LAB. L. 511 (2005).

34. See Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46 (1991); Enrique R. Carrasco, *Collective Recognition as a Communitarian Device: Or, Of Course We Want To Be Role Models!*, 9 LA RAZA L.J. 81 (1996); Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN'S L.J. 93 (1991); see also Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 871 (1995) ("The visible competence of minority group members may reduce outsiders' negative stereotypes and reinforce positive ones about the group as a whole."); Antoinette Sedillo Lopez, *Latinas in Legal Education—Through the Doors of Opportunity: Assimilation, Marginalization, Cooptation or Transformation?*, 13 AM. U. J. GENDER SOC. POL'Y & L. 109 (2005) (highlighting the importance of role models for women of color in law-school faculties). Admittedly, the role-model rationale for affirmative action has been criticized. See Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222 (1991).

35. See Herma Hill Kay, *UC's Women Law Faculty*, 36 U.C. DAVIS L. REV. 331, 352 (2003) (emphasizing the significance of representation and support by women and people of color for newcomers when entering professions dominated by white males).

36. See Judith S. Kaye, *A Life in the Law*, 30 SETON HALL L. REV. 752 (2000) (discussing the significant impact of Justice Sandra Day O'Connor's appointment to the Supreme Court from the perspective of the Chief Judge of the Court of Appeals of New York); Susan A. Berson, *Making Herstory*, A.B.A. J., Mar. 2010, at 28 (commenting on the difficulties that women in

The role-model principle applies to minority law students as well. African-American, Latina/o, Asian-American, and Native-American students often clamor for more role models on their law-school faculties and consistently press for more diverse faculties at law schools across the country.³⁷ The presence of historically underrepresented minorities on law faculties sends an unmistakable message to students of color—and most effectively “teaches” them—that they in fact belong in law school and the legal profession, as well as that they have the ability to be top-flight lawyers, scholars, judges, and policy makers. For similar reasons, the appointment of the first African-American Justices, Justices Thurgood Marshall³⁸ and Clarence Thomas,³⁹ and the first Latina, Sonia Sotomayor,⁴⁰ to the U.S. Supreme Court figuratively told African-American and Latina/o students—as well as students, lawyers, and the public at large—something important about the ability of African Americans and Latina/os to ascend to the pinnacle of the legal profession.⁴¹

For a number of years, law-school administrators and faculties have recognized the need to increase the number of minorities on law-school

leadership positions experience); Danielle E. Reid, *6 Who Have Made a Difference: Mentors and Role Models for Women Lawyers*, N. J. LAW., Aug./Sept. 1995, at 11 (describing the adversity faced by women in leadership positions and the need for women in power to serve as mentors to other women).

37. See generally Carrasco, *supra* note 34 (commenting on how role models provide “proof that the equal opportunity principle really works,” which in turn motivates minority students to attend law school).

38. See Beth Barrett, *Defining Queer: Lesbian and Gay Visibility in the Courtroom*, 12 YALE J.L. & FEMINISM 143, 163 (2000) (demonstrating that pioneers like Justice Thurgood Marshall set an example of advocacy and visibility not only for people of color, but also for gay-rights advocates); Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1, 3–7 (2002) (discussing the powerful message sent to the African-American community with the confirmation of Justice Marshall to the Supreme Court).

39. See Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 482 (2000) (contending that Justice Clarence Thomas was confirmed as a Supreme Court Justice because of his status as a conservative role model to many whites: “[A]s a role model, Thomas presented an alluring image to many white Americans. Thomas offered the promise that if other blacks simply would persevere, and leave behind concerns about racism, they could go as far as Thomas had gone in his meteoric rise to High Court nominee.”).

40. See Kevin R. Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice of the U.S. Supreme Court: The Assimilation Demand at Work*, CHICANA/O-LATINA/O L. REV. (forthcoming 2011); see also Johnson, *supra* note 38, at 7 (“As Thurgood Marshall’s appointment did for African Americans, the addition of the first Latina/o to the Supreme Court could have significant impacts for the greater Latina/o community, as well as to the Court and the nation as a whole.”); Linda Maria Wayner, *The Affirmatively Hispanic Judge: Modern Opportunities for Increasing Hispanic Representation on the Federal Bench*, 16 TEX. WESLEYAN L. REV. 535, 549 (2010) (arguing that pioneers in a field must be more than mere cosmetic symbols to further ideals of true diversity and progress).

41. Cf. *supra* text accompanying notes 35–36 (discussing the importance of having more women on law faculties and courts).

faculties and, to a certain extent, have made efforts to hire more of them.⁴² Many law schools aggressively recruit minority faculty candidates, with the competition especially keen for those with the most elite credentials.

The persistent lament of law schools that a “pool problem”⁴³ exists for minority faculty due to a dearth of “qualified” minorities in the legal profession carries weight. Relatively few minority graduates possess the stratospheric credentials that are most coveted by law schools, such as a degree from the very best law schools (defined quite—some would say unduly—narrowly by some schools) and a coveted clerkship for a Supreme Court Justice, with diversity among Supreme Court clerks nearly nonexistent.⁴⁴ The persuasiveness of the “pool problem” excuse, however, has markedly declined since the 1950s as law-school student bodies have slowly but surely become more diverse. With respect to women, few could dispute that, in these times, with women comprising approximately one-half of all law students,⁴⁵ there are plenty of well-qualified women law-school graduates in the pool of potential law professors.

There are other benefits to having a diversity of backgrounds represented among teachers in law-school classrooms. For example, might it

42. See Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L.J. 445, 455 (2000) (arguing that the benefits of a diverse faculty in clinical education are similar to those of a diverse student body, including the benefits of enhanced perspectives and the “robust exchange of ideas” (quoting Jonathan Alger, *When Color-Blind Is Color Bland: Ensuring Faculty Diversity in Higher Education*, 10 STAN. L. & POL’Y REV. 191, 199 (1999))); Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 WASH. U. L. REV. 763, 769 (2010) (referring to the substantial progress in the hiring of faculty members of color in law schools since 1995). This is not to say that further work to diversify law faculties is not necessary. See Ediberto Roman & Christopher B. Carbot, *Freeriders and Diversity in the Legal Academy: A New Dirty Dozen List?*, 83 IND. L.J. 1235 (2008) (highlighting the need for increased hiring of Latina/o law faculty).

43. See Anjali Chavan, *The “Charles Morgan Letter” and Beyond: The Impact of Diversity Initiatives on Big Law*, 23 GEO. J. LEGAL ETHICS 521, 528 (2010) (describing the “pool problem” as the idea that law schools are producing relatively few minority students to meet the demands of law firms seeking to hire minority attorneys); Akshat Tewary, *Legal Ethics as a Means To Address the Problem of Elite Law Firm Non-Diversity*, 12 ASIAN AM. L.J. 1, 8 (2005) (criticizing the claim of law firms of a “pool problem” as explaining the lack of diversity because of a small number of qualified minority law graduates in the applicant pool; the percentage of minorities attending elite schools far exceeds the percentages at top law firms).

44. See Tony Mauro, *U.S. Court Justices Grilled over Lack of Diversity Among Clerks*, N.J. L.J., Mar. 20, 2000, at 11 (reporting on a congressional hearing concerning the paucity of minority law clerks selected by Supreme Court Justices); Joan Biskupic, *Two Justices Defend Lack of Minority Court Clerks*, WASH. POST, Mar. 16, 2000, at A25; Michael A. Fletcher, *As Term Opens, Lack Of Diversity Is Decried*, WASH. POST, Oct. 6, 1998, at A3.

45. See ABA-LSAC OFFICIAL GUIDE, *supra* note 3, at 870; see also Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 544 (1988) (arguing that the alleged difficulty that law schools experience in finding qualified minority and female faculty candidates is exaggerated); Jane Byeff Korn, *Institutional Sexism: Responsibility and Intent*, 4 TEX. J. WOMEN & L. 83, 98 n.68 (1995) (contending that there is an adequate pool of qualified women in the top ten percent of their law schools and women therefore should be adequately represented among U.S. Supreme Court clerks).

not be possible—some would contend probable—that a woman teaching the law of rape, abortion, or employment discrimination might present the law to students in different ways, with different perspectives, experiences, and— at a most fundamental level—knowledge than her male counterparts?⁴⁶ Recall, for instance, Justice Sandra Day O'Connor's pivotal role in preserving the right to abortion access in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴⁷ Similarly, Justice Ruth Bader Ginsburg reportedly swayed several of her male colleagues on the Supreme Court, who appeared unconvinced at oral argument, in the 2009 decision holding that a strip search of a middle school woman, incorrectly thought to be concealing an over-the-counter pain medication, violated the Fourth Amendment.⁴⁸

Similarly, an African-American man might understandably bring an entirely different set of perspectives, experiences, and knowledge to bear on the classroom discussion of the phenomenon of racial profiling by police in a criminal-law or criminal-procedure course than the average white colleague might be able to offer.⁴⁹ Harvard professor Charles Ogletree, who is African American (or, for that matter, Harvard's Henry Louis Gates, Jr., whose racially charged encounter with the Cambridge, Massachusetts, police in the summer of 2009 made the national news, with President Obama even entering the fray),⁵⁰ might teach criminal law and criminal procedure differently than, say, Wayne LaFave, who is white.⁵¹ This is true even though

46. See, e.g., SUSAN ESTRICH, *REAL RAPE* (1987) (critically analyzing the prosecution of the crime of rape of women in the United States); see also Meera E. Deo, Maria Woodruff & Rican Vue, *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 *CHICANA/O-LATINA/O L. REV.* 1 (2010) (analyzing the impact of race and gender of faculty on issues covered in first-year law-school classes).

47. 505 U.S. 833 (1992). For discussion of Justice O'Connor's role in the Supreme Court's reaffirmation of *Roe v. Wade*, 410 U.S. 113 (1973), see Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated,"* 39 *AKRON L. REV.* 373, 389–92 (2006).

48. See *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009); Joan Biskupic, *Ginsburg: The Court Needs Another Woman*, *USA TODAY*, May 6, 2009, at 1A; Adam Liptak, *Strip Search of Girl by School Officials Seeking Drugs Was Illegal, Justices Rule*, *N.Y. TIMES*, June 26, 2009, at A16.

49. See M.K.B. Darmer, *Teaching Whren to White Kids*, 15 *MICH. J. RACE & L.* 109, 110 (2009) (addressing "the unique problems of teaching racialized issues of criminal justice in racially homogeneous classrooms"); see also Deo, Woodruff & Vue, *supra* note 46; cf. Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 *MICH. J. RACE & L.* 5, 11–22 (2004) (summarizing how judges of diverse backgrounds enhance the perspectives among judges and benefit the judicial decision-making process).

50. See CHARLES OGLETREE, *THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA* 9–13 (2010).

51. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677 (1995) (discussing the contention of a law professor, based on his experience as a federal prosecutor and as an African American, that juries should refuse to convict African Americans of drug crimes); Deo, Woodruff & Vue, *supra* note 46, at 18–19 (identifying in a case study of first-year criminal-law classes the tendency of white male professors to sidestep

few would seriously dispute that Professor LaFave is one of the leading criminal-procedure scholars of his generation.⁵²

Along similar lines, Latina/o and Asian-American law professors, with direct or indirect experience with, and knowledge of, how their communities are affected, might bring entirely different perspectives to bear on immigration law and enforcement than even brilliant colleagues of different backgrounds could be expected to offer.⁵³ Similarly, a Native-American faculty member might have an entirely different perspective on, as well as knowledge of, federal Indian law than other professors would be in a position to provide.⁵⁴ Perhaps rather obviously in light of the events of the first decade of the twenty-first century, Arab or Muslim law professors might hold wholly different perspectives on the plethora of measures the U.S. government put into place in the name of security after September 11, 2001, than faculty members from different backgrounds.⁵⁵

And these are only the most obvious examples. Importantly, this difference of perspective is not limited to particular subject matters that directly implicate race or gender—it might also be expected to apply to a wide variety of legal topics. Professor Patricia Williams, for example, famously discussed the importance of formality to a black woman in contract negotiations and formation as a means of establishing her credibility,

discussions of diversity); Dubin, *supra* note 42, at 455–60 (analyzing the enhanced multiperspective and cross-cultural education that professors of color may bring into the classroom).

52. See generally WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE (3d ed. 2008); WAYNE LAFAVE, CRIMINAL LAW (5th ed. 2010).

53. Latina/os and Asian Americans are overrepresented among law professors who teach immigration law. Their backgrounds, along with attracting them to the field, might influence their scholarly analysis, for example, of the role of race in immigration law and enforcement. See Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 552–54; Bill Ong Hing, *Asian Americans and Immigration Reform*, 17 ASIAN AM. L.J. 83 (2010).

54. See, e.g., S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004); READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL (Jo Carrillo ed., 1998); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

55. See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609 (2005); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002). The same is true with respect to analysis of the long-standing political conflict in the Middle East. See George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467 (1994); George E. Bisharat et al., *Israel's Invasion of Gaza in International Law*, 38 DENV. J. INT'L L. & POL'Y 41 (2009).

autonomy, and legitimacy as a commercial actor.⁵⁶ Along similar lines, I have highlighted the importance of discussing race in the teaching of the core civil-procedure course for first-year students, a course that focuses generally on the civil-litigation process.⁵⁷

B. *THE BENEFITS OF FACULTY DIVERSITY TO LEGAL SCHOLARSHIP*

Nor is the classroom the only place where the diversity of a law faculty matters. Differences of perspective, experience, and knowledge can influence legal scholarship just as they can affect teaching. Even if one feels uneasy over the concept of a “voice of color,”⁵⁸ it is an unquestionable truth that, as in teaching,⁵⁹ members of different minority groups in the aggregate bring different life experiences, perspectives, and knowledge to bear on the analysis of the law and legal doctrine than their white counterparts.

Consider the many unique contributions to legal scholarship offered by Critical Race Theory and Critical Latina/o Theory,⁶⁰ established genres of legal scholarship that abound with minority scholars. The same is true for women legal scholars.⁶¹ It would be startling, moreover, if the different backgrounds of these scholars did not influence their scholarship to a certain degree.

Of course, not all members of minority groups or women will add new, unique, or different perspectives to the mix. My claim is significantly more limited in scope. A law faculty with a robust diversity of perspectives, experiences, and knowledge can help enrich law teaching and legal

56. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146–48 (1991). For other examples, see Martha M. Ertman, *Legal Tenderness: Feminist Perspectives on Contract Law*, 18 *YALE J.L. & FEMINISM* 545 (2006) (book review); Samantha A. Moppett, *Acknowledging America's First Sovereign: Incorporating Tribal Justice Systems into the Legal Research and Writing Curriculum*, 35 *OKLA. CITY U. L. REV.* 267 (2010); Laura Spitz, *I Think, Therefore I Am; I Feel, Therefore I Am Taxed: Descartes, Tort Reform, and the Civil Rights Tax Relief Act*, 35 *N.M. L. REV.* 429 (2005); Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007*, 27 *REV. LITIG.* 37 (2007).

57. See Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*, 54 *J. LEGAL EDUC.* 242, 243–45 (2004).

58. See Alex M. Johnson, Jr., *The New Voice of Color*, 100 *YALE L.J.* 2007 (1991).

59. See *supra* text accompanying notes 46–57.

60. For examples of leading Critical Race Theory contributions, see *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); *THE LATINO/A CONDITION: A CRITICAL READER* (Richard Delgado & Jean Stefancic eds., 2d ed. 2010); MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (Robert W. Gordon & Margaret Jane Radin eds., 1993). But see DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) (questioning in detail the intellectual rigor and scholarly contribution of Critical Race Theory as a body of legal scholarship). For critical analysis of the scholarly and other contributions of LatCrit theory, see Keith Aoki & Kevin R. Johnson, *An Assessment of LatCrit Theory Ten Years After*, 83 *IND. L.J.* 1151 (2008).

61. See generally MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* (1999) (discussing the influence of feminism on legal doctrine since the 1970s).

scholarship. In turn, the products of a racially and gender-diverse faculty can contribute to the excellence of a law school.

Bedrock premises of the U.S. legal system fully embrace the understanding that a diverse set of perspectives makes a difference in decision-making. For instance, the highest courts in the federal and state systems, as well as intermediate appellate courts, have a group of justices, rather than a single one, deciding cases. Similarly, U.S. courts opt not for a single judge as decision maker but require juries that decide civil and criminal cases to be comprised of a number of jurors (ordinarily twelve) pulled from a cross-section of the community.⁶² Based on similar reasoning, the commitment to diversity makes perfect sense in law teaching and scholarship as well.

There is also good reason to consider the diversity of faculties in evaluating the quality of law schools. There, too, one can expect a multiplicity of perspectives to improve the quality of debate and deliberation on contentious, as well as ordinary, issues, which positively impacts both law teaching and legal scholarship.

C. PRACTICAL PROBLEMS IN MEASURING FACULTY DIVERSITY

Once one concludes that a diverse faculty provides educational value to law students, faculty, and the law school generally, the questions then turn to the practical. This section considers some practical questions raised by efforts to recruit and retain diverse faculty members.

1. How Much Diversity? The Need for a “Critical Mass”

Perhaps most importantly, a “critical mass” of minority faculty members—not just one or two—on a law-school faculty is good for both the teaching and scholarly missions of the law school.⁶³ This is precisely the same for faculty as the Supreme Court recognized it to be for student bodies.⁶⁴ True diversity, not tokenism, should be the goal for a school with respect to its faculty as well as its students.

A meaningful number of minority and female faculty will ensure that students are exposed to a diversity of law professors possessing different experiences, perspectives, and knowledge bases. This diversity will, in turn, provide students with a richer learning environment—one that more likely

62. See 28 U.S.C. § 1861 (2006) (declaring that juries be “selected at random from a fair cross section of the community in the district or division wherein the court convenes”); see also *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community.”).

63. See *supra* Part III.A–B.

64. See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (“The Law School has determined, based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”).

mirrors the diversity of lawyers, judges, and clients (and their perspectives) that the students will encounter as practicing lawyers.

In contrast, a “token” minority professor teaching a few classes clearly will not have nearly as significant a positive impact on the educational experience of law students as having a greater variety of minority and women teachers.⁶⁵ Indeed, seeing and experiencing the diversity of opinion within members of a minority group, and among women, teaches students volumes about racial and gender diversity in and of itself.

As this discussion suggests, a “critical mass” of faculty of color will help to ensure that minority faculty members do not feel as if they represent little more than lip service to diversity. It also will minimize the potential that a minority faculty member will feel that she is looked to by students and colleagues to offer the law school’s “minority perspective,” an uncomfortable predicament for a faculty member. Unfortunately, many minority law professors feel precisely this way,⁶⁶ as tokens rather than as representing a true and meaningful commitment to diversity and inclusion.

In addition, a single minority faculty member⁶⁷ is more likely to leave a law school for greener (i.e., more diverse) pastures elsewhere. Who, to use Dean Rachel Moran’s vivid phrase, wants to be a “Society of One”? Many minority faculty members have bittersweet memories of being just such a society at various—indeed, sometimes many—stages of their lives. Thus, the retention of minority faculty members will depend in part on the ability of a law school to maintain a “critical mass” of diversity on its faculty.

2. Who Counts?

In evaluating the racial diversity of law faculties, it seems relatively clear that we should consider faculty members who are African American, Latina/o, and Native American, all groups that are severely underrepresented in legal education and the legal profession.⁶⁸ However, some might immediately ask whether Asian Americans, who are richly represented on college and university campuses across the United States,

65. See Dubin, *supra* note 42, at 455 (arguing that the benefits of a diverse faculty include enhanced perspectives and “robust exchange of ideas” (quoting Jonathan Alger, *When Color-Blind Is Color Bland: Ensuring Faculty Diversity in Higher Education*, 10 STAN. L. & POL’Y REV. 191, 199 (1999) (internal quotation marks omitted))).

66. See Delgado, *supra* note 34, at 1226–31.

67. See Rachel F. Moran, Commentary, *The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503, 513 (1986) (“[F]ewer [minorities and women] will fall and more will endure successfully as Societies of One, until larger numbers of minorities and women make it possible to create Societies of Two, Three, and more. It takes courage and principle to stand as a Society of One and to preserve the dream deferred until it becomes a community dream.”).

68. See, e.g., Floyd Weatherspoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 80 MISS. L.J. 259, 260 (2010) (“Very few African American males complete the long and daunting journey to enter and advance in the legal profession.”).

should be counted in evaluating the racial diversity of a law faculty.⁶⁹ (For now, I will not touch the thorny issues that persons of mixed racial backgrounds raise, which hit close to home.⁷⁰)

Importantly, as in evaluating the diversity of a student body, the benefits of a diverse law faculty accrue with or without societal (or university) underrepresentation of a particular group.⁷¹ A remedial-based rationale for diversifying a law faculty based on a school's past discrimination might lead to a different result.⁷² The goal of a diverse faculty including Asian Americans is not premised on the need to remedy past discrimination against Asian Americans, even though such discrimination has been documented as existing at various times by different institutions in U.S. history,⁷³ but to ensure diversity among law faculties for educational reasons, namely for the benefit of students, faculty, and legal scholarship.

The fact of the matter is that Asian Americans historically have been severely underrepresented in the field of law in the United States and remain so today. Societal and other pressures, including but not limited to enduring racial stereotypes, have historically tracked many Asian Americans into the study of math and the sciences.⁷⁴ Some commentators also have claimed that law faculties have based hiring decisions on stereotypes of the so-called "passive" or "quiet" Asian to argue that Asian-American faculty

69. See Sharon S. Lee, *The De-Minorization of Asian Americans: A Historical Examination of the Representations of Asian Americans in Affirmative Action Admissions Policies at the University of California*, 15 ASIAN AM. L.J. 129, 136-42 (2008) (discussing support in the 1970s from Asian-American advocacy groups for the UC Davis School of Medicine admissions program that included Asian-American applicants); Victoria Choy, Note, *Perpetuating the Exclusion of Asian Americans from the Affirmative Action Debate: An Oversight of the Diversity Rationale in Grutter v. Bollinger*, 38 U.C. DAVIS L. REV. 545, 569 (2005) ("[C]ourts, including the United States Supreme Court, erroneously view Asian Americans as a uniform, successful group. If judges and courts do not distinguish between the 'overrepresented' and 'underrepresented' Asian Americans, they may continue overlooking the needs of Asian Americans in equal protection jurisprudence.").

70. See generally KEVIN R. JOHNSON, HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY (1999) (analyzing, from an autobiographical perspective, the identity issues faced by a person of mixed Anglo/Latino ancestry).

71. For a discussion of how Asian Americans remain underrepresented in the humanities, social sciences, and law, see Lee, *supra* note 69, at 149, and also see Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 ASIAN L.J. 39, 49 & n.29 (1996), for a discussion of how Asian Americans are underrepresented on law-school faculties and how they are often stereotypically perceived as competent in technical acumen but lacking in social skills.

72. See *supra* note 7 and accompanying text.

73. See generally BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850-1990 (1993) (analyzing the historical impact of discriminatory U.S. immigration laws on the Asian-American community in the United States); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1998) (analyzing history of discrimination against Asian Americans in the United States).

74. See Lee, *supra* note 69, at 149; Yen, *supra* note 71, at 49 & n.29.

candidates with strong academic credentials nevertheless would not cut it as teachers.⁷⁵

* * *

In essence, the relative excellence of law schools rests in part on the diversity of their law faculties as well as of their student bodies. Both should be considered in any legitimate attempt to measure the quality of a law school. A diverse faculty benefits a law school's teaching and scholarship missions. A "critical mass" of diverse law faculty will contribute to a true community among law faculty (as opposed to a "Society of One"), and a law school will be more likely to recruit and retain minority and women faculty.

IV. THE IMPORTANCE OF A BROAD CONCEPTION OF DIVERSITY TO A LEGAL EDUCATION

To this point, this Essay has focused on racial minorities and gender in considering the benefits of diverse student bodies and law faculties. In addition to racial diversity, however, diversity of background, experience, and knowledge among law students and faculties also may have positive impacts on the teaching, scholarship, and overall community of a law school. Socioeconomic status,⁷⁶ ideology, sexual orientation,⁷⁷ disability, and religion, to name a few characteristics, can be important ingredients of a truly diverse educational environment.

The list above is clearly not exhaustive. My intentionally modest point here is that diversity among students and faculty is not limited to racial diversity. Rather, diversity on a great many different dimensions can contribute to a positive and well-rounded learning environment. Along these lines, the Supreme Court in its affirmative-action decisions has consistently recognized the benefits of a robust and broad conception of diversity in a student body.⁷⁸

A. BROAD NOTIONS OF DIVERSITY IN *BAKKE* AND *GRUTTER*

In the landmark decision of *Regents of University of California v. Bakke*, Justice Lewis Powell, writing for a plurality of the Supreme Court, emphasized that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single . . . element."⁷⁹ In rejecting what

75. See, e.g., Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 40-41 (1994).

76. See generally RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996) (advocating class-based affirmative-action systems as alternatives to race-conscious ones).

77. See Kelly Strader et al., *An Assessment of the Law School Climate for GLBT Students*, 58 J. LEGAL EDUC. 214, 214 (2008).

78. See *infra* Part IV.A.

79. 438 U.S. 265, 315 (1978) (plurality opinion).

the Court viewed to be a rigid—and unconstitutional—quota system, he specifically endorsed the vigorous quest for heterogeneity among students along many different dimensions pursued by the admissions process then in place at Harvard College.⁸⁰ Indeed, Justice Powell included the Harvard College Admissions Program as an appendix to his opinion to serve as an example of good practices.⁸¹ Few modern observers dispute the benefits of a broad notion of diversity.⁸²

Similarly, besides seeking to enroll a critical mass of minority students, the Michigan Law School admissions system upheld by the Supreme Court in *Grutter v. Bollinger* demonstrated a commitment to pursue diversity of many different types in its student body; indeed, “the Law School engage[d] in a *highly individualized, holistic review* of each applicant’s file, giving serious consideration to *all the ways* an applicant might contribute to a diverse educational environment.”⁸³

As the Court acknowledged, “[l]ike the Harvard plan, the [Michigan] Law School’s admissions policy [in place at the time] ‘is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.’”⁸⁴ The Court concluded that “the Law School’s race-conscious admissions program adequately ensures that *all factors that may contribute to student body diversity* are meaningfully considered alongside race in admissions decisions.”⁸⁵

In defending its robust conception of diversity, the University of Michigan Law School offered examples of many different characteristics and experiences that might contribute to a rich learning environment, including students who:

- “have lived or traveled widely abroad”;
- “are fluent in several languages”;
- “have overcome personal adversity and family hardship”;
- “have exceptional records of extensive community service”;
- “have had successful careers in other fields.”⁸⁶

80. *See id.* at 316–18.

81. *See id.* at 321–24.

82. *But see* Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1900–10 (1996); Lino A. Graglia, “Affirmative Action,” *Past, Present, and Future*, 22 OHIO N.U. L. REV. 1207, 1214 (1996); Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2076 (1996).

83. *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (emphasis added).

84. *Id.* (emphasis added) (quoting *Bakke*, 438 U.S. at 317).

85. *Id.*

86. *Id.* at 338.

Moreover, “[t]he Law School seriously considers each ‘applicant’s promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—*e.g.*, an unusual intellectual achievement, employment experience, nonacademic performance, or personal background.’”⁸⁷ After reviewing the record, the Court in *Grutter v. Bollinger* concluded that the University of Michigan Law School, in practice, actually considered diversity other than race—rather than embracing a broad notion of diversity simply as window dressing to obscure overreliance on race in the admissions decision—that an applicant might bring to the law school.⁸⁸

As *Bakke* and *Grutter* suggest, the Supreme Court takes seriously its endorsement of a broad conception of diversity in admission programs. In a companion case to *Grutter*, the Court found that a race-conscious undergraduate admissions plan at the University of Michigan, as a practical matter, made race the decisive factor in admissions decisions—and thus in operation was the antithesis of individualized review—and therefore violated the Equal Protection Clause of the Fourteenth Amendment.⁸⁹

Similarly, the Court just a few years later in a controversial decision struck down local-school-district plans that relied exclusively on race in an “‘nonindividualized, mechanical’ way” in an attempt to achieve racial balance in public elementary and secondary schools.⁹⁰ Race was not merely one factor in the school assignment process at issue in that case. In the estimation of a plurality of the Court, race was “decisive by itself” and did not provide for “meaningful individualized review,”⁹¹ as required by Supreme Court precedent.

Put simply, the Supreme Court has placed its imprimatur on diversity of many sorts in evaluating—and, in the case of *Grutter v. Bollinger*, rejecting—constitutional challenges to the consideration of race in public-college and -university admission systems. Although race unquestionably is a critical contributor to diversity in a student body, most experienced teachers will tell you that it is not the *only* form of diversity that enhances the educational environment for students and faculty. Diversity of class, gender, and many other characteristics and experiences can also contribute positively to the education of the student body, both inside and outside the classroom.

87. *Id.*

88. *See id.* at 334–35, 339.

89. *See Gratz v. Bollinger*, 539 U.S. 244, 274–75 (2003).

90. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (plurality opinion) (quoting *Gratz*, 539 U.S. at 276, 280 (O’Connor, J., concurring)). The Court’s decision in *Parents Involved* has been much criticized. *See, e.g.*, Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); Pamela S. Karlan, Lecture, *What Can Brown® Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049 (2009); Goodwin Liu, *Seattle and Louisville*, 95 CALIF. L. REV. 277, 311 (2007).

91. *See Parents Involved*, 551 U.S. at 723 (quoting *Gratz*, 539 U.S. at 275, 276, 280 (2003) (O’Connor, J., concurring)) (internal quotation marks omitted).

B. DIVERSITY IN TIMES OF (RACIAL) LIMITS

Importantly, a number of states, as a policy matter,⁹² prohibit the use of race-conscious affirmative action. California public colleges and universities, for example, are constrained by Proposition 209, an initiative passed by the state's voters in 1996 that bans the consideration of race in the admissions process.⁹³

In recent years, affirmative action has come under attack in the political arena. For example, a few years ago, the American Bar Association ("ABA"), the mainstream national bar association, urged greater diversity at law schools. This step provoked critical scrutiny by, surprisingly enough, the U.S. Commission on Civil Rights; like the administration of President George W. Bush, the Commission expressed skepticism about race-conscious affirmative action.⁹⁴ In addition, the ABA, prodded by the Bush administration, imposed law-school-accreditation requirements for bar passage rates despite forceful opposition, contending that such a change might have a detrimental impact on law schools with the largest minority enrollments.⁹⁵

After the Supreme Court's decision in *Grutter v. Bollinger*, political movements opposed to race-conscious admissions blossomed. Today, Proposition 209 in California, as well as similar measures in other states, including Michigan and Washington, prohibit the consideration of race in the admission of students.⁹⁶ Although voters passed Proposition 209 several years before the Court decided *Grutter*, the initiative served as a model for some anti-affirmative-action advocates after the decision to ban the consideration of race in university admissions.

Unfortunately, Proposition 209 had serious adverse impacts on minority enrollment, especially of African Americans and Latina/os, in the

92. See *supra* Part II.B (examining policy arguments against race-based admissions).

93. See CAL. CONST. art. I, § 31(a); see generally Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997) (analyzing the purposes and assumptions of, and arguments for and against, Proposition 209); Karen Miksch, *Widening the River: Challenging Unequal Schools in Order To Contest Proposition 209*, 27 CHICANA/O-LATINA/O L. REV. 111 (2008) (criticizing Proposition 209 and arguing in favor of race-conscious admission practices).

94. See generally U.S. COMM'N ON CIVIL RIGHTS, *AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS* (2007) (reviewing the legal and policy implications of affirmative action in law-school admissions and providing recommendations for future action).

95. See Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 756-57 (2010) (discussing how the Bush administration pressured the ABA to end its push for racial diversity in law-school admissions); Jodie G. Roure, *Achieving Educational Equity and Access for Underrepresented Students in the Legal Profession*, 19 TEMP. POL. & CIV. RTS. L. REV. 31, 40 (2009) ("[S]tudents of color generally have lower bar passage rates than Caucasian students. Lower bar passage rates for students of color result in fewer diverse attorneys in the legal profession, which in turn cripples the legal community, especially communities of color.").

96. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 94, at 177 n.176.

California public-college and -university systems.⁹⁷ Nevertheless, other states followed suit and banned race-conscious affirmative action.⁹⁸

Consequently, although almost every university and college administrator claims devotion to, and often makes statements endorsing the benefits of, a racially and otherwise diverse student body, race is the only factor eliminated wholesale in a number of states from the admissions decisions of public colleges and universities. And while many observers and activists—at times aggressively—demand more racially diverse law-school student bodies, law schools in the states in which race-conscious admissions are prohibited are handicapped in their efforts to achieve that goal.

Besides barring the consideration of race in admissions, public colleges and universities, unlike their private counterparts, cannot target minority students for scholarships in anti-affirmative-action jurisdictions.⁹⁹ Private schools can and do, however, aggressively compete for minority students through financial assistance and, in my experience, have been increasingly successful in luring them away from public law schools.

In the states that prohibit the consideration of race in the admissions process, there have been efforts to ensure socioeconomic and other diversity, without race-conscious affirmative action, among public-college and -university student bodies. For example, the “10% plan” adopted by the Texas legislature guarantees that the top ten percent of the graduating class of every high school in the state is eligible for admission to a Texas public university.¹⁰⁰ In addition, “pipeline” programs like those funded by the Law School Admission Council¹⁰¹ are designed to increase the numbers of

97. See generally Jennifer M. Chacón, *Race as a Diagnostic Tool: Latina/os and Higher Education in California, Post-209*, 96 CALIF. L. REV. 1215 (2008) (focusing on the underrepresentation of Latina/os in higher education in California).

98. See Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1139 (2008); Symposium, *From Proposition 209 to Proposal 2: Examining the Effects of Anti-Affirmative Action Voter Initiatives*, 13 MICH. J. RACE & L. 461, 464 (2008).

99. See Chacón, *supra* note 97, at 1219 (“The implementation of Proposition 209 has done nothing to address the disadvantages faced by underrepresented minorities in California’s primary and secondary education system. Instead, Proposition 209 simply has taken away one tool . . . that could have remediated some of those inequalities.”).

100. See William E. Forbath & Gerald Torres, *Merit and Diversity After Hopwood*, 10 STAN. L. & POL’Y REV. 185, 185 (1999). The Texas plan was a response to the court of appeals’ decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which held that the University of Texas law school’s race-conscious admission plan violated the Equal Protection Clause. For a study concluding that the Texas plan has not resulted in the hoped-for positive impacts on the enrollment and retention of minority students, see Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan*, 29 ECON. EDUC. REV. 1110 (2010); see also Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 546 (2002) (contending that percentage plans adopted in several states to try to bring diversity to college campuses have had limited success).

101. See Jose Perez, *Cultivating Latino Leaders of Tomorrow*, in DIVERSITY IN LAW PRACTICE 2010: STRATEGIES AND BEST PRACTICES FOR CHALLENGING TIMES 55, 58 (PLI Corporate Law & Practice, Course Handbook Ser. No. B-1795, 2010) (describing “LAWbound,” a Law School

students of diverse backgrounds in the undergraduate pipeline for law school. However, such measures arguably are not as direct or as effective at ensuring racial diversity at law schools as race-conscious admission schemes.¹⁰²

Reminiscent of the Michigan Law School's admissions scheme, but without the consideration of race, the UC Davis School of Law's admissions criteria, for example, instruct applicants about the topics that might be discussed in personal statements submitted in the application process:

The statement may discuss any of a variety of factors, including academic promise, background information and any discrepancies in [grade-point average] and/or [Law School Admission Test] score; growth, maturity and commitment to law study as evidenced, for example, by extracurricular activities, community service, employment experience and advanced study; severe economic disadvantage or physical disability; other factors relating to diversity, including bilingual skills and unusual accomplishments, skills or abilities relevant to the legal profession.¹⁰³

The flexibility of a broad-based, multifaceted approach to diversity allows for an individualized, multifaceted assessment of each application, much like that endorsed by the Supreme Court in *Bakke* and *Grutter v. Bollinger*.¹⁰⁴ Although race cannot be a factor in the assessment of applicants in California's public colleges and universities,¹⁰⁵ other forms of diversity can be weighed in the admissions decisions. Consequently, a law school in a

Admission Council program designed to provide support for Latina/o undergraduates interested in the study of law); Charles R. Calleros, *Enhancing the Pipeline of Diverse K-12 and College Students to Law School: The HNBA Multi-Tier Mentoring Program*, 58 J. LEGAL EDUC. 327, 327-28 (2008) (discussing how the Law School Admission Council collaborated to host and fund a national pipeline diversity conference entitled "Embracing the Opportunities for Increasing Diversity into the Legal Profession: Collaborating to Expand the Pipeline (Let's Get Real)"). At UC Davis, the King Hall Outreach Program strives to provide education and support for undergraduates from socioeconomically disadvantaged backgrounds and those who are first-generation university students to better compete for admission into law school. See *KHOP-King Hall Outreach Program*, UC DAVIS SCH. OF LAW, <http://www.law.ucdavis.edu/prospective/outreach/KHOP.html> (last visited May 8, 2011).

102. See Greenberg, *supra* note 100, at 553; see generally Mex. Am. Legal Def. & Educ. Fund et al., *Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After Grutter and Gratz*, 8 HARV. LATINO L. REV. 33 (2005) (arguing that racially neutral percent plans cannot replace race-conscious affirmative-action programs in terms of achieving racial diversity); Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1596 (2003) (acknowledging that although the Texas 10% Plan was designed to increase racial diversity in Texas undergraduate colleges, it did not operate in the same way for graduate or professional schools); Sara Hebel, "Percent Plans" Don't Add Up, CHRON. HIGHER EDUC., Mar. 21, 2003, at A22 (same).

103. *J.D. Admissions: How to Apply*, UC DAVIS SCH. OF LAW, <http://www.law.ucdavis.edu/prospective/JD/how-to-apply.html> (last visited May 8, 2011).

104. See *supra* Part IV.A.

105. See *supra* note 93 and accompanying text.

jurisdiction like California still can strive for a diverse student body—at least with respect to characteristics other than race—through an individualized, holistic admissions process.

In recent years, a related issue touching on racial diversity in higher education has emerged. The access of undocumented immigrant students, who are not eligible for most federally insured loan and other programs, to public colleges and universities has become a deeply controversial issue.¹⁰⁶ This is not simply an issue of access to higher education but is inextricably entangled with the ongoing national debate over immigration reform.¹⁰⁷ The access of undocumented students to public colleges and universities has consequences for the diversity of the student bodies, given that many undocumented students initially came—some when they were young children—from Latin America and Asia and are people of color as we understand that term in the United States.¹⁰⁸

* * *

The endorsement of broad-based diversity is not the same as achieving it. There are significant impediments to achieving diversity of all different types. For example, the most influential law-school rankings system, which has a measurable impact on how law schools operate, allocate resources, and plan for the future, does not credit diversity of any sort among students and faculty.¹⁰⁹ All told, precious few incentives exist for law schools to strive to achieve diversity. Part V of this Essay offers some thoughts on the practical impediments to the pursuit of a diverse student body and faculty.

V. INCENTIVE SYSTEMS FOR LAW SCHOOLS AND DEANS, THE *U.S. NEWS* RANKINGS, AND THE QUEST FOR DIVERSITY

As anybody reading this Essay is no doubt well-aware, ensuring a diverse student body and faculty, racially and otherwise, is easier said than done. This part of the Essay identifies an oft-ignored, but very real, practical problem facing law schools striving to achieve a diverse student body and

106. See Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259, 1280–82 (2008). For a detailed analysis of the various bills designed to benefit undocumented college and university students, known collectively as the DREAM Act, see Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009). In December 2010, the latest version of the federal DREAM Act failed in the U.S. Senate. Shankar Vedantam, *DREAM Act Defeat Reveals Failed Strategy*, WASH. POST, Dec. 19, 2010, at A3.

107. See generally *Comprehensive Immigration Reform Symposium: Problems, Possibilities and Pragmatic Solutions*, 55 WAYNE L. REV. 1599 (2009) (addressing various issues of immigration reform).

108. See generally Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1 (2009) (analyzing the disparate impacts of the operation of the U.S. immigration laws on poor and working people of color from the developing world).

109. See *infra* Part V.

faculty. Importantly, current reward structures for law schools—and law-school deans—do not reward schools that are truly committed to a diverse student body and faculty as concretely as they reward other outcomes.

Many observers extoll the virtues of diversity among students and faculty, and deans often receive advice on what must be done on this front.¹¹⁰ However, internal and external reward systems provide minimal—some might even say little—concrete incentives for pursuit of diversity by law schools and law-school deans. Except for informal kudos and general statements of support, law-school deans ordinarily experience relatively few tangible rewards for enrolling a diverse student body or hiring and retaining a diverse faculty. Many university presidents, whom law deans customarily are directly or indirectly accountable to, generally endorse diversity but fail to tangibly reward law schools and administrators that achieve diverse results.

True, a more diverse law school may receive somewhat less pressure—and fewer protests and complaints—for a perceived lack of diversity from student and other groups than less diverse schools. And some faculty, students, alumni, and donors voice generalized support for the pursuit of diversity. However, my experience has been that few large donors—critical to the long-term success of any sitting dean, with development being an increasingly important task of a law dean in times of budgetary scarcity—express much interest in giving to a law school based on the relative success of the school in achieving a diverse student body and faculty.

In stark contrast, many donors and alumni pay close attention to a law school's track record in various law-school rankings, especially the *U.S. News & World Report* annual ranking of law schools.¹¹¹ Indeed, I have found that, year in and year out, talk of *U.S. News* rankings often dominates the discussions at virtually any alumni gathering. The *U.S. News* rankings, however, do not measure law-school quality by incorporating into the rankings formula any measure of the diversity of a law school's student body and faculty.¹¹² Nor, for that matter, do the *U.S. News* rankings expressly incorporate teaching quality or student satisfaction into the rankings, both of which unquestionably contribute to the quality of a law school, the law-school community, and a legal education.¹¹³

The *U.S. News & World Report* rankings of law schools are an elaborate, albeit by almost all accounts imperfect, rankings system that garners much attention among law-school watchers. Because of their prominence, the rankings also have a dramatic influence on the perceived prestige of a

110. See AM. BAR ASS'N, *supra* note 2, at 17–24.

111. See U.S. NEWS & WORLD REPORT, AMERICA'S BEST GRADUATE SCHOOLS: 2011 EDITION (2010).

112. See *id.*

113. See *id.*

school. Importantly, the rankings have impacts on the operation of law schools seeking to climb the rankings and, as is oft-repeated, “move to the next level.” Schools and administrators respond to the rankings and directly play to the variables factored into the rankings’ formula when making decisions about admissions, faculty hiring, curricular offerings, allocation of resources, and many other facets of the law-school program.

Currently, student *selectivity* factors heavily into the *U.S. News* rankings. The median score on the Law School Admission Test (“LSAT”), the standardized test employed for law-school admissions, accounts for one-half of the measure of a law school’s student selectivity.¹¹⁴ As a result, law schools compete aggressively through scholarships and financial aid for the students with high LSAT scores, which has been referred to in a jocular way as the “LSAT ‘arms race.’”¹¹⁵

In contrast, student *diversity* is not considered at all in the *U.S. News* rankings of law schools. To remedy what I believe to be a serious failing, I have advocated integrating the diversity of law-school student bodies into the influential *U.S. News* rankings.¹¹⁶

As with student diversity, I am on record supporting the inclusion of faculty diversity in the formula employed by *U.S. News* for the ranking of law schools. I firmly believe that, for reasons similar to those that militate in favor of diverse student bodies,¹¹⁷ the greater the diversity within a law faculty, the higher the quality of the legal education for the students and the better the law school.

Some proponents of diversity might reject any consideration of the *U.S. News* rankings as a measure of law-school quality, viewing them as a lost cause when it comes to encouraging law schools to enroll a more diverse student body and to strive for a truly diverse law faculty.¹¹⁸ Indeed, most law-school deans invariably love to hate the *U.S. News* rankings and have registered powerful complaints; many thoughtful observers have offered

114. *See id.* at 32.

115. William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 978 (2004).

116. *See* Amar & Johnson, *Student Diversity*, *supra* note 1. The California State Bar Board of Governors also has asked *U.S. News* to add a diversity category to its law-school-ranking methodology. *See* Diane Curtis, *Include Diversity in Law School Ratings, Bar Board Says*, CAL. B.J., Feb. 2011, <http://www.calbarjournal.com/February2011/TopHeadlines/TH5.aspx>. *U.S. News* currently includes a separate ranking of the diversity of law-school student bodies; however, this ranking receives relatively little attention. *See* Goodman, *supra* note 22, at 32 n.115; Espeland & Sauder, *supra* note 18, at 593. To test that assertion, can the reader with any degree of certainty identify which law school is at the top of the latest list of most diverse student bodies? Answer: Florida A&M. *See* U.S. NEWS & WORLD REPORT, *supra* note 111, at 35.

117. *See supra* Part II.

118. *See* Sam Kamin, Commentary, *How the Blogs Saved Law School: Why a Diversity of Voices Will Undermine the U.S. News & World Report Rankings*, 81 IND. L.J. 375, 378 (2006).

reasons why they should be ignored.¹¹⁹ A few years ago, the deans of nearly all accredited law schools signed a letter that characterized ranking methodologies, such as that of *U.S. News*, as “inherently flawed.”¹²⁰ One law-school dean went so far as to flatly refuse to respond to the *U.S. News* survey of information used to rank a school and thus opted out of the rankings.¹²¹

At first glance, a simple boycott of the *U.S. News* rankings, which consider a great many factors but exclude any measure of student and faculty diversity, might appear to be the appropriate alternative for those schools and deans truly committed to diversity. A boycott, however, would not have much of an impact without mass participation, which seems unlikely; without such participation, a boycott by a school indeed might have negative impacts on a law school’s reputation and prestige if it falls completely out of the rankings.

Moreover, there is nothing like consideration of a factor in the *U.S. News* rankings to grab the attention of—and lead to concrete action by—law-school deans across the United States. Those rankings, for better or worse, have proven to be a critically important consideration—perhaps the most frequently relied upon indicator of law-school quality—by prospective students from all backgrounds when selecting a law school. Prospective faculty members are not much different, although hopefully they are more sophisticated in their decision-making about where to accept a faculty position.

Love them or hate them, it is unquestionably the case that the *U.S. News* law-school rankings have concrete impacts. They directly affect application numbers, yields on offers of admission, and overall law-school enrollment, to name a few measurable impacts. They also have an impact on faculty recruitment, as faculty candidates consider the rankings in deciding which law-school job offer to accept. In certain respects, the rankings can be a self-fulfilling prophecy, with present upward movement contributing to future upward movement as reputational surveys in the current year reflect ascendancy in the rankings in past years.

Moreover, as virtually any sitting law-school dean can tell you, the rankings have less tangible but deep, lasting, and meaningful impacts on the morale of faculty, students, alumni, donors and potential donors, and staff at

119. See, e.g., Ronald A. Cass, *So, Why Do You Want To Be a Lawyer? What the ABA, the AALS, and U.S. News Don't Know That We Do*, 31 U. TOL. L. REV. 573 (2000); Russell Korobkin, Essay, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 404 (1998). But see Mitchell Berger, *Why the U.S. News and World Report Law School Rankings Are Both Useful and Important*, 51 J. LEGAL EDUC. 487 (2001).

120. LAW SCH. ADMISSION COUNCIL, LAW SCHOOL DEANS SPEAK OUT ABOUT RANKINGS 1 (2005), available at <http://replay.waybackmachine.org/20060209215746/http://www.l sac.org/pdfs/2005-2006/RANKING2005-newer.pdf>.

121. See Julie Kay, *Florida Law Dean Boycotts 'U.S. News' Rankings Survey*, LAWJOBS.COM (May 3, 2010), <http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=1202457535997&slreturn=1&hblogin=1>. For other criticisms of the rankings, see sources cited *supra* note 5.

just about any law school,¹²² as well as how those constituencies perceive the quality of that school. All want to be affiliated with a school moving up, not sliding down, in the rankings. Put bluntly, people want to be associated with a winner; the rankings are one of the few objective indicators of being one.

As almost any dean whose law school has dipped in the rankings can attest, a law school's decline in the *U.S. News* rankings can mean an extremely long and unpleasant year for the dean. Indeed, law-school deans have reportedly left (some might say have been forced from) their jobs because of a fall in their schools' place in the *U.S. News* rankings.¹²³ Alternatively, a move upward in a school's ranking makes for a much cheerier group of faculty, students, staff, and alums—as well as campus administrators.

Indeed, the *U.S. News* rankings' methodology arguably penalizes schools seeking to promote diversity. A 2010 Report of the Special Committee on the *U.S. News* rankings by the Section of Legal Education and Admissions to the Bar concludes that, in its evaluation of law-school quality, the current *U.S. News* "methodology tends to reduce incentives to enhance the diversity of the legal profession."¹²⁴ In fact, by focusing, for example, on median LSAT scores as the predominant measure of student selectivity,¹²⁵ the *U.S. News* rankings arguably inhibit law schools from aggressively pursuing diversity among the student body.¹²⁶ At a minimum, the *U.S. News* rankings methodology requires law-school administrators to carefully weigh the ranking implications of any measures—such as less reliance on LSAT scores

122. See Espeland & Sauder, *supra* note 18, at 588; Rachel J. Littman, *Training Lawyers for the Real World Part Two*, N.Y. ST. B.J., OCT. 2010, at 31, 37; Sauder & Lancaster, *supra* note 5, at 109–10.

123. See, e.g., Mónica Guzmán, *Dean of UH Law Center Resigning; Move Follows Criticism for Drop in National Ratings*, HOUS. CHRON., Apr. 18, 2006, at B1.

124. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON THE *U.S. NEWS AND WORLD REPORT* RANKINGS 3 (July 15, 2010) (emphasis added), available at <http://amlawdaily.typepad.com/files/f.usnewsfinal-report.pdf>. An ABA committee is currently considering whether to make the LSAT optional for law schools. See Debra Cassens Weiss, *LSAT Would Be Optional Under Possible ABA Accreditation Change*, A.B.A. J. (Jan. 13, 2011, 9:29 AM), http://www.abajournal.com/news/article/lSAT_would_be_optional_under_possible_aba_accreditation_change/?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Daily+News&utm_content=Netvibes.

125. See *supra* text accompanying notes 111–15.

126. See, e.g., Janice L. Austin, *LSAT, U.S. News and Minority Admissions*, 80 ST. JOHN'S L. REV. 289 (2006); Espeland & Sauder, *supra* note 18; Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309 (2006); Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107 (2006); Laura Rothstein, *The LSAT, U.S. News & World Report, and Minority Admissions: Special Challenges and Special Opportunities for Law School Deans*, 80 ST. JOHN'S L. REV. 257 (2006).

in admissions decisions—designed to increase diversity among the student body.¹²⁷

In reality, my experience has been that few but the true believers seem to care much about—or at least pay more than lip service to—the importance of a racially diverse faculty and student body at a law school. This, perhaps, is too strong a statement. Nonetheless, it undoubtedly is the case that the incentives are less tangible than for other achievements of a law school, such as ascendance in the *U.S. News* rankings and large six-figure (and more) gifts.

From this dean's perspective, one is left to ponder whether a law school should pursue diversity simply because it is the right thing to do (and I firmly believe that it is) and produces concrete educational and scholarly benefits, even if, in the larger scheme of things, it is lightly rewarded in the law-school and decanal reward structure.

VI. CONCLUSION

Racial diversity is one form of diversity among law students and faculty that may provide educational and other benefits to students, the faculty, and the law school generally. Socioeconomic diversity also can add benefits to a law-school education. Gender and other diversities undoubtedly can as well. This Essay has sketched some of the benefits from diversity in law-school student bodies and faculties.

This Essay also has sought to identify some of the practical challenges for law schools and law-school deans pursuing racial and other forms of diversity in a time of increasing limitations on race-conscious admissions and growing competition for law students and faculty. Although I perhaps have raised more questions (or at least food for thought) than answers, these are important questions that law-school deans—especially those committed to student and faculty diversity—should consider.

127. For a forceful argument for eliminating consideration of LSAT scores in law-school admissions, see Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593 (2001).

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

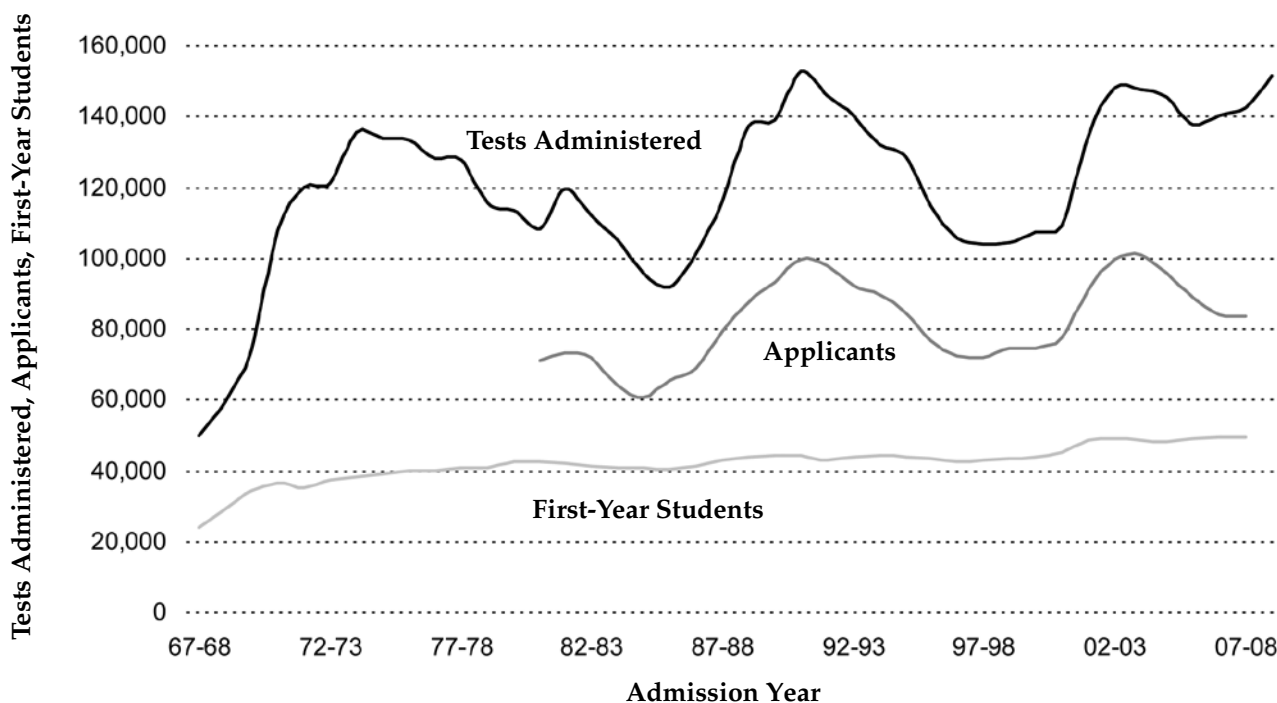


Figure 1: Tests Administered, and Applicants and First-Year Students at ABA-Approved Law Schools, 1967–1968 through 2007–2008. (Note: Due to changes in data collection methods, ABA-approved law school applicant data beginning in 1999–2000 is not directly comparable to prior applicant data.) (Source: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

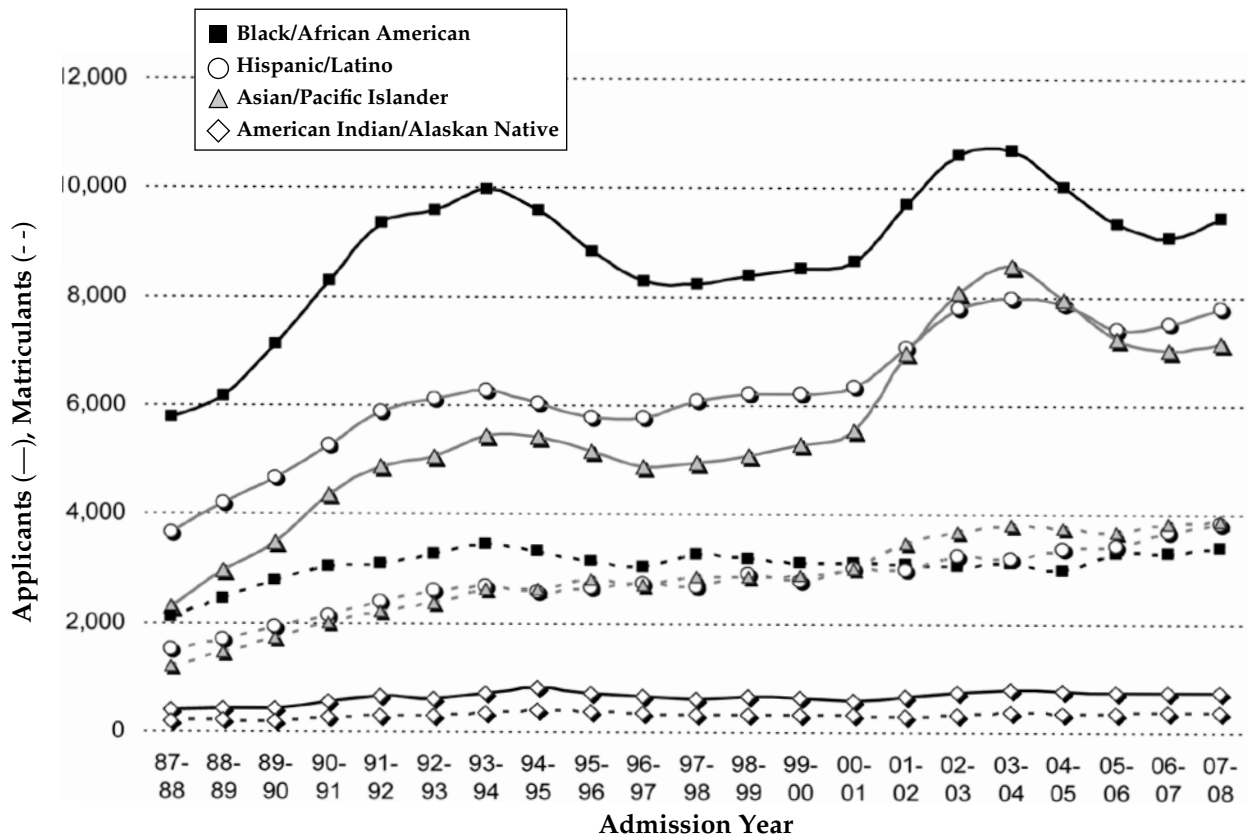


Figure 3: Minority Applicants (—) and Matriculants (- -), 1987–1988 through 2007–2008 (based on applicants who provided their ethnicity). (Note: Due to changes in data collection methods, ABA-approved law school applicant data beginning in 1999–2000 is not directly comparable to prior applicant data.)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

by Frank DiMaria

A fundamental skill or a habit of mind for any lawyer is the ability of an individual to consider facts and issues from a number of perspectives, a skill that law schools attempt to teach in a variety of ways. Employing this habit of mind precludes individuals from thinking that the



“It sounds naive, perhaps, but I am still shocked at how far we *haven't* come and how few people realize it or care.”

Christina Quintero, student,
Columbia School of Law

way they perceive pertinent issues is the perspective used by others. “This is poison for any lawyer,” said Conrad Johnson, clinical professor of law at Columbia Law School (N.Y.).

A decent advocate understands and appreciates the way the other side looks at the facts and interprets the law. For lawyers to be persuasive, they must consider the various issues a judge might consider, Johnson added. For lawyers to learn to employ multiple perspectives and ply their trade effectively, law schools must embrace diversity.

But not all law schools are doing so. Johnson and two students at Columbia Law School have created a new Web site that documents a disturbing drop in enrollment of Mexican-American and African-American students in America’s law schools, despite the relatively constant numbers of minority applicants over the last 15 years.

Even more worrisome, according to the Web site, during that same period, Mexican-Americans and African-Americans are doing better than ever on the leading indicators that law schools use to determine admissibility, such as undergraduate grade point average and LSAT scores. In addition, the size of law school classes and the total number of law schools have increased, making room for nearly 4,000 additional students.

First-year African-American and Mexican-American enrollment has declined 8.6 percent, from a combined 3,937 in 1992 to 3,595 in 2006. These data are provided together for the first time on the new Web site (www2.law.columbia.edu/civilrights) created by Columbia Law School’s Lawyering in the Digital Age Clinic, in collaboration with the Society of American Law Teachers (SALT).

Johnson said that he had heard “anecdotally” that minorities were not represented in America’s law schools, “and I thought ‘this can’t be true; things have come too far.’”

To get to the bottom of the issue, he and current student Christina Quintero, and former student Jeffrey Penn began talking to admissions people and people of “good will” who care about these issues and want to see minorities succeed. They spoke to individuals from a number of organizations, scoured the Web for data and sifted through that data. They found year-to-year comparisons, but nothing that tracked minority representation at law schools longitudinally. While year-to-year comparisons are useful, they do not reveal the bigger picture.

“We all spent a lot of time looking at the numbers, discussing the factors that may be contributing to these devastating consequences and asking other people what they thought about the issue, through both formal interviews and informal conversations,” said Quintero.

She and the others pored over the numbers and could not believe what they were seeing. “Being in law school and working a bit in the legal profession, you certainly notice that the legal profession is not nearly as diverse as it should be, but I never thought that we had actually regressed as much as these numbers indicate. I think we are told, especially in law school, how far we have come, how much work the law has

American Law School Enrollment

done for the people. It was shocking and disheartening to realize that what may appear to happen or what happens on paper doesn't actually have the result it should.

"It sounds naive, perhaps, but I am still shocked at how far we *haven't* come and how few people realize it or care. Sadder still is the hopelessness that seems to permeate a lot of people's thinking now, with new Supreme Court decisions and a general political and social climate that doesn't seem concerned with or friendly to what so many people have been fighting for, for decades," said Quintero.

By studying the data, Johnson, Quintero and Penn hoped to see the issue in the context of factors that might affect the numbers longitudinally, such as supply of students, the demand for law school, the quality of applicants and the number of seats that are available.

Johnson said that through the data he was seeing "the striking dissonance of more Mexican-Americans in law schools in 1992 than there are today. You also see that in the context of there being 10 percent more seats and better quantitative measures on the part of that population and steady demand on that part of the population for law school seats. That is a striking result and one that I know surprises a number of people," said Johnson.

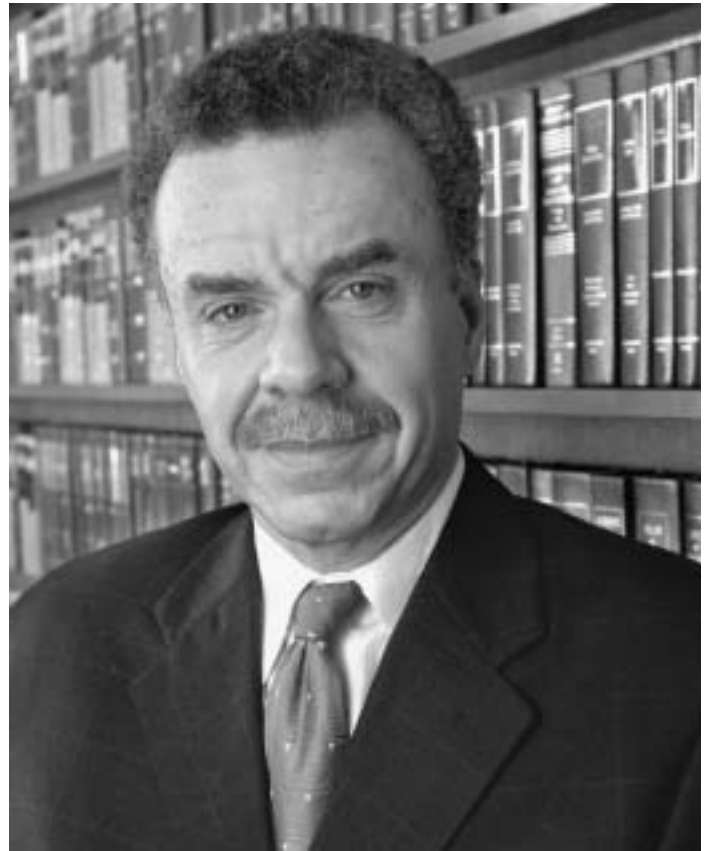
To Johnson, it's not at all an ideological issue – it's just a set of facts that are not realized widely or are not known widely. Ideologically, people argue about affirmative action and opportunity as though these issues are passé and should be removed from the social radar screen. But the numbers prove that this is an issue that must be addressed. "The problem has not gone away," said Johnson.

Concerning affirmative action, the Web site includes an analysis of the 2003 U.S. Supreme Court decision written by then-Justice Sandra Day O'Connor in *Grutter v. Bollinger*, which reaffirmed the limited use of affirmative action in university and law school admissions. In this, the most significant affirmative action case in a generation, the Supreme Court found that "student body diversity is a compelling state interest that can justify the use of race in university admissions."

Paula Johnson, a SALT board member and professor at Syracuse University College of Law, prepared the analysis of the *Grutter* case, which was one of the most important decisions on affirmative action in higher education in a generation. It was the first time since *Regents of University of California v. Bakke*, in 1978, that the U.S. Supreme Court considered a constitutional challenge to race-conscious admissions policies at institutions of higher education. In *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Supreme Court reaffirmed the constitutionality of the consideration of race and ethnicity in university and law school admissions decisions, according to the Web site.

Grutter v. Bollinger and *Gratz v. Bollinger* were class-action lawsuits in which White applicants claimed they were denied admission to the University of Michigan Law School and undergraduate program, respec-

tively, because the university unconstitutionally used race as a predominant factor in admissions decisions. The claimants alleged violations under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the



Through data, Johnson sees "The striking dissonance of more Mexican-Americans in law schools in 1992 than there are today."

Conrad Johnson, clinical professor of law, Columbia Law School

Civil Rights Act of 1964.

The court rejected the argument that consideration of race in the admission decision was unconstitutional. Instead, the court adopted Justice Powell's pivotal plurality opinion in *Bakke*, in which diversity in higher education was found to constitute a compelling state interest.

In addition to Johnson's analysis of *Grutter*, the Web site presents a number of best practices taken from the 2004 publication *Preserving Diversity in Higher Education: A Manual on Admissions Policies and Procedures after the University of Michigan Decisions*. Written by attorneys from the law firms Bingham McCutchen LLP, Morrison & Foerster LLP, and Heller Ehrman White & McAuliffe LLP, the manual has become a tool for admissions officers, general counsel and others involved in crafting admissions policies. It provides a clear, comprehensive legal interpretation

Quintero acknowledged that there is no simple solution or single way to solve the problem, but she feels strongly about redefining student merit, rethinking the LSATs, and dismantling those ranking systems that seem to be ubiquitous in the profession of law.

Johnson agreed and said that admissions officers should evaluate the entire individual – the most important best practice and one that not every school employs. According to Johnson, some law schools – Columbia being one – have the correct approach when it comes to admissions. Others do not. Some schools, for example, take shortcuts and employ automatic cutoffs. One of those shortcuts to which Johnson is referring involves an improper use of the LSAT.

Johnson said that even the Law Schools Admissions Council, which administers the LSAT, indicates that the test is only a rough predictor of

Currently, one in three people in the U.S. is non-White, and 89.2 percent of the country's lawyers are White.

of the Supreme Court decisions to help universities and law schools around the country as they redraft their policies to comply with the 2003 high court rulings.

Those admissions practices that the Web site considers constitutional are: assigning a "plus" to the race of a candidate when it contributes to the diversity of the class; weighing race as heavily as – or even more heavily than – other qualities if it contributes to the diversity of the class (but not so much as to guarantee admission); considering race after weighing several additional qualities of the candidate, as long as the consideration of race does not guarantee admission; striving for a flexible "critical mass" or variable goal of admitted minorities; conducting a full comparison of the candidate's qualities – including his or her race – with those of other candidates; and keeping and referring to the demographic composition of the admitted class to evaluate the status of goals or critical masses.

Those admissions practices that are not considered constitutional, according to the best practices listed on the Web site are: always giving a "plus" to a candidate's race with no consideration of how it contributes to diversity; weighing race, regardless of whether it contributes to the diversity of the class; basing a decision on race without any consideration or assessment of other qualities of the candidate; basing admissions decisions on attaining a predetermined, rigid number of minorities; insulating a candidate based on his or her race and making an admissions decision without comparison to the general applicant pool; and relying on the demographic composition of the admitted class to determine whether a particular student is admitted or rejected.

As part of their research, Quintero, Johnson and Penn hoped to determine not only who else was talking about this issue, but *how* people were combating it, especially as they explored those strategies that were successful.

"One of our goals was to show that perhaps the way in which people had been thinking about diversity in higher education was a little misguided and that alternative methodologies need to be implemented in order to achieve a more successful result," said Quintero.

first-year success and does not predict success as a lawyer, success in later years or even intelligence. Johnson urges admissions officers to view LSAT scores within a range. For example, a score of 150 can be viewed in a seven-point range on either side.

"You could have gotten a 157 on the test or a 143," said Johnson. This is why hard cutoffs put students, and especially minority students, at a distinct disadvantage. But some law schools still employ them and refuse to consider any student who scores below a given score.

"Even the makers of the exam would say, 'that's an improper use of our numbers,'" said Johnson.

The LSAT, Johnson pointed out, is just one indicator of the many attributes an individual must possess to be a successful lawyer. Good GPAs, an individual's ability to overcome circumstances, set goals, take the initiative, and work with a variety of personalities are other attributes that contribute greatly to the success of attorneys. These, though, are not tested on the LSAT. So evaluating the entire individual is the best approach for the admissions office.

Today's lawyer deals with not only a domestic population that is becoming increasingly non-White but also an international community that comprises a variety of views, making it important for individuals to understand the perspectives and cultural differences that others bring to the table and work effectively with those individuals "to get past the stereotypes," said Johnson.

Currently, one in three people in the U.S. is non-White. In an increasingly globalized legal economy, the idea that 89.2 percent of the country's lawyers are White is a limiting factor and one that does not serve the public well, according to Johnson. "Too many people are talking to too many people who are just like themselves," Johnson said.

Johnson has not tracked the career paths of the many minority members who had aspirations of being lawyers but were never given that opportunity. But, he said, it's the profession's loss and the public's loss as consumers of the profession.



As Law Schools Struggle Diversity Offers Opportunities

By Aaron N. Taylor

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Legal education has been ground zero for practically all of the major challenges facing higher education: rising tuition, rising student debt, a contracted job market, and resulting questions about the utility and value of the degree. Unsurprisingly, there has been a steady drumbeat of bad publicity that has exposed the sausage-making side of law schools to unprecedented scrutiny.

As a result, applications are down more than a third in just three years. First-year enrollments are at their lowest levels in almost 40 years and down 24 percent since the record high just three years ago. Moreover, declining Law School Admission Test registrations, a proverbial canary, suggest those enrollment trends have yet to bottom out.

That has led colleges to lay off faculty and staff members and to revisit pricing strategies; a few have even gone as far as lowering tuition to attract more students—an unthinkable move during the boom. But lost in the din of negativity is a milestone that deserves cautious celebration: Law schools, as a whole, are more racially and ethnically diverse than ever.

Today, students of color account for 26 percent of all law students. Ten years ago, the proportion was 21 percent; 40 years ago, it was 10 percent. Unsurprisingly, the rate of increase has been uneven. Forty years ago, Asians accounted for less than 1 percent of the nation's law students; today, they account for 7 percent. The increase among Hispanic law students has been similarly striking, going from 1.7 percent 40 years ago to 8 percent today. Over the same time, the proportion of black students has gone from 5 percent to 7.5 percent.

The changing demographics of legal education are a welcome and necessary trend, even if most of the change is a result of fewer Asian and white students' applying to law school. But the legal profession remains woefully unrepresentative of the population at large. Blacks and Hispanics account for about 30 percent of the population, but only 8.5 percent of lawyers. That proportion lags behind even the physicians' ranks, in which blacks and Hispanics account for 12 percent. But today's record proportion of black and Hispanic law students, while far below where it needs to be, is a tentative bright spot among all the unfavorable trends. That bright spot, however, could evolve into a dim reality if law schools do not adapt.

In their book *The End of the Pipeline*, the Pennsylvania State University professors Dorothy H. Evensen and Carla D. Pratt write about how the Socratic and case methods—pedagogical bastions of legal education—foster classroom environments that put students of color, women, and "nontraditional" students at a disadvantage. According to data from the Law School Survey of Student Engagement, students of color are less likely to report positive relationships with classmates; female students ask questions in class less frequently; and diverse perspectives are not as commonly expressed as we tend to believe.

To overcome those challenges, reformers have recommended a more seamless and intrusive integration of academic support services and other reforms, like adopting a problem-based approach to framing classroom discussions (as opposed to the venerable case method). Whatever the solution, schools must not miss this opportunity to assess the extent to which their programs aid the development of all students. The ends should be uniform, but the means must be flexible.

An assessment of admissions policies is also critical to the reform discussion. A threshold question is: Do we appreciate the extent of our obligations? When our new classes show up, we are not merely enrolling students; we are enrolling future professionals and leaders. Do our admissions policies and, more important, the qualities we seek in students reflect that long view? And, lastly, do our admissions policies serve equitable ends?

LSAT scores and undergraduate grades play major roles in determining which applicants gain admission to law school. While those indicators do have some value in predicting student success, the value is focused on the first year of law school, an important but nonetheless fleeting period of time. Those indicators have little to no value in predicting longer-term outcomes, like subsequent grades, bar passage, or professional success. Therefore, when one considers the larger purpose of legal education—to prepare students to be ethical professionals and leaders—the folly of undue reliance on the LSAT and undergraduate grades becomes apparent.

Marjorie M. Schultz and Sheldon Zedeck, two University of California at Berkeley professors, conducted a study in which they identified 26 skills that were important to lawyer effectiveness. The skills ranged from the abilities to write, speak, and listen effectively to the abilities to feel empathy for others and passion for one's work. The professors found that the LSAT had very weak predictive value for 10 of the skills and no value at all for the other 16. Interestingly, two of the 10 correlations were negative—meaning, the higher the LSAT score, the less effective the lawyers in the study were at exhibiting the skills in question (in this case, networking and community service). Undergraduate GPA had even less predictive value across the 26 skills.

The authors identified a range of alternative assessments that were much more effective at predicting lawyer effectiveness—including an 80-question instrument that showed positive correlations with 24 of the 26 skills and a 72-question instrument that correlated with 23. Those correlations tended to be weak, but they also tended to be stronger than the LSAT and undergraduate GPA. Moreover, unlike the LSAT and undergraduate GPA, those assessments had very little deleterious racial or ethnic impact. In other words, the assessments were better at predicting lawyer effectiveness and did so in a more responsible and equitable manner. Those findings are yet more proof of the value of truly holistic admissions policies that serve the larger purpose of legal education.

And all of this comes back to the record proportions of students of color. Much of the rhetoric about the trend has been decidedly negative. A popular narrative seems to be that entering cohorts are weaker over all. Bolstering that assertion are large drops in high LSAT scorers—a trend that makes sense, given that whites and Asians tend to score highest on the test. Another thread to the commentary is that the increased diversity is being driven by weak, desperate law schools that are enrolling weak, desperate students in order to fill seats in a declining market.

While I believe those assertions are rooted in the type of elitism that stifles innovation and progress, law schools must be mindful of the stakes involved when they make an offer of admission. Long gone are the sink-or-swim days when orientation rituals included a directive to "look left and right" to observe future academic casualties. Law schools must take ownership of their students' success. Now when an orientation speaker asks new law students to scan the room, it must be to prompt them to take note of their future colleagues. That is why we cannot ignore the imperatives presented by the difficult times we face. Our changing students, profession, and society require us to seize the opportunities in this crisis.

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