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## Who Gets In? The Quest for Diversity after *Grutter*

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## Who Gets In? The Quest for Diversity after *Grutter*

### Authors

Athena D. Mutua, Sheldon Zedeck, Frank H. Wu, Charles E. Daye, Margaret E. Montoya, and David L. Chambers

# TRANSCRIPT

## Who Gets In? The Quest for Diversity After *Grutter*

THE 2004 JAMES MCCORMICK MITCHELL LECTURE  
UNIVERSITY AT BUFFALO LAW SCHOOL  
THE STATE UNIVERSITY OF NEW YORK

ATHENA D. MUTUA—MODERATOR  
SHELDON ZEDECK,  
FRANK H. WU,  
CHARLES E. DAYE,  
MARGARET E. MONTOYA,  
DAVID L. CHAMBERS—PANELISTS

### INTRODUCTION

*Athena D. Mutua*

On March 8, 2004, the University at Buffalo Law School hosted its annual Mitchell Lecture,<sup>1</sup> a panel discussion entitled, “Who Gets In? The Quest for Diversity After *Grutter*.”

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1. Lavinia A. Mitchell endowed the Mitchell Lecture Series in 1950 with a gift in memory of her husband, James McCormick Mitchell, an 1897 graduate of the UB Law School.

The Mitchell Committee<sup>2</sup> decided to focus this year's lecture on innovative proposals to ensure diversity in law school admissions in light of the Supreme Court's ruling in *Grutter v. Bollinger*,<sup>3</sup> which confirmed that race and ethnicity could be taken into consideration in admission decisions for diversity purposes. Noting that much of the debate about *Grutter* thus far has emphasized the decision's constitutionality or its implications for affirmative action, the Committee sought to have a different kind of conversation, one that explored new approaches to admissions that might aid law schools in admitting more diverse student bodies. To this end, the Committee invited five leading scholars, whose work, either analytical or empirical, could change or deepen understandings about the potential for and the obstacles to diversity in law school admissions post-*Grutter*. Their short presentations (each speaker had only twelve minutes to speak), which provoked a lively discussion, are presented in this edited transcript of the event together with selected excerpts from the question and answer period.

#### A. Snapshot of the *Grutter* Decision

The *Grutter* case involved the issue of whether Michigan Law School's use of race as a factor in student admissions violated the Equal Protection Clause of the Fourteenth Amendment and related federal statutes. The suit was brought against the Law School in 1996, by Barbara Grutter, a white Michigan resident with a 3.61 grade-point average ("GPA") and a 161 score on the Law School Admission Test ("LSAT"), after she was denied admission.<sup>4</sup> She alleged that the school "discriminated against her on the basis of race,"<sup>5</sup> and that the school "used race as a predominant factor."<sup>6</sup> Further, she claimed that the Law School "had no compelling interest to justify [its] use of race

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2. The Mitchell Committee included David Engel and Lynn Mather as Co-Chairs, Robert Berger, Ilene Fleischmann, Terrence McCormack, Athena Mutua, and James Wooten.

3. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

4. *Id.* at 316.

5. *Id.* at 317 (alleging that her denial violated the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981).

6. *Id.* She claimed that doing so gave "applicants who belong to certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups.'" *Id.*

in . . . admissions,”<sup>7</sup> anticipating the Supreme Court’s equal protection analysis applying strict scrutiny to race cases, thereby requiring the state to demonstrate both a compelling state interest and a narrowly tailored use of racial classifications to further that compelling interest.

The Supreme Court held in a split five-to-four decision that Michigan Law School has “a compelling interest in attaining a diverse student body,”<sup>8</sup> and that the School’s “narrowly tailored use of race in admissions decisions to further the compelling state interest in obtaining the educational benefits that flow from a diverse student body” is not prohibited by the Equal Protection Clause or the other claimed statutory provisions.<sup>9</sup> Justice O’Connor wrote the majority opinion on behalf of the Court.

The crux of the case, though buried in the rationale, was the Court’s finding that race is a relevant difference in the context of a university’s educational mission of bringing together students of diverse ideas, backgrounds, and experiences. Context matters, said the Court, and strict scrutiny requires that relevant differences be taken into account.<sup>10</sup> In explaining the function of a racial classification in achieving a diverse student body, the Court noted that, “just as growing up in a particular region or having particular professional experience is likely to affect an individual’s views, so too is one’s own, unique, experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”<sup>11</sup> Further, the use of race is narrowly tailored in an admissions program, like Michigan’s, where every applicant receives individual review, each is deemed qualified, all factors of diversity are considered, and race is used as a “plus factor,” but not a defining feature of the application. Finally, the Court expressed the hope that in

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7. *Id.*

8. *Id.* at 329.

9. *Id.* at 343.

10. *Id.* at 327 (noting that “context matters in reviewing race-based governmental action under the Equal Protection Clause,” and that strict scrutiny analysis must take relevant differences into account). *See also id.* at 341 (stating that race-conscious admissions be narrowly-tailored and that strict scrutiny is not abandoned when relevant differences are taken into account).

11. *Id.* at 333 (noting that the need for a critical mass of minority students is not based on belief that minority students always express some characteristic minority viewpoint on any issue; rather, the policy goal is to diminish stereotypes something that cannot be done with token numbers).

twenty-five years race-conscious admissions would no longer be necessary.

### B. *A Glimpse at the Panelists and their Presentations*

1. *Panelists.*<sup>12</sup> Nils Olsen, Dean of the University at Buffalo Law School, opened the Mitchell Lecture with welcoming remarks. He was followed by Lynn Mather, Co-Chair of the Mitchell Committee, who explained the way in which the Committee came to host a panel discussion on diversity in admissions and introduced the panelists in the order in which they spoke.

Professor Sheldon Zedeck began the discussion with a presentation of the research work in which he is engaged with Professor Marjorie Shultz of Boalt Hall School of Law with funding from the Law School Admission Council. The project identifies factors and criteria for successful lawyering and developing and validating tests that can be used as complements to the LSAT for admitting law schools.

Professor Zedeck, a Professor of Psychology at the University of California at Berkley since 1969, was the only social scientist on the panel. He has been involved in numerous efforts to create, evaluate and ensure that job entry tests relate to the actual requirements of a particular job's performance. He has co-authored four books and written numerous articles on the topics of moderator variable, selection and validation, test fairness, banding performance appraisal assessment centers, stress and work, and family issues. He has served on the editorial boards of the *Journal of Applied Psychology*, *Contemporary Psychology*, and *Industrial Relations* and was editor of the *Human Performance*, a journal he co-founded in 1988. Professor Zedeck has also been very active in the Society for Industrial and Organizational Psychology and has been a consultant to a wide variety of public and private sector or-

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12. These biographical descriptions are summaries taken from the Mitchell Lecture announcement brochure, republished as a press release. See Press Release, University at Buffalo Law School, Advancing Law School Diversity to Be Focus of Panel Discussion: Participants to Include Leading Scholars, Experts Involved in Supreme Court Case (Feb. 19, 2004), at <http://www.buffalo.edu/news/fast-execute.cgi/article-page.html?article=65910009> (last visited May 25, 2004).

ganizations particularly in the area of test development as they relate to job entry and performance.

The second speaker, Professor Frank H. Wu, is a Professor of Law at Howard University and an Adjunct Professor at Columbia University. He testified as an expert witness in the *Grutter* case, and has written extensively on issues of race, justice, and the law. In 2002, he published the book entitled, *Yellow: Race in America Beyond Black and White*,<sup>13</sup> which won the "Notable Book" Kiriyama Prize. He also has co-authored the book *Race, Rights and Reparation: Law and the Japanese American Internment*.<sup>14</sup> Since the Lecture, Professor Wu has been named dean of Wayne State University Law School.

Professor Charles E. Daye, the Henry Brandies Professor of Law at the University of North Carolina-Chapel Hill spoke next. He was the first African-American to join the UNC faculty as a tenure-track professor in 1972. Professor Daye was a past president of the Law School Admission Council ("LSAC") and made significant contributions to major LSAC reports on affirmative action, diversity, and test use in law school admissions. He served as dean of the North Carolina Central University School of Law for four years before returning to the UNC-Chapel Hill law faculty. He has taught and published on a variety of issues including, *inter alia*, housing and community development, torts, law school admissions, and black lawyers.

Professor Margaret E. Montoya, the fourth speaker, is a Professor at the University of New Mexico School of Law. She and her students also filed an *amicus curiae* brief in *Grutter*, arguing that New Mexico's urgent need to provide legal services to underserved populations is a compelling state interest justifying considerations of race in law school admissions. She was also a witness for the student defendant-intervenors in the case. Professor Montoya has published extensively in the area of critical race theory and is a past president of the Society of American Law Teachers, a present member of its board of governors, chair of the Diversity Committee for the Law and Society Association

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13. Frank H. Wu, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2002).

14. Eric Yamamoto, Margaret Chon, Carol L. Izumi, Frank H. Wu & Jerry Kang, *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001).

and currently serves as the interim director of the Southwest Hispanic Research Institute.

Professor David L. Chambers, the last panelist, is a longtime supporter of diversity in admissions at Michigan Law School. He is the Wade H. McCree, Jr., Collegiate Professor Emeritus at the University of Michigan Law School and has been a member of the Michigan law faculty for 34 years. Professor Chambers co-authored a comprehensive study of the careers of white and minority graduates of the Michigan Law School entitled, "Minority Law Graduates in Practice," which earned the Distinguished Article award from the Law and Sociology section of the American Sociological Association. Professor Chambers served as a co-chair of the Association of American Law Schools' ("AALS") Task Force on Diversity in Admissions, is past president of the Society of American Law Teachers, and served on the AALS executive committee. He is known for his work on the legal profession and family law.

2. *Presentations.* The presentations focus on three major themes or concerns that pervade discussions about affirmative action and are given voice in the Supreme Court's *Grutter* decision. These themes are diversity, merit, and social justice, including questions of who should bear the cost of systemic subordination, reflecting both current and historically-based oppression. In the law school admissions context these themes become more specific discussions about the meaning of diversity, the place, history, and usefulness of tests, grade point averages as indicators of merit, and the relationship of merit and diversity to the systemic subordination and historical exclusion of certain groups manifested, in part, in the small pool of minority law school applicants.

While each of the presentations takes up these themes, they do not simply rehash the affirmative action debate but explore the underlying assumptions of the quest for diversity in admissions and propose new tools to achieve it.

The Mitchell Committee believed that Professors Zedeck and Shultz's empirical study would provide a distinctive starting point for the discussion it envisioned, and the panel therefore began with an overview of this work. The Zedeck-Shultz research project aims to identify factors and criteria for successful lawyering and to develop and validate tests that can be used in addition to the LSAT



for admitting law students. This project is of particular relevance to the question of diversity because preliminary information suggests that the work may yield law school admission tests that will produce a far more diverse pool of qualified students than is currently culled by law schools' reliance on LSAT and college GPA scores. In this sense the research marries *diversity and merit*, redefining merit in a way that includes diversity. It does so, however, by asking a completely different question: *What makes an effective lawyer?*<sup>15</sup>

What makes an effective lawyer, indeed? During the first stage of their research, Professors Zedeck and Shultz have identified twenty-six factors that contribute to effective lawyering. Professor Zedeck explains several of these factors and notes that these factors will serve as a basis for developing and validating a test in the second stage of the research.

Professor Wu's presentation addresses the reasoning in the *Grutter* case by critiquing what he terms as the Court's abstract notion of diversity. He cautions that diversity, when divorced from the social and historical experiences of particular groups in American society, could be manipulated easily to avoid addressing the issues of Native American, African-American and Latina/o American exclusion. Instead, he explains this abstract view of diversity could be met through the admission of more Asian American or black African students to the exclusion of other historically disadvantaged groups.<sup>16</sup> He asks us always to pose the question: "Diversity for what purpose and for whom?"<sup>17</sup>

Professor Daye describes the preliminary work and motivations for an empirical study he and others have undertaken to explore the connection between race and educational diversity. *Grutter* endorses the proposition that racial diversity contributes to educational diversity. Professor Daye agrees with this proposition, positing that his "life would have been different had he been white" and arguing, as do many proponents of diversity, that racial diversity is crucial to "assure diversity of perspective, experience, expectations, and values."<sup>18</sup> However, opponents to diversity

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15. See discussion *infra* pp. 542-50.

16. See discussion *infra* pp. 552-54.

17. See discussion *infra* pp. 576-87.

18. See discussion *infra* pp. 554-62.

in admissions argue that race is irrelevant. Neither assertion is based in any real empirical evidence; evidence Professor Daye's research may begin to provide thereby better informing this debate.<sup>19</sup>

Professor Daye notes that he is engaging in this research under protest. He believes that the Supreme Court has forced us to focus on the "wrong issue."<sup>20</sup> The issue, as he sees it, consistent with Professor Wu's comments, is one of social justice. Critiquing *Grutter* and the line of cases that support it, Professor Daye notes that almost all avenues for dealing with the current effects of past discrimination and historical exclusion in the context of higher education have been prohibited by the Court, and that the issues of social or redistributive justice are completely off the table.<sup>21</sup>

The last two panelists' presentations situate the issue of diversity in admissions in the wider context of education by shifting the discussion from the underlying assumptions of admissions to considerations of who gets to apply to law school, particularly from minority communities, and what happens to those who apply and are admitted after they enter law school.

Professor Montoya's presentation deals with the issue of the pipeline to law school in the context of New Mexico, one of the three minority-majority states, including California and Hawaii. She notes that the pool of potential law school applicants in New Mexico is quite small and this has an effect on law school efforts to admit diverse student bodies. The small applicant pool results in part from the vagaries of race and the "multiple histories of exclusion and discrimination," and the ways in which these play out in inferior schooling and high minority dropout rates in kindergarten through twelfth grade ("K-12") and college.<sup>22</sup> For

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19. See discussion *infra* pp. 560-62.

20. See discussion *infra* pp. 556-58.

21. See discussion *infra* p. 557.

22. See discussion *infra* pp. 564-70. Professor Montoya began by noting that the question of "Who gets in?" is innocent enough, but behind it are "multiple histories of exclusion and discrimination. She went on to say that, "race continues to structure individual relations and institutional arrangements." See discussion *infra* p. 564. After providing some demographic information about New Mexico, she noted that the state "shows patterns of segregation," even though New Mexico has one of "the most equitable funding schemes for education." See discussion *infra* p. 566. She concluded this section of her presentation

example, she explains that there exist approximately 1300 Latina/o seventh graders in New Mexico, of whom, based on current numbers, only slightly more than half will complete high school and less than one-hundred in total will complete college and pursue doctorate level work at the Ph.D, M.D., or J.D. level.<sup>23</sup> Professor Montoya then describes programs in which she has been involved to retain minority students in K-12, and advocates for law faculty and students to get involved in similar efforts.

In the final presentation, Professor Chambers, like Professor Montoya, discusses the pipeline to law school, but also details the last stages of the pipeline—law school grades, graduation, bar passage, and job placement—putting the question of “Who gets in?” in a longer timeframe.<sup>24</sup> He cautions that, in light of the *Grutter* decision, law schools could become complacent in addressing the problems in this longer timeline.<sup>25</sup> He notes that minority students, particularly at the large majority white law schools, do not do as well as white students in terms of grades, graduation, bar passage rates, and job placement.<sup>26</sup> He believes that these problems together with the pre-law school pipeline are the issues with which the larger society must deal if law schools are to be in a reasonable position in twenty-five years, as Justice O’Connor hopes, to eliminate race-conscious programs.

Together these presentations provoked a lively discussion, excerpts of which are included following the presentations. I then add comments about the event in the Afterword.

#### WELCOMING COMMENTS

*Dean R. Nils Olsen, University at Buffalo Law School*

Good afternoon. On behalf of the faculty of the Law School, I would like to welcome you to our annual James McCormick Mitchell Lecture. The Mitchell lecture series

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by stating that New Mexico represents a context in which educational attainment is affected by race and ethnicity. *See discussion infra* p. 567.

23. *See discussion infra* p. 567.

24. *See discussion infra* pp. 568-69, 571-573.

25. *See discussion infra* p. 575.

26. *See discussion infra* pp. 574-75.

was endowed in 1950 by Lavinia A. Mitchell in memory of her husband, James. The first Mitchell lecture was delivered by Justice Robert H. Jackson and was entitled, "Wartime Security and Liberty Under Law." It is just as timely today as it was when he gave it. The lecture was published as a lead article in the first issue of the Buffalo Law Review. Through the years, the Mitchell Lecture has featured an array of distinguished and compelling speakers, and today's lecture is certainly no exception.

The topic, "Who Gets In? The Quest for Diversity After *Grutter*," is particularly timely and important. It is no accident that it was a law school—the University of Michigan Law School—that was the defendant in the most important diversity case in twenty-five years in the United States Supreme Court. Attorneys are, in the classical sense of the term, the archetypal professional. The services that attorneys provide are often indispensable to all in society, rich and poor, men and women, minority and non-minority. Attorneys who operate within the justice system safeguard its integrity and protect the perceived validity of legal processes that resolve disputes fairly in our society. Given the increasing diversity of our people, a system in which the judges and attorneys are not representative of the totality of American society is likely to undermine over time the broader community's confidence and support of the system. In addition, the primary responsibility of attorneys in the legislative process, in the administrative state, and in corporate governance gives further imperative to a broad-based profession with diverse life experiences, values, and perspectives.

Nor should we be blind to the history of the legal profession in this country. For more than a century, the profession was largely comprised of white, Anglo-Saxon males. Women, ethnic immigrants, and people of color were consciously excluded and/or marginalized in the legal profession by law, regulation, and custom. Over time, options for entry into the profession through clerking in law offices have been effectively eliminated in most states. Attendance at and graduation from an accredited law school, most often embedded within the larger university, has become the only avenue into the profession. As a result, since the role of the law school is that of a gatekeeper for entry into the profession and since there are effectively no other ways for the profession to become more representative of society as a

whole, law schools have, for quite some time, put a particular emphasis upon recruitment, retention, and graduation of what the University of Michigan Law School referred to as "a critical mass of minority students." In actively seeking diversity, legal educators have emphasized that the presence and participation of a representative student body enriches the learning experiences and opportunities for all students ensuring that our graduates will be prepared to live and work effectively in an increasingly diverse society.

Law schools are accredited by the American Bar Association Section on Legal Education and Admission to the Bar and by the Association of American Law Schools ("AALS"). Both explicitly require demonstrable efforts to achieve a diverse student body. Thus, Standard 211 of the ABA standards for the approval of law schools, provides in important part that "[c]onsistent with sound legal education policy and the Standards, the law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms. This commitment typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and a program that assists in meeting the unusual financial needs of many of these students ...."<sup>27</sup> And Section 6-3 of the AALS Bylaws provides that "[a] member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex."<sup>28</sup>

These requirements have had significant success. In 2003, the American Bar Association and the Law School Admissions Council reported that minority students comprised more than twenty percent of the total J.D. enrollment during the 2002-2003 academic year.<sup>29</sup> The

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27. AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Standard 211 (2003), *available at* <http://www.abanet.org/legaled/standards/chapter2.html> (last visited May 25, 2004).

28. BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC. § 6-3(c) (2004), *available at* <http://www.aals.org/bylaws.html> (last visited May 25, 2004).

29. AMERICAN BAR ASSOCIATION & LAW SCHOOL ADMISSIONS COUNCIL, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 828 app. A (2005 ed.); *see also* Memorandum from David Rosenlieb, Data Specialist, Section of Legal Education and Admission to the Bar, to Deans of ABA-approved Law Schools,

importance of a strong commitment to diversity by our law schools has been demonstrated by the experiences of the University of Texas Law School after the *Hopwood* decision<sup>30</sup> effectively banned diversity recruitment and of the University of California Law Schools that have operated under similar constraints. Resegregation of the student body was both dramatic and immediate. Gains that took decades to achieve and consolidate were set back significantly. Because of the importance of diversity within both the law school and the legal profession and considering the persistent attacks that the concept evokes, I am particularly looking forward to today's discussion.

### OPENING PRESENTATIONS

#### *Sheldon Zedeck*

This afternoon I would like to describe a project that Marjorie Shultz (Boalt School of Law, University of California at Berkeley) and I have been working on for several years along with Jamie Clark (graduate student research assistant). As you may know, the citizens of California passed Proposition 209 in 1996,<sup>31</sup> which states that you cannot use race or gender for hiring or admissions decisions at state institutions. After passage of Proposition 209, Boalt School of Law began looking at how to maintain diversity in the student body while also assuring merit and complying with Proposition 209. Marjorie Shultz and I decided to examine current law school admissions practices including the Law School Admissions Test ("LSAT") to determine how good those practices are at predicting success. We wanted to know whether we could make the system better and at the same time obtain a more diverse student body.

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Corrected Fall 2002 Enrollment Statistics 2 (May 16, 2003), *available at* <http://www.abanet.org/legaled/statistics/Fall%202002%20Enrollment.pdf> (last visited May 26, 2004).

30. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

31. CAL. CONST. art. I, § 31.

This afternoon, I am going to describe our project very briefly.<sup>32</sup> It is funded by the Law School Admission Council ("LSAC"), and we began the first of two phases of the research in July 2001. The ultimate goal is to develop admissions practices that are more valid than current ones, which rely very heavily on an index of LSAT scores and undergraduate grade point average ("UGPA"). We are interested in identifying what could be used in addition to the LSAT and index scores to admit the most qualified students to law schools. We are asking whether a battery of tests that complements the LSAT could predict success in practice as well as in law school. We designed the first research phase to determine "how we know an effective attorney when we see one." Once we defined the dimensions of effectiveness, we needed to determine how they could be measured. We have spent two years studying this issue, and I am going to present some of our results this afternoon.

We are now in the second phase, which is designed to see if predictors other than the LSAT and index can explain lawyering effectiveness. In Phase I, we attained a reasonable understanding of what makes an attorney effective; we are now hypothesizing what types of information we can collect from undergraduates that might predict their success in practicing law. Next, we plan to test our hypotheses about predictors, initially by administering tests (that will later be used with undergraduates) to current Boalt students and alums. We will then collect performance measures on our sample. Once those steps are completed, we can evaluate whether the tests we have identified and developed show a statistical relationship to measures of effective performance in law practice and in law school as measured by methods other than grades.

In their admissions process, law schools look at an index that combines the LSAT with the undergraduate grade point average. Research shows that the index correlates with first-year law school grade point average to the tune of 0.49.<sup>33</sup> Statistical correlations go from zero to one, where 0.49 represents a fairly good level of prediction. Another

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32. The full report is found in Marjorie Shultz & Sheldon Zedeck, *Phase I Final Report: Identification and Development of Predictors for Successful Lawyering* (June 30, 2003) (on file with the authors).

33. Lisa C. Anthony et al., *Predictive Validity of the LSAT: A National Summary of the 1995-1996 Correlation Studies* (LSAC Technical Rep. 97-01, 1999).

way to look at correlations is to examine the amount of variance in performance that the test or predictor explains. A correlation of 0.49 indicates that approximately 25 percent of the variability in first year grade point average for law school students is explained by the index score. That leaves 75 percent still to be explained. That 75 percent is the portion that we are looking at in our study. We are interested in increasing the amount of variance in law school grades that is explained by admissions predictors. In addition, we want to assess how well the current index and the complementary tests that we are evaluating explain job performance of practicing lawyers. The LSAC, who funded this project, is not the only organization trying to figure out other ways of selecting students into universities. Medical school admissions, graduate school admissions, as well as undergraduate admissions, are all looking for measures besides the MCAT (Medical College Admissions Test), the GRE (Graduate Record Exam), and the SAT (Scholastic Aptitude Test), to seek better explanation of performance within those contexts.<sup>34</sup>

As I mentioned above, the purpose of the first phase of our study is to identify dimensions of effectiveness both for law students and for practicing attorneys. In evaluating law students' performance, we are not interested solely in grades. We are curious about other criteria that can measure success or effectiveness as a law student. We believe that non-grade measures of law students' performance may have similarity to the measures we are developing of the effectiveness of practicing attorneys. Our sample is confined to Boalt Hall students and alumni, which is Berkeley's Law School. Right now, we lack the capability to do more than study Boalt Hall. If we are successful at Boalt, then our model and strategy, and perhaps our findings, might be extended to other institutions.

During the first phase, we interviewed second and third year Boalt students, faculty, and alumni from different parts of the country. The alumni graduated from two to twenty years ago, and they come from various types of firms and types of practice. We also involved judges who are asso-

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34. Symposium, *Complementary Tests for Admissions to Academic Institutions: Beyond Cognitive Ability*, SOC'Y FOR INDUS. AND ORGANIZATIONAL PSYCHOL. (Apr. 2004).



ciated with or graduated from Boalt Hall as well as clients of attorneys from Boalt Hall.

We looked at different types of law jobs, taking into account that lawyers work in a variety of practice specialties, settings, and roles. We know that lawyering varies as a function of the particular practice. So in the first phase, we conducted a large number of interviews and focus group meetings with attorneys from many fields and types of practice. We asked them all, "How do you know a good attorney when you see one?" We asked them, "If you needed an attorney, think of whom you might pick, and then tell us not who, but why?" "What is it about that attorney that would cause you to pick him or her to represent you in a particular case?" Through these questions and resulting discussions, we identified twenty-six effectiveness factors. In other words, we concluded that there are twenty-six ways to evaluate the effectiveness of attorneys. That does not mean that every single attorney would be evaluated on all twenty-six factors. We expect that there will be varying sub-sets of factors that are important depending on the type or field of practice, the number of years out of school, the setting, etc.

For the purpose of today's presentation, we have grouped these twenty-six effectiveness factors into eight categories. The first category is "intellectual and cognitive," which includes factors such as "analysis and reasoning" and "practical judgment." In other words, during our discussions with Boalt alums, faculty, students, clients, and judges, we were told that an effective attorney is one who is very good at analysis and reasoning, shows some creativity, can problem solve, and also has practical judgment. A second general factor is "research and information gathering," which deals with effectiveness in researching the law, fact finding, questioning, and interviewing. The third factor, we label "communications." This includes influencing and advocating, writing, speaking, and listening. The fourth is "planning and organizing," which covers whether the attorney is good at strategic planning, can manage his or her own work, and can manage others' work, either staff or colleagues. The fifth is broadly labeled "conflict resolution," and whether the attorney is good at negotiations and is able to see the world through the eyes of others. The sixth is "client and business relations—entrepreneurship," which involves networking and providing advice and counsel. The

seventh broad category is "working with others," developing relationships within the legal profession, and evaluating, developing, and mentoring other attorneys. This factor is to a significant degree a function of stage of career, type of firm, and so forth. The eighth category is probably the one that is most interesting to me as a psychologist; it is concerned with "character," and includes passion and engagement, diligence, integrity and honesty, stress management, community involvement, and self-development. By integrity and honesty, we are not concerned so much with traditional measures of honesty, such as whether an individual will steal bubble gum from the local candy store, but more with moral and social responsibility.

After we identified the twenty-six effectiveness factors, we next developed over seven hundred examples of behaviors relevant to those factors. The participants in our interviews and focus groups generated these behavioral examples of different levels of performance on the twenty-six effectiveness factors. So, for example, we have examples of behavior that represents very good "analysis and reasoning." We have examples of behavior that represents moderate levels of "analysis and reasoning." Summarizing the overall process, then, for each of the twenty-six factors, we have behavioral examples that were generated by interviews and focus groups, and then evaluated by over two thousand alumni respondents to a questionnaire that asked them to evaluate the levels of effectiveness of the different behaviors for attorneys performing different jobs. Those evaluated behaviors (statistical results for the evaluations of the levels of effectiveness) can then be used to assemble a set of performance evaluation scales that will be used in Phase II to evaluate attorney performance.

In Phase II of the project, we have hypothesized tests or predictors that might predict one or more of the effectiveness factors identified in Phase I. This afternoon I am going to briefly describe some of the tests that we are currently considering. First, we will administer personality tests that not only measure personality constructs, but also constructs such as emotional intelligence. In personality theory, research shows that you can describe personality in five dimensions: Openness, Conscientiousness, Extroversion, Agreeableness, and Neuroticism. Conscientiousness, for one, has been demonstrated to be relevant to the world of

work.<sup>35</sup> So we will use personality instruments to assess these constructs. We are also going to measure motives, values, and interests, using a test that looks at an individual's capacity to fit into an organizational culture.<sup>36</sup> We will also try to test the "potential for derailment." An instrument has been developed to study unsuccessful managers and executives to find out why they were "derailed," and why they were unsuccessful.<sup>37</sup> This instrument can give us evaluations on dimensions such as "excitable," "diligent," "bold," and "leisurely."

Testing for emotional intelligence can determine whether a person can regulate, manage and perceive emotions. One form of an emotional intelligence scale that is being used today assesses whether an individual can detect what is being expressed or shown by pictures of faces or expressions. We are currently exploring measures that can be used to assess this dimension of emotional intelligence.

We also will examine biographical information, as well as an "accomplishment record form" that requires that a respondent describe his/her previous history or experience in certain areas, such as planning and organizing, researching, problem solving, and the like. The "accomplishment record form" and biographical data are used because they reflect the axiom that "the best predictor of future performance is past performance." As an example of a biographical item, we might ask the question, "How often have you attended workshops, training sessions, or developmental courses that are designed to help you become a better student?" The hypothesis here is that responses might predict whether the respondent would have passion and engagement about his/her work, or an interest in self-development.

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35. Murray R. Barrick & Michael K. Mount, *The Big Five Personality Dimensions and Job Performance: A Meta-Analysis*, 44 PERSONNEL PSYCHOL. 1, 1-26 (1991).

36. See Robert Hogan & Joyce Hogan, *Motives, Values, Preferences Inventory* (Hogan Assessment Sys, Inc., 1996), available at <http://www.performanceprograms.com/pdf/HoganMVPIFacts2004.pdf>.

37. See Joyce Hogan & Brent Holland, *Using Theory to Evaluate Personality and Job-Performance Relations: A Socioanalytic Perspective*, 88 J. APPLIED PSYCHOL. 100 (2003).

Situational judgment tests are another important type of test used to predict performance.<sup>38</sup> These types of tests present a situation such as the following: "You're working on a political campaign with five other volunteers, and you usually take charge at the meetings. The end of the campaign is approaching, and one member who has not shown up frequently also has not completed his responsibility. How do you respond?" The test-taker has to pick from a set of alternatives the behaviors that they would most likely and least likely undertake. The responses are scored based on a priori established scoring keys.

Moral responsibility can be tested, for example, by using narratives or dilemmas that present situations that may for example, put legal codes, moral responsibility, and family obligations in conflict with each other. The respondent needs to indicate how he/she will respond to the situation.<sup>39</sup> These tests describe a situation and ask which of several choices you might make. You must also rate how important each of your choice factors is to your making the decision.<sup>40</sup>

Once we have developed our hypotheses about which tests might predict particular effectiveness factors, we will undertake empirical validation by giving these tests to students and practicing attorneys. For the students in our sample, we will get evaluations other than grades from their instructors and perhaps their peers at Boalt Hall. For the practicing attorneys, we will seek to have supervising attorneys, peers, and the individuals themselves rate the individual attorney's effectiveness on a relevant subset of the twenty-six factors. We will determine through statistical analyses which test or set of tests can explain the study participants' performance as measured by the performance evaluations we will collect. We will examine how well these new tests on their own predict attorney and law student performance as well as how well they predict performance

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38. See Michael A. McDaniel et al., *Use of Situational Judgment Tests to Predict Job Performance: A Clarification of the Literature*, 86 J. APPLIED PSYCHOL. 730 (2001).

39. See James R. Rest et al., *DIT2: Devising and Testing a Revised Instrument of Moral Judgment*, 91 J. EDUC. PSYCHOL. 644 (1999).

40. With such types of tests, we recognize that there are gender differences and probably ethnic differences as well in the way people may respond to different test situations. We are attempting to take those differences and various critiques of the tests into account in our research.

when combined with the traditional LSAT/UGPA index score.

In summary, we have identified twenty-six factors that reflect lawyering effectiveness. We are now identifying and developing predictors that go beyond assessment of cognitive ability, which is what the LSAT tests. The LSAT/UGPA index explains only 25 percent of law student success, which leaves considerable room for improved prediction. In addition, LSAT/UGPA index scores do not even try to predict success in law practice. We hope that by adding other tests and other types of information to the law admissions process, we will be able to explain subsets of the twenty-six factors that describe effective lawyers. If we are successful, we will have developed and empirically validated tests that could be used to identify applicants who are the most qualified for admission to law school based on a much broader set of relevant considerations than those currently in use.

*Athena D. Mutua*

Dr. Zedeck, I understand that the new approach to law school admissions that you are developing may also have the effect of increasing diversity. Is that correct?

*Sheldon Zedeck*

I have done most of my research and practice in the world of employment work, and my experience is that if you get beyond purely cognitive ability, if you use other factors or even change the ways you test cognitive ability by using methods other than multiple choice tests, you can decrease the differences in results particularly between African-Americans and Caucasians. Even for cognitive ability, I have given tests that have been traditionally given as paper and pencil examinations, but instead I have used video demonstrations and asked the test takers to respond to what they see in the videotape. By introducing this change of method, I have been able to reduce the difference between Caucasians and African-Americans by a half of a standard deviation. In other words, I have reduced the racial disparity just by changing the format of a cognitive

ability test; others have found similar results.<sup>41</sup> So there are data from industry to show that if we are willing to look at other devices for testing an individual's qualifications, racial disparities will significantly decrease. In the end, our project does hope to increase the diversity of law schools and ultimately the legal profession as a whole.

*Margaret E. Montoya*

I noticed that your effectiveness factors do not include anything having to do with culture such as language or community connections, and I ask that because virtually all of the clients that I have contact with immediately need to know what the culture and the language proficiency is of the lawyers that they're being referred to. I am wondering where in your schema that comes up?

*Sheldon Zedeck*

The answer is that we have lots of items in the set of over 700 behavioral examples that represent how people deal with cultures, how they understand different cultural patterns, how well they develop relationships, and how they develop networks across cultural boundaries. Those examples are used to define different levels of effectiveness for some of these twenty-six factors. Today, I have focused on presenting the 26 effectiveness factors. Another critical aspect of our research in Phase I has been the identification of the behavioral examples that will be used to define and evaluate performance on those factors.

*Frank H. Wu*

In the *Grutter* case,<sup>42</sup> Justice Sandra Day O'Connor articulated the principle of inclusion. That is the bridge that does not appear elsewhere in our jurisprudence and one of the most important aspects of the opinion that she wrote. She said that diversity promotes inclusion. She said

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41. Neal Schmitt et al., *Subgroup Differences Associated with Different Measures of Some Common Job-Relevant Constructs*, in 11 INT'L REV. OF INDUS. & ORGANIZATIONAL PSYCHOL. 115 (Cary L. Cooper & Ivan T. Robertson eds., 1996).

42. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

the following: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training."<sup>43</sup>

I would like to propose that it is necessary but not sufficient. As laudable as the University of Michigan Law School is, as much as we may admire the outcomes of these cases—which were uncertain until the moment the decisions were handed down—nonetheless, if we favor racial integration, if we favor especially the inclusion of African-Americans, Latinos, and other historically disadvantaged and under-represented groups in law schools and elsewhere, we might do well to be skeptical of "diversity."

Let me offer a cautionary tale about two politicians whose names are now long forgotten except for this particular anecdote. In 1970, President Richard Nixon, starting off in his term of office, had decided to appoint a southerner to the Supreme Court. His first choice, Clement Haynsworth, was rejected. So President Nixon offered as his second choice a Florida United States district judge named G. Harold Carswell, who was an individual with a relatively undistinguished record. As it became apparent that the Senate was virtually certain to reject this nomination, Senator Roman Hruska from Nebraska rose on the floor of the Senate to speak. He said, immortally, in response to the charge that Judge Carswell was mediocre, "Even if he is mediocre, there are a lot of mediocre judges and people and lawyers out there. They are entitled to representation."<sup>44</sup> You cannot have all Brandeises and Cardozos and Frankfurters. Well, as you can imagine, with this ringing endorsement, Carswell was promptly defeated, and he did not advance and report.

As humorous as the quote is, I would like to take it seriously, because I think the claim shows us a great deal about the risks of abstracting diversity. When we talk about diversity in the abstract—and this is how the Supreme Court talks about it—those of us who are supportive of in-

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43. *Id.* at 335.

44. William H. Honan, *Roman L. Hruska Dies at 94; Leading Senate Conservative*, N.Y. TIMES, April 27, 1999, at B8.

creasing diversity run the same risk that we have run with other civil rights advances: namely, the very concepts, the very slogans and phrases that we have promoted, will be appropriated and used with unintended consequences.

Allow me just to highlight at least three such consequences. First, it is possible to achieve racial diversity without necessarily enhancing the integration of African-Americans. One could have a college classroom or a law school classroom or a medical school lab that had a large number of Asian-Americans along with whites. You would have a racially diverse classroom without necessarily increasing the number of African-American students. Indeed, had the Michigan cases come out differently, although campuses would quite quickly have found themselves with a diminishing number of African-American and Hispanic students, they almost certainly would have maintained the Asian-American enrollments. Now, I point this out not to suggest that it is laudable but, quite the contrary, to suggest that racial minority groups are not fungible. If we increase diversity by adding Asian-American students, that does not address the classic black-white color line and the "American dilemma," as Gunnar Myrdahl called it in his classic study in 1954.<sup>45</sup> Regretfully, that is often what happens. Often you hear a claim, "Well, this institution discriminates against African-Americans," and the response to that claim is, "Well, no we don't. We have lots of Asian-Americans." This is entirely and obviously a non sequitur.

Second, it would be possible to increase the number of Black students without increasing the number of native-born African-Americans. It is possible to have diversity without addressing the particular issues that face urban, inner-city, impoverished African-Americans, especially young men in the educational pipeline. By increasing the number of foreign-born Black students, you could create a student body that did not have a large number of native-born African-Americans. That in itself is not wrong. I would be the first to suggest that we avoid a comparison that would pit foreign-born blacks against native-born African-Americans. Yet it suggests the danger of diversity as an abstraction, when we do not make these distinctions, when

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45. GUNNAR MYRDAL ET AL., *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (Harper & Row 1969) (1944).



we do not look at the historical circumstances and the actual facts. We could have diversity by admitting a large number of Caribbean students, Haitians, Africans, and others who would not identify themselves nor perhaps be identified by others, as African-Americans.

Third, because Justice O'Connor's opinion in *Grutter* abstracts even beyond race, it is clear that the Supreme Court needs to discuss diversity in all of its forms. There is the possibility—as has already happened—that people will make much the same argument that Senator Hruska made about G. Harold Carswell, namely, that we ought to add representation of every conceivable demographic group. In a recent issue in the *Chronicle of Higher Education*, for example, demagogue David Horowitz engages in a debate with Stanley Fish.<sup>46</sup> David Horowitz made the claim—and let us for a moment posit that the empirical basis of the claim is accurate or is not laughably disturbing—that college campuses lack ideological diversity. He claims that if you were to survey faculties at law schools and other academic departments, you would find that they were predominantly on the left politically, that there are not a large number of political conservatives. There are not many reactionaries. He does not put it this way, but I would add that there are not many fascists and neo-Nazis, either. Well, if we wish to promote merely diversity, we have difficulty responding to Senator Hruska, David Horowitz, and others who would say, if we merely want representation, why do we not have more representation of individuals who are mediocre? Why do we not have more representation of neo-Nazis or skinheads? What about the over-representation, for example, of Jewish faculty, Asian faculty and the under-representation of white, Christian males? Now, I think those arguments can be refuted, but it cannot be done by dismissing them out of hand. It requires adopting a more nuanced principle.

It is especially appropriate here at the State University of New York at Buffalo Law School, which is renowned for its involvement in the field of law and society, that we question the abstraction of this doctrine. Justice O'Connor has announced that diversity is a compelling state interest. For

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46. See David Horowitz, *In Defense of Intellectual Diversity*, CHRON. OF HIGHER EDUC., Feb. 13, 2004, at 12; Stanley Fish, "Intellectual Diversity": *The Trojan Horse of a Dark Design*, CHRON. OF HIGHER EDUC., Feb. 13, 2004, at 13.

that, she and the Court must be commended. But I would suggest that we ought not to ask about diversity merely in the abstract—diversity as difference. Instead, it might serve us in advancing the broader interest of racial justice and civil rights to look more specifically, not just at whether the path to leadership is open, as she puts it, to every race and ethnicity, but to whom it has been closed, how, and why? What will be needed to remedy it in the concrete? It is not enough to say merely that every group has the same problem of access or has the same unequal access or that they have the same need to achieve a critical mass. There are particular problems that we want to address. So, I close with the thought that in seeking diversity we may do what Oscar Wilde once warned us of, namely, that the only thing worse than not getting the last word is getting it.<sup>47</sup>

*Charles E. Daye*

I will discuss some preliminary work that I am doing with three colleagues—Dr. Abigail T. Panter, Associate Professor of Psychology at the University of North Carolina-Chapel Hill, Dr. Walter R. Allen, Professor of Sociology at the University of California-Los Angeles, and Dr. Linda F. Wightman, Professor and Chair of the Department of Educational Research Methodology at the University of North Carolina-Greensboro. I am Professor of Law at the School of Law at the University of North Carolina-Chapel Hill.

The title of my presentation is “What’s Race Got to Do With It? An Empirical Study of ‘Race’ and Educational Diversity.”<sup>48</sup>

This is a presentation about a research project that my colleagues and I are undertaking under protest. I am kind of annoyed that I have to do a project like this. A major reason I thought about doing a research project of this sort was because there are some folks who like to deny that race is

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47. See OSCAR WILDE, *LADY WINDERMERE’S FAN* act 3:

“In this world there are only two tragedies. One is not getting what one wants, and the other is getting it. The last is much the worst; the last is a real tragedy!”

48. The term “race” is used here to include common racial and ethnic classifications. We are aware that the very concept of race can be controversial. See, e.g., Elbert Lin, *Identifying Asian American*, 33 SW. U. L. REV. 217 (2004); Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121 (2003).

salient. One court has gone so far as to opine that, "The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the *physical size* or *blood type* of applicants."<sup>49</sup> My experiences as a Black American teach me that, as an empirical matter, that perspective is patently refutable.<sup>50</sup> Another court pronounced that, "If the goal in creating a diverse student body is to develop a university community where students are exposed to persons of different cultures, outlooks, and experiences, *a white applicant in some circumstances may make a greater contribution than a non-white applicant.*"<sup>51</sup> This pronouncement is true, of course. True, but irrelevant. Also the District Court in the Michigan affirmative action case had pronounced that, "*The connection between race and viewpoint is tenuous, at best.* The defendants walk a fine line in simultaneously arguing that one's viewpoints are not determined by one's race but that certain viewpoints might not be voiced if students of particular races are not admitted in significant numbers."<sup>52</sup> It is, of course, one thing to say that race does not determine viewpoint. It is something of a giant leap to the conclusion that there is *no* connection between viewpoint and race, if for no other reason than that race in America influences one's experiences and experiences, in turn, may influence one's perspective. Yet those who assert that race is not relevant speak *ex cathedra*, as it were, suffering no burden of proof as to the normative assertion or the relevance of the assertions they make. Only those asserting the positive are burdened with the obligation to offer empirical evidence.

Professor Wu has mentioned that we have got the wrong issue. His point underscores the second reason this project causes me anguish. The Supreme Court has taken

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49. *Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (emphasis added).

50. I even set out to demonstrate how this perspective was at odds with reality in an allegorical parody of the *Hopwood* case. See Charles E. Daye, *Monday Morning Blues: or, Is Race Really Insignificant?*, 47 J. LEGAL EDUC. 122 (1997).

51. *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1253 (11th Cir. 2001) (emphasis added).

52. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001) (emphasis added), *rev'd*, 288 F.3d 732 (6th Cir.), *aff'd*, 539 U.S. 306 (2003).

off the table any question about social justice, any question of distributive justice, and any question of racial reconciliation,<sup>53</sup> if you will. The Supreme Court rejected arguments that advanced the idea that a distinction could and should be made between racial classifications that were "invidious" and those that were "benign."<sup>54</sup> So the Court erected a tall barrier to the making of remedial gestures toward advancing racial equality. But it did not stop there. We cannot seek to enroll a certain number of minorities.<sup>55</sup> We cannot seek to achieve a certain racial balance.<sup>56</sup> And even though the Court acknowledges that, "No one doubts that there has been serious racial discrimination in this country,"<sup>57</sup> any attempt on the part of an actor to correct for or to take race into account on the basis of "societal discrimination" is impermissible.<sup>58</sup> Similarly, educators may not consider race on the basis that we are trying to train minorities to service underserved communities.<sup>59</sup> Nor can race be considered on the ground that black students need role models in the educational setting.<sup>60</sup> The Court has held that even when an actor is trying to correct its own prior discriminatory conduct, that actor cannot take race into account unless its prior discrimination has been the subject of "judicial, legislative, or administrative findings of constitutional or statutory violations."<sup>61</sup>

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53. See, e.g., Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903 (2003).

54. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (holding that strict scrutiny applies to all racial classifications regardless of whether they are claimed to be benign or for remedial purposes. The Court said, "We thus reaffirm the view . . . that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.").

55. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J.).

56. *Id.*

57. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986).

58. *Id.* at 274 ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification."); *Bakke*, 438 U.S. at 307 (The goal of remedying prior discrimination "was far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past.") (Powell, J.).

59. *Bakke*, 438 U.S. at 310-11 (Powell, J.).

60. *Wygant*, 476 U.S. at 276.

61. *Bakke*, 438 U.S. at 307 ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the

So, the entire discussion has pushed the justice question completely off the table. That's why this is project causes me great anguish.

This state of affairs brought us to the diversity rationale, which *Bakke*<sup>62</sup> said was permissible, and which *Grutter* affirmed is still permissible. Professor Wu has already pointed out some of the pitfalls of the Court's approach to "diversity," and the diversity rationale is problematic in its use of the diversity idea in just the ways Professor Wu points out. Diversity, apparently as far as the Court is concerned, is "unanchored" from the justice question.<sup>63</sup> Having prohibited nearly every efficacious use of "affirmative measures" to assure admissions of under-represented minorities to elite institutions, the Court uses a "diversity" rationale that is not contextualized in any meaningful way. It is not anchored to any social justice rationale, compensatory justice rationale, distributive justice rationale, or even within its historical milieu. So diversity is a concept that is fully adrift from justice. If the diversity rationale as the Court uses it, has any underpinning it is some sort of "majoritarian utility construct." At least as attributed to Justice Stevens,<sup>64</sup> affirmative action under the diversity rationale will be used in a highly utilitarian fashion by the majority. He is reported to have said, "Presumably it is in the universities' self-interest to eliminate the preferences as soon as it is no longer necessary. . . . There is no reason for the majority to grant preferences to the minority *unless those preferences serve the best interests of the majority.*"<sup>65</sup> Justice O'Connor apparently was somewhat less convinced. She

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expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.").

62. *Id.*

63. See Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757 (1996-1997) (criticizing Justice Powell's formulation for being divorced from any corrective justice dimension, and as dependent on the college's conception of what benefits it, rather than how to effect justice for the victims of societal discrimination).

64. Justice Stevens voted with the majority to uphold the affirmative action program employed at the University of Michigan Law School. *Grutter*, 539 U.S. 306.

65. Charles Lane, *Stevens Gives Rare View Of Court's 'Conference': Justice Details Thoughts on Affirmative Action Case*, THE WASHINGTON POST, Oct. 19, 2003, at A01 (emphasis added) (reporting on a talk that Justice Stevens gave at a luncheon in his honor sponsored by the Chicago Bar Association on September 18, 2003).

went on to express her "expectation" that affirmative action programs would end in twenty-five years.<sup>66</sup>

Now, with that preliminary matter finished let me turn to our project.

Does race contribute to educational diversity? *Grutter* holds that the Constitution permits the narrowly tailored use of race in admissions to assure the educational benefits that flow from diversity.<sup>67</sup> *Grutter* can be seen as working out of the following syllogism: the major premise is that an educational institution has a compelling interest in deriving the benefits of educational diversity. The minor premise is that racial diversity contributes to educational diversity. The conclusion follows that, therefore, race may be considered as a "plus" factor when used in a narrowly tailored way. That is what I call "the *Grutter* syllogism." First, the major premise is a question of constitutional law; that is, whether the legal and policy underpinning of diversity is constitutionally acceptable. The minor premise, however, is empirical: that race contributes to educational diversity. But for judicial and other assertions to the contrary, one's intuition might have been that the minor premise is true.

What, if any, relationship exists between race and educational diversity? The research project on which we are working is to make a first attempt at investigating that relationship. Proponents argue that racial diversity is critical to assure diversity of perspective, experience, expectations, and values. Opponents say race is irrelevant. The problem is that neither argument is grounded in a scientific investigation of that narrow issue.<sup>68</sup>

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66. *Grutter*, 539 U.S. at 310 ("The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

67. *Id.* at 309.

68. Diversity as a concept has been used in contemporary discussions of higher education since the mid-twentieth century. See *Sweatt v. Painter*, 339 U.S. 629 (1950) (segregated education provided at a makeshift black law school was not substantially equal to education available at the University of Texas Law School, in part, because of a lack of diversity among the students enrolled in the all-black law school). Diversity has been linked to deeper historical antecedents with research pushing the consideration of diversity to Biblical times. See Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915 (2000-2001).

Although the precise question of whether and, if so how, race contributes to educational diversity as the Supreme Court has employed the term has not yet been examined specifically, many researchers have studied multiple aspects of

diversity. See generally WILLIAM G. BOWEN & DEREK C. BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 158-64 (1998); Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in *COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* (Mitchell J. Chang et al. eds., 2003); Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on Campus*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 175-186 (Gary Orfield & Michal Kurlaender eds., 2001); Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 U. FLA. L. REV. 861, 863 (2000); Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity from Affirmative Action in the Law School Admissions Process*, 77 N.C. L. REV. 1479, 1480 (1998-1999).

More particularized empirical examinations include: Octavio Villalpando, *The Impact of Diversity and Multiculturalism on All Students: Findings from a National Study*, 40 NAT. ASS'N OF STUDENT PERSONNEL ADMINS. J. 124 (2002), available at <http://publications.naspa.org/cgi/viewcontent.cgi?article=1194&context=naspajournal> (last visited May 25, 2004); Daniel Solorzano, Walter R. Allen and Grace Carroll, *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15 (2002); Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How are Students Affected?*, *CHANGE*, Mar. 1993, at 44; Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (Gary Orfield & Michal Kurlaender eds., 2001), available at <http://www.civilrightsproject.harvard.edu/research/lawmichigan/DiversityandLegalEducation.pdf> (last visited May 25, 2004); Mitchell J. Chang, *The Impact of an Undergraduate Diversity Course Requirement on Students' Level of Racial Views and Attitudes*, 51 J. GEN. EDUC. 21 (2002); AMERICAN COUNCIL ON EDUCATION & AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS* Executive Summary (2000), available at <http://www.aaup.org/Issues/AffirmativeAction/Archives/2000/DIVSUMY.PDF>; Richard A. White, Preliminary Report, *Law School Faculty Views on Diversity in the Classroom and the Law School Community* (unpublished copy on file with Charles E. Daye); *Expert Report of Patricia Gurin*, in UNIV. OF MICHIGAN, *THE COMPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION*, available at <http://www.umich.edu/~urel/admissions/legal/expert/gurintoc.html> (last visited May 25, 2004); SYLVIA HURTADO, JEFFREY MILEM, ALMA CLAYTON-PEDERSEN & WALTER R. ALLEN, *ENACTING DIVERSE LEARNING ENVIRONMENTS: IMPROVING THE CLIMATE FOR RACIAL/ETHNIC DIVERSITY IN HIGHER EDUCATION* (1999); Walter R. Allen & Daniel Solorzano, *Affirmative action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 327 (2001); Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 L. & SOC. INQUIRY 395 (2000); Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: Answers to Methodological Queries*, 25 L. & SOC. INQUIRY 585 (2000); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1 (1997).

Our study is going to undertake to see if we can capture certain personal background factors including race, ethnicity, gender, age, marital status, economic status, and education. Then the question will be whether these personal factors can be related in some way that connects race (and other factors) to educational diversity. Is there an empirically demonstrable relationship between race and educational diversity sufficient to support an assertion that racial diversity is more likely to result in educational diversity than would exist in a non-racially diverse educational setting?

We have put together five "diversity construct areas"—diversity of family background, diversity of experience, diversity of perspective, diversity of educational expectations, and diversity of career goals and aspirations. Diversity of *family background* includes demographic and social family factors, such as family size, socio-economic status, culture, customs, and traditions that influence a student's perceptions and interpretations of curricular material. Diversity of *experience* refers to positive and negative life experiences that each student brings to the classroom and the campus. These might include exposure to a variety of customs, cultures, and perspectives as well as experiences of prejudice and disadvantage that might influence a student's perspective on the social order. Diversity of *perspective* includes, among other things, differences in values, beliefs, conceptions of the world, and political orientation. Analysts have argued that when members within a group of students hold different beliefs about what is important, worthy, beautiful, and good in life will be more likely to discover for themselves the depth and interminability of the disputes in which human beings find themselves entangled than a group whose members share homogenous values.<sup>69</sup> Diversity of *educational expectations* refers to predispositions that students bring to both curricular interpretations and classroom interactions. These predispositions will be manifested in rates of class participation, the way that assignments and class projects are prepared and presented, and whether students participate in study groups, class project groups, and other study/social influences. Diversity of *career goals and aspirations* ties differences in reasons for pursuing

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69. See Anthony T. Kronman, *supra* note 68, at 863; Arnold H. Loewy, *supra* note 68, at 1486.



higher education to different foci that students bring to issues under study and to the ways students foresee that their educations will be beneficial to themselves or to their communities after they leave the formal educational setting.

Second, *we will examine the role, if any, race plays as an aspect of educational diversity in fostering institutional goals in identified educational domains.* We identify three "educational domains." The domains are not entirely distinct, but place emphasis on different foci. First, the "individual domain" emphasizes enriching each student's educational experiences by deepening understandings about ideas through exposure to many different perspectives and by making educational encounters richer, livelier, and more interesting. Second, the "institutional domain" emphasizes having a presence of diverse groups, widening the scope of perspectives expressed on campus, and increasing the range of activities, programs, and interests represented within institutions. Third, the "social domain" emphasizes creating opportunities for students to interact with others of different backgrounds, races, and cultures with the goal of increasing their abilities to interact positively and effectively in a diverse society after graduation.

We hope to tie together the personal demographic factors and these diversity constructs in a way that informs us whether we are getting anything out of racial diversity that otherwise we would not have. We are really trying to see the grounding in the assertion that diversity adds a value in educational settings.

The possible impact of our study is that if we find little or no evidence of a relationship between race and diversity, then the claim that race-conscious admissions are essential will be weakened. Another possible impact of the study is that if we find a meaningful or strong relationship between race and diversity, the argument that race is a material factor in achieving educational diversity will be strengthened. This dichotomy reflects the danger of social science research. We develop our research hypothesis, but we are not sure the data will prove our hypothesis right. In that sense, we are embarking on a dangerous quest, but I'm convinced enough as an African-American that my life would not be the same as it has been if I had been born white, that I'm willing to take that chance.

*Athena D. Mutua*

We have a little bit of time to take a question from the panel.

*Frank H. Wu*

One of the arguments that comes up and distresses me is that sometimes people say to me, "Well, you teach at Howard University, and that is a predominantly black institution. Why isn't Howard University regarded as a discriminatory institution?" I happen to believe in the value of Howard and other predominantly black, historically black, institutions. I wonder, is there a way that we can distinguish or explain why that type of institution, as a majority/minority institution, is valuable even as we promote the racial diversity of institutions such as Michigan, Buffalo, and so forth?

*Charles E. Daye*

Well, that is one of the tough questions. I served for four years as Dean of the Law School at North Carolina Central University, and we wrestled with that problem perpetually. I think there are multiple answers.

First of all, Howard University was founded under the auspices of the Freedmen's Bureau<sup>70</sup> that was really the first affirmative action program for the former slaves, although the effort was soon scuttled.<sup>71</sup> Today, I think the reason we have a controversy over affirmative action (resolved for the time being by *Grutter*), is that there are elite schools that would not enroll a substantial number of minorities because of something called the "test-score gap"

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70. See HARRY G. ROBINSON III & HAZEL RUTH EDWARDS, *THE LONG WALK: THE PLACEMAKING LEGACY OF HOWARD UNIVERSITY* (1996); see also HARRY G. ROBINSON III & HAZEL RUTH EDWARDS, *THE LONG WALK: THE PLACEMAKING LEGACY OF HOWARD UNIVERSITY Development Framework*, at <http://www.howard.edu/longwalk/> (May 25, 2004).

71. See, e.g., *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000). The promise of significant, sustained aid and land was breached, but during its approximate six years, "The Freedmen's Bureau, which ceased operation in 1871, had spent more than \$5 million on education for ex-slaves, helping to finance some 4,300 schools with 9,300 teachers and nearly a quarter of a million students." Ronald S. Sullivan, Jr., *Multiple Ironies: Brown at 50*, 47 *How. L.J.* 29, 45, n.75 (2003).

between certain minorities and the general test-taking population.<sup>72</sup> If we did not have the test-score gap, we would not have a need for race-conscious admission policies.<sup>73</sup> So we get people who want to have it both ways. In a shorthand, and, of course, over-simplified way, let me point out our dilemma. First, we over-rely on law school admission test scores and GPAs and that helps to create the problem of insufficient diversity. But we also believe in diversity. So, we have to create exceptions to follow through on that belief. Schools like Howard and NCCU probably do not apply the LSAT and GPA as the sole measures of admissibility and preparation for law the way some other places apply these numerical indicators.

Second, there also is a culture and a history that surrounds each one of the historically minority law schools, including Howard. Some students, racial minorities or not, might be inclined to choose Howard because of its classical relationship with the struggle for justice for minorities in the United States.

So, I think there are multiple responses, but I do not think the answer is an easy one. I do think even Howard would say, "We want to have diversity." We can go back to *Sweatt v. Painter*,<sup>74</sup> which is one of the cases in the 1950s that said that students need diversity on racial grounds and that Heman Marion Sweatt could not get that at an all-black, under-funded, makeshift, law school hastily and belatedly concocted to keep him segregated. If he had chosen to go to a historically black school, that would be fine, but if

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72. See Linda F. Wightman, *supra* note 68.

73. Why there is a test-score gap is controversial. Arguments include educational deprivations at all level of education for minorities, continued effects of racial discrimination, cultural and racial bias in tests, low economic opportunities suffered by minorities, and a phenomenon known as stereotype threat. See generally 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); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 616-18 (1997); Gail L. Heriot & Christopher T. Wonnell, *Standardized Tests Under the Magnifying Glass: A Defense of the LSAT Against Recent Charges of Bias*, 7 TEX. REV. L. & POL. 467 (2003).

74. 339 U.S. 629 (1950) (Segregated education provided at a makeshift black law school was not substantially equal to education available at the University of Texas Law School, in part, because of a lack of diversity among the students enrolled in the all-black law school.).

he wanted to go to the University of Texas, he might, in the court's conception, have a more diverse educational experience.<sup>75</sup> But my point is that the court thought, way back then, that a law student could derive advantages from a more diverse educational experience that would better enable participation as a full member of the legal profession.

*Margaret E. Montoya*

Good Afternoon. Thank you for inviting me to participate in this academic encounter.

"Who gets in?" Well, the question is rather innocent, but behind it are multiple histories of exclusion and discrimination. From my vantage point, it is important that we begin by acknowledging a historic and contemporary reality, namely that race continues to structure individual relations and institutional arrangements, so that some segments of society are privileged by it and others are subordinated. In *Grutter*, we have heard Sandra Day O'Connor acknowledge that race matters. Race matters throughout the society and not just at the law school door, but figuring out the racial dimensions of who gets in requires localized analyses and local responses. New Mexico can be an instructive example because of its large Hispanic and Native populations and its well-integrated political leadership. The state's only law school has been a national leader on issues of affirmative action in student admissions. However, I would posit that opponents of diversity have created an excessive caution among academic administrators that has resulted in retrenchment on these issues throughout the nation, and it has also been felt in New Mexico.

So, let me give you a thumbnail history of the University of New Mexico Law School. That history would probably begin with an acknowledgment that Fred Hart, who became dean in the mid-1960s, is credited with transforming the state bar by changing the law school's admission procedures so that large numbers of Hispanic and Native students were admitted. Dean Hart came in at a time when the school was virtually all white—all professors, students and probably all the staff were white. Some years there had been two or three Hispanics, and I believe there had been

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75. But that would be very problematic if he were the only Black student there.

one or two Native Americans who had been accepted, and I understand that early on there was even one Hispanic woman who was admitted, but these students often failed to complete their studies.

In the late 1960s, Dean Hart learned about the CLEO Program,<sup>76</sup> and that was to become the model to conditionally admit significant numbers of Native American and Hispanic students. By the end of the early 1970s, the Law School had created its own conditional admissions programs. One was called PLSI—the Pre-Law Summer Institute for Native students, a program that exists even today. Another version called “Instituto” emerged for Hispanic students, but it also was open to other students. These programs were phenomenally effective. By the early 1990s, the University of New Mexico Law School’s entering class was about forty-five percent students of color. These students who lacked the traditional numerical predictors for success in law school, namely high LSAT scores, were nonetheless admitted. They enrolled, most graduated passed the bar, and went on to productive careers. Some became prominent members of the bar and the judiciary, serving on courts at all levels including the state’s Supreme Court. The few who did not pass the bar found employment and, in different ways, used their legal education, often to help their home communities.

But in 1996, the *Hopwood* case<sup>77</sup> was decided by the Fifth Circuit, and the University of New Mexico Law School decided that, although it was not bound by the decision since New Mexico sits in the Tenth Circuit, it would change its admissions policies by removing any mention of race. Although the Law School did retain ethnicity as one aspect of diversity, it also decided that it would increase the number of out-of-state students from ten percent to fifteen percent. The result has been that the percentage of students of color in each entering class has been lowered by about ten percent. The Law School went from an average of about forty-five percent to an average of about thirty-five percent. More recently, the numbers have begun climbing again and the

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76. Information about the thirty-five year history of the Council on Legal Educational Opportunity’s summer pre-law programs can be found at [http://cleoscholars.com/all\\_aboutcleo/index.htm](http://cleoscholars.com/all_aboutcleo/index.htm) (last visited May 25, 2004).

77. *Hopwood v. State*, 78 F.3d 932 (5th Cir. 1996), *reh’g en banc denied*, 84 F.3d 720 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

faculty, under the direction of Dean Suellen Scarnecchia, has undertaken a comprehensive review of the admission policy and procedures.

Let me give you some demographic information about New Mexico. With Hawaii and California, it is one of three minority-majority states. In other words, the 2000 census found that 55.3 percent of New Mexico's population was non-White or White Hispanics.<sup>78</sup> Of these, 42 percent identify as Hispanic, Latino, and Chicano, compared to a national average between 12 and 13 percent.<sup>79</sup> Native peoples represent 9 percent of the total in New Mexico as compared to a national average of 0.7 percent.<sup>80</sup> The state has about 2 percent African-Americans and less than 2 percent Asian-Americans.<sup>81</sup> New Mexico is also the poorest state in the nation.<sup>82</sup> Only the District of Columbia ranks any lower.<sup>83</sup> Twenty percent of our state's population consistently falls below the poverty line.<sup>84</sup> The state's schools show patterns of racial and ethnic segregation, yet New Mexico has one of the most equitable funding schemes for education in the nation. Public education is funded out of the general revenues rather than through property taxes.

There is another feature of the state that complicates this question of who gets in, and that is the complex relationship between the state and federal governments and the twenty-two sovereign Indian governments within New Mexico's borders. Many of the Indian nations and pueblos maintain their own schools and most have language recovery programs to preserve the Indian languages. The New Mexico Law School has long had one of the outstanding Indian law programs. Recently, Professor Christine Zuni Cruz (Isleta Pueblo member) has created a tribal law program with a law clinic and an electronic law journal to provide targeted services for tribal peoples in the state.

Thus, the state of New Mexico represents a context in which educational attainment is affected by race and eth-

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78. U.S. Census Bureau, *New Mexico Quickfacts*, at <http://quickfacts.census.gov/qfd/states/35000.html> (May 25, 2004).

79. *Id.*

80. *Id.*

81. *Id.*

82. See U.S. Census, *Small Area Income & Poverty Estimates*, at <http://www.census.gov/hhes/www/saie.html> (last visited May 26, 2004).

83. *Id.*

84. *Id.*

nicity and the widespread poverty. New Mexico's graduate and professional programs play a central role in maintaining a high level of diversity among the state's lawyers, doctors, and other professionals, but the success of the doctoral programs depends on the entire educational system from pre-primary schools through the undergraduate colleges. The loss of students from the elementary levels to high school is enormous, and it constricts the number of those who can go on to college.

To see how the pipeline narrows in New Mexico, I would ask you to consider these numbers. There are approximately 13,000 Hispanic seventh graders.<sup>85</sup> In the year 2000, there were 7,554 high school graduates who were Hispanics.<sup>86</sup> Of these 7,554, 2,122 go on to earn Bachelor's degrees, and this is taking into account all colleges and universities, public and private, in the state.<sup>87</sup> Of these 2,122, some 28 go on to get Ph.D.s,<sup>88</sup> 31 get J.D.s,<sup>89</sup> and 22 get M.D.s,<sup>90</sup> or a total of about 81 go on to the doctoral level.

What does this have to do with law schools, and what does this have to do with law professors? Well, I am currently serving as Director of the Southwest Hispanic Research Institute, and in that capacity I have had the opportunity to begin working with a coalition of community people who are committed to asking the question, "Who gets in?," in a broader context. We are focused on the entire pipeline from high school into the post-graduate programs. This coalition includes advocacy groups, business people and entrepreneurs, politicians, and civic leaders, and educators from kindergarten to middle school, high school,

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85. New Mexico Public Education Department, *District Reports*, at <http://www.sde.state.nm.us/div/ais/data/dcrfactsheets.html> (May 25, 2004).

86. *Id.*

87. Southern Regional Education Board, *Table 42: Bachelor's Degrees Awarded by Private and Public Colleges and Universities*, available at <http://www.sreb.org/main/EdData/FactBook/indexoftables03.asp> (last visited May 25, 2004).

88. Southern Regional Education Board, *Table 46: Doctoral Degrees Awarded by Private and Public Colleges and Universities*, available at <http://www.sreb.org/main/EdData/FactBook/indexoftables03.asp> (last visited May 25, 2004).

89. Information on file with Susan Mitchell, Director of Admissions, University of New Mexico School of Law.

90. Information on file with Dr. Valerie Romero-Leggott, Director of Cultural and Ethnic Programs, University of New Mexico School of Medicine.

community colleges, and a number of different departments at the university.

A number of forces are converging at this time, and it makes our coalition work quite timely. For example, last Friday Governor Bill Richardson announced his priorities for the next legislative session, and his number one priority will be reforming the higher education system in the 2005 legislative session. On February 10th, there was a banquet honoring the state's Hispanic legislators, and the theme of that banquet was "*Si Se Puede*" (César Chávez's motto of "Yes, We Can"), applied to educational achievement. In today's *Albuquerque Journal*, I have an op-ed article appearing entitled, "Doctorates Elude Hispanics."<sup>91</sup> The article makes a series of recommendations. It begins by suggesting that we need a comprehensive data analysis of the pipeline. We need to figure out how students are faring from one level to the next, and this analysis needs to be broken out to see how both boys and girls, rural students, tribal students, low-income students, and those with poor English skills are doing. Secondly, we need to identify retention programs, such as the ENLACE projects funded by the Kellogg Foundation, that are currently working. Third, we need an attitudinal change, because most of the time students who do not continue on are described as "high risk" or "educationally disadvantaged." I suggest that we need to abandon this language of educational deficits and learn to see these students as bringing a different set of skills and competencies and adjust our classrooms to develop those skills. Fourth, we need to lower specific barriers such as standardized tests. Finally, we need to create a system of financial incentives for students to return to work in underserved communities.

Let me mention two other things that are going on. I have been using my classroom in order to create a place where law students can respond to these kinds of social issues. Last semester, my students wrote an amicus brief in the *Grutter* case. This semester, my students are involved in planning a conference for school superintendents and principals on the historic and contemporary aspects of school segregation in New Mexico to honor the fiftieth anni-

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91. Margaret E. Montoya, *Doctorates Elude Hispanics*, ALBUQUERQUE J., Mar. 8, 2004, at A12.



versary of *Brown v. Board of Education*.<sup>92</sup> Another group of students is doing a comprehensive pipeline analysis that is examining the leaks in the system and engaging a number of law school faculty, administrators, students and alumni/ae in a conversation about the obstacles along the path to a law degree.

Finally, I have been working in the Los Lunas Minimum Security Prison, outside of Albuquerque looking at the pipeline from the other end, from the perspective of those who have not completed their high school education. If we do not understand why people get pushed out and what insights and wisdom they have to share with us about how we might go about keeping students in school, we are not going to be as successful as we can be.

So what does all of this mean for law school admissions? Well, our approach is a long-term, systemic one. We intend to make changes all along the pipeline, and we understand that we might have success with only a small number of students. But we feel confident that we will have a better integrated system: one that is also more just and inclusive. Finally, we seek an educational system in which affirmative action is understood as a mechanism to secure educational benefits that translate into competent leadership for all segments of our multicultural society. As Justice Sandra Day O'Connor wrote in her majority opinion in the *Grutter* case, "[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders.... In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."<sup>93</sup>

*David L. Chambers*

I taught at the University of Michigan for thirty-four years, including the last six years while *Grutter* was being litigated, but I do not plan to talk about *Grutter* today. Instead, I want to take a longer view of the questions, "Who gets into law school?" and "Who gets into the legal profession?" and discuss why the success in *Grutter*, however gratifying, solves so little.

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92. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

93. *Grutter*, 539 U.S. at 332.

Most of us in this room seem to share the belief that it is important to have large numbers of African-American, Native American and Hispanic law students and attorneys in the United States. (Within the term "Hispanic," I am bunching together several quite different groups—most numerous, Puerto Ricans, Mexican-Americans, and Cuban-Americans. I wish I could do better, and will give more detailed information where it is available and important.)

The good news, of course, is that the country has many, many more African-American, Hispanic and Native-American lawyers than we had in the years before affirmative action. At Michigan, just to give one example, about thirty African-Americans graduated from the law school in the thirty years before 1970, while about 900 graduated in the 30 years after. Many other schools can tell the same story. Despite this enormous progress, our country still has a long way to go before minority lawyers are represented in the legal profession in numbers roughly proportional to the minority population. In the United States in 2001, 6.5 percent of newly employed lawyers were African-American, but 12 percent of Americans were African-American.<sup>94</sup> Similarly, 4.9 percent of new lawyers were Hispanic, while 12.5 percent of Americans were Hispanic.<sup>95</sup>

Why does this gap persist after 30 years of affirmative action?

For a few minutes, let's look together at the key moments in the chain of achievements of all persons who become lawyers in the United States today and particularly at two events that occur before admission to law school—graduation from high school and graduation from college—and three events that occur after admission to law school—graduation from law school, passing the bar, and securing a job. I am deeply indebted to Gita Wilder of the Law School Admission Council for pulling together this information in a single accessible place.<sup>96</sup> As we will see, minority persons fall disproportionately out of the pool of potential lawyers at each of these points.

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94. GITA Z. WILDER, *THE ROAD TO LAW SCHOOL AND BEYOND: EXAMINING CHALLENGES TO RACIAL AND ETHNIC DIVERSITY IN THE LEGAL PROFESSION 2* (LSAC 2003).

95. *Id.*

96. *Id.*

First, high school and college. African-American and Hispanic students finish high school and college at lower rates than whites. To be sure, high-school graduation rates for African-Americans and Hispanics have improved markedly over the past thirty years,<sup>97</sup> but the high school completion rate remains distressingly low, particularly for Hispanics. In 1999, among Americans between eighteen and twenty-four, 82 percent of whites, 73 percent of African-Americans, and 62 percent of Hispanics had completed high school.<sup>98</sup> The completion rate was below 50 percent for Mexican-Americans.<sup>99</sup> A disturbingly high percentage of African-American and Hispanic males who drop out of high school end up in the criminal justice system.<sup>100</sup>

The story at the college level is similar. Among those who graduate from high school, attendance at college for at least one year is closely similarly for whites, African-Americans, and Hispanics, but attendance at four-year colleges is disproportionately lower among African-Americans and Hispanics.<sup>101</sup> Especially distressing is the proportion of African-American and Hispanic students who begin but fail to graduate from four-year colleges. Consider the large universities in Division I of the National Collegiate Athletic Association, an organization that monitors college completion for athletes and in the process gathers completion rates for all racial groups. These Division I institutions supply a large proportion of the nation's law students. In 1998, 37 percent of African-Americans and 48 percent of Hispanics who started at these universities completed their degrees within six years, in comparison to 59 percent of whites.<sup>102</sup>

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97. *Id.* at 9. (In 1960, the high school completion rate for African-Americans was about 20 percent; it rose to 73 percent in 1998. In 1970 (the first year for which data is available), the high school completion rate for Hispanics was 32 percent; it rose to 60 percent in 1998.).

98. *Id.* at 10.

99. *Id.*

100. Among male high-school dropouts aged 18-24, 30 percent of African-Americans and 19 percent of native-born Hispanics are currently incarcerated or on parole, in comparison to 11 percent of whites. See MICHAEL WALD & TIA MARTINEZ, CONNECTED BY 25: IMPROVING THE LIFE CHANCES OF THE COUNTRY'S MOST VULNERABLE 14-24 YEAR OLDS 8 fig.3 (William and Flora Hewlett Foundation, Working Paper, November 2003), available at <http://www.hewlett.org/NR/rdonlyres/60C17B69-8A76-4F99-BB3B-84251E4E5A19/0/FinalVersionofDisconnectedYouthPaper.pdf>.

101. See WILDER, *supra* note 94, at 11.

102. *Id.* at 12.

(The white graduation rate is also low, but still sixty percent higher than the rate for African-Americans.)

Putting high school and college together, census data reveal that of all Americans between the ages of 25 and 29, 27 percent of whites, but only 16 percent of African-Americans and 10 percent of Hispanics have a baccalaureate degree.<sup>103</sup>

I would make two points about high school and college completion. The first is that much emphasis is placed today on changing admissions criteria to law schools—changes such as reducing the weight attached to the LSAT or supplementing the LSAT with new tests such as those that Sheldon Zedeck and Marjorie Schultz are trying to develop. I applaud those efforts. I think the project of Zedeck and Schultz is the most exciting attempt to broaden the range of capacities we look for in admissions that has occurred during my career. Still, we have to recognize that these efforts to change application decisions will, in themselves, do nothing to increase the numbers of African-American and Hispanic students who successfully complete a college degree. And so long as law schools and the American Bar Association continue to require a college diploma as a condition of admission to law school (and they will certainly continue to do so), law schools will continue to have a disproportionately small pool of minority college graduates to draw upon at the point of admissions.

The second point is that while the high school and college completion rates among minorities is a serious problem for this country, it is a problem that the law schools themselves can do very little to solve. Making positive improvements will require increasing economic opportunity for the parents of minority children, improving elementary and secondary education, providing more substantial financial aid for college expenses and much more, none of which law schools themselves can directly make happen. To be sure, some universities are beginning to set up creative links with high schools that have large minority enrollments and a few law schools are beginning to create programs for minority college students while they

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103. *Id.* at 11. Sixteen percent of Hispanics age 24-26 born in the United States have a bachelors degree or higher in comparison to only 4.3 percent of Hispanics not born in the United States. See MICHAEL WALD & TIA MARTINEZ, *supra* note 100, at 6 tbl.1.

are still in college, but such programs even if adopted widely can reach only a small proportion of minority youths.

The next stage in the pipeline is the application of college graduates to law school, the point in the process at dispute in *Grutter*. Law school is a popular professional degree to pursue for African-American and Hispanic college graduates, as popular for them as it is for whites.<sup>104</sup> Nonetheless, despite affirmative action, a smaller proportion of African-American and Hispanic who apply to law school are accepted. African-Americans and Hispanics constitute roughly 20 percent of the applicant pool to law schools but only 14 percent of those who are admitted.<sup>105</sup> This lower rate of acceptance is due almost entirely to minority students' somewhat lower mean undergraduate grades and much lower mean LSAT scores.<sup>106</sup> It is their lower performance on the LSAT that has fueled much of the efforts to measure qualities important to success as a lawyer in addition to the few tested for by the LSAT.

I want to devote the rest of my time to what happens after admission to law school. Because public attention has been so focused on the admissions decision, it is easy to forget that three additional critical hurdles must be surmounted before students admitted to law school become practicing lawyers. They must graduate from law school. They must pass a bar examination. And they must find a job. I see some anxious faces in the audience. I sympathize. Here is some information about these hurdles.

First, of those who start law school, how many actually finish? In the nation's law schools as a whole, of students who started law school in the year 1998, 91 percent of white students were still there at the beginning of their third year, in comparison with 86 percent of Hispanics and 79 percent of African-Americans. Over twice as high a proportion of African-Americans as whites had left law school.<sup>107</sup> The final percentages at graduation were closely similar.

After finishing law school, the next challenge is passing the bar examination. Unfortunately, the only information systematically gathered by race for the nation as a whole is for the class that entered law school in 1991. Here again,

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104. *Id.* at 13.

105. *Id.* at 18 tbl.13.

106. *Id.* at 16-18.

107. *Id.* at 7 tbl.18.

African-American and Hispanic students had comparatively difficult experiences. Among those who took the bar examination at least once, 97 percent of whites eventually pass, in comparison with 78 percent of African-Americans and 88 percent of Hispanics.<sup>108</sup>

If we put these two stages together—law school graduation and bar passage—and ask among all those who start law school what proportion eventually both graduate and pass a bar, the figures for minority students are particularly discouraging. Using the 1991 class figures, 83 percent of whites who started law school both graduated and passed the bar, in comparison to 71 percent of Hispanics and 57 percent of African-Americans. We worry a great deal about getting African-American students into law school, but fail to recognize that more than two of every five African-Americans who begin law school never pass a bar.

Finally the last hurdle is finding a job as a lawyer. Many law school graduates, regardless of race, have a difficult time finding full-time employment as a lawyer. Reliable information by race is unavailable, but the data we do have suggests that minority students may have even more difficulties than white. Part of this difficulty may be due to old-fashioned discrimination, but it is also due to the grades that minority students earn in law school. Grades count more heavily in the legal profession for first jobs than in any other profession and, on average at most law schools, minority students earn lower grades than white students.<sup>109</sup> Minority students also carry with them onto the job market less social capital than whites—for example, fewer of them have a parent or other close relative who is already a lawyer.

If one adds difficulties in finding employment to their graduation and bar passage difficulties, it may well be that half the African-American students who start law school end up in the full-time practice of law. How regrettable that is.

One point to be drawn from this information about the events after admission to law school is obvious: law schools need to continue to reconsider the criteria taken into ac-

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108. LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY (LSAC 1998), *available at* <http://www.lisacnet.org/lisac/research-reports/NLBPS.pdf>.

109. *Id.*

count in admissions, but they need to give at least as much effort to improving minority student performance at the three later points in the pipeline. At least on their face, these later moments—graduation, bar passage, and job attainment—ought to be more susceptible to law school interventions than the earlier and more daunting problems of high school and college completion. As to graduation from law school, for example, minority students encounter greater problems than whites not only with regard to academic performance but also with finances and social comfort. Not nearly enough research has been undertaken to learn what could be done to increase graduation rates.

I worry that our success in *Grutter* is going to make law schools complacent. The Supreme Court has given us permission to continue the admissions procedures we have developed over the past three decades. Because of it, we may devote too little attention to improving minority success at the stages before and after admission.

I want to end, however, on a more optimistic note. It is simply that when minority law students make it over all the hurdles I've discussed and enter into the practice of law, they typically have satisfying and valuable careers. Two other colleagues at Michigan and I have conducted a study of all of Michigan's minority and white graduates.<sup>110</sup> We found that minority graduates were in all areas of practice, and that they more frequently than whites took public service jobs in government. Those in government earned substantial incomes and commonly rose to positions of significant responsibility. Those in private practice earned very high incomes. They provided a great deal of service to minority clients. Our black graduates in private practice, for example, much more frequently served black clients than our white graduates did. Thus, they are providing valuable services to previously underserved groups. Finally, our minority private practitioners, to a greater extent than our white practitioners, provided public service in the form of pro bono legal work and service on the boards of non-profit organizations.

At the end of her opinion in *Grutter*, Justice O'Connor expresses the expectation that in twenty-five years there

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110. Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through the Law School*, 25 LAW AND SOC. INQUIRY 395 (2000).

will be no more need for affirmative action.<sup>111</sup> Very little in current trends suggests that she is correct. This country has many reasons to want to ensure the substantial representation of minority lawyers in the legal profession over the century to come. Sad to say, we have a great deal more work to do to make certain that it happens.

Thank you.

## QUESTIONS AND DISCUSSION

*Athena D. Mutua*

One member of the audience has submitted a question asking to what extent an affirmative action program should account for social class, considering that many under-represented groups are over-represented in the lower class.

*Charles E. Daye*

There have been instances of schools experimenting in trying to use class instead of race.<sup>112</sup> It turned out that economic bases for affirmative action would not work for racial minorities who were greatly out-numbered by whites who were also poor. But there appears to have been even a perverse dimension in the sense that African-Americans or minorities in the economic upper class were treated like whites in the economic upper class. Consequently, if you take low economic status (class) as an independent factor worth some plus consideration, you exclude the better-qualified minorities from consideration in favor of both less qualified minorities and less qualified whites. So class was confounding in that way. That does not mean class ought not be its own variable. At the University of North Carolina, where I am, we speak about giving opportunities to

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111. *Grutter*, 539 U.S. at 310.

112. See, e.g., Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997); Deborah C. Malamud, *Affirmative Action, Diversity, and the Middle Class*, 68 U. COLO. L. REV. 939 (1997); Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. Rev. 1913, 1947-52 (1996) (discussing limits of effectiveness of economically-based programs and reporting on studies at California schools); Suzanne E. Eckes, *Race-Conscious Admissions Programs: Where Do Universities Go From Gratz and Grutter?*, 33 J.L. & EDUC. 21 (2004).



kids from the coastal hamlets of Eastern North Carolina and from the hollows of the mountains of Western North Carolina. We try to take seriously that we are engaged in social uplift by getting those students into the legal profession. So, I think class is its own variable, but it is confounded when it is used as a surrogate or as a proxy for race.

*Frank H. Wu*

I want to make a similar point, which is that no matter how robust your measure for class is you almost certainly end up benefiting predominantly poor people who are white. Now that is not a bad thing, but it means that to the extent that you address issues of race, it is only as a side consequence. If you want to address problems of race, the most direct way is to address problems of race, not to address problems of class and hope incidentally to produce a racial benefit.

*David L. Chambers*

Charles Daye said that one of the effects of considering class but not race would be that some of the best qualified minority students who have upper- or upper-middle class backgrounds would not then get into law school. Some people hear that and say, "Well, that's exactly right." They would say, "The upper-class black kid has had all the privileges. Why should he or she get extra consideration in the admissions process?" Well, here is why. First, their life experience still has been quite different. That they were born black has not been irreverent to their lives; and thus, their sensibilities, their experiences of race in this country add something distinctive to the student body. Second, at least our own studies at Michigan suggest that black persons of upper class or upper-middle class backgrounds still provide more service to black clients not necessarily of the upper classes after they graduate. They are also more likely than white graduates to involve themselves in the black community and in black neighborhoods in their pro bono work. We would lose something very important if we tried somehow to substitute class for race in our evaluations.

*Athena D. Mutua*

Here is another question from the audience for the entire panel. What lessons can be learned from how law schools have dealt with gender discrimination in admissions that might be helpful in dealing with racial disparities?

*Charles E. Daye*

You did not have to deal with it. Once you stopped discriminating against women, they took over the place! [laughter] National data on women show that nearly 50 percent of last fall's entering first-year class was women.<sup>113</sup>

*David L. Chambers*

And among black students, particularly, women outnumber men by almost two to one.

*Athena D. Mutua*

This question asks about the desirability of using a diversity definition that matches the percentage profile of a particular state in terms of African-Americans, Hispanics, Native Americans, Asians, and other ethnic groups.

*Margaret E. Montoya*

Well, I think that data inform decisions that you might take, but I certainly hope that nothing I said suggested that what we are trying to do is to match those percentages. I think they are relevant, because they give all of us a backdrop or a context against which these decisions are being made. As it happens, in the southwest these numbers are changing very rapidly because of increases in immigration. I think that we need to keep these numbers in front of us, but we don't use them as goals or targets or anything else.

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113. ABA data for Fall 2003 show that women comprised 47.8 percent of the incoming class and 48.7 percent of total J.D. enrollment. See Memorandum from David Rosenlieb, Data Specialist, Section of Legal Education and Admission to the Bar, to Deans of ABA-approved Law Schools, Fall 2003 Enrollment Statistics (Jan. 14, 2004), available at <http://www.abanet.org/legaled/statistics/enrollment2003statistics.pdf>.

*David L. Chambers*

The Supreme Court is permitting law schools to take race and ethnicity into account in admissions, but it has not said that we must take into account any particular racial and ethnic groups. A law school in a state with a large Mexican-American population might permissibly place nearly its entire diversity focus on Mexican-American students, could it not?

*Charles E. Daye*

Justice Sandra Day O'Connor has a statement in her opinion in which she lauds Michigan for not being focused solely on race.<sup>114</sup>

*Frank H. Wu*

The trouble is that she does treat it that way. Although I also applaud what the school did, it gives me pause that one of the arguments the school presented was that even whites could benefit if there were some issue that required that we consider whiteness as a plus factor. Now, it is understandable that they would make that argument, that they would concede that, but it just shows that the concept of diversity has been entirely abstracted.

*Charles E. Daye*

Another thing that is very clear is that, if you have an avowed proportional representation program, it would be struck down summarily. The quota issue is foreclosed. It is not even clear to me the extent to which you can say that, in light of the proportion of our population that is Hispanic or whatever, we have a *goal* of some particular fixed number or percentage. I think a "hard" goal is really going to put you in a very tough, if not impossible, place to defend. The court was very clear about this. Justice O'Connor said, "Moreover, . . . between 1993 and 2000, the number of Afri-

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114. *Grutter*, 539 U.S. at 338 ("What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than under-represented minority applicants (and other nonminority applicants) who are rejected.").

can-American, Latino, and Native-American students in each class at the [Michigan] Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.<sup>115</sup>

*Margaret E. Montoya*

I just wanted to comment on the amicus brief that was submitted by the service academies in *Grutter*. If there was any affirmative action program that was aggressive and that had aspects of proportionality, it was what the service academies were doing. They were definitely looking to see what were the percentages of African-Americans and Chicanos as a percentage of the total population. It will be interesting to see what they will do post-*Grutter*, but pre-*Grutter* they were certainly doing things that I would never have advised any law school to do.

*Athena D. Mutua*

Professor Wu, I wonder if you could comment further about historically black colleges and the issue of diversity? The argument has been made that diversity serves a different purpose when African-Americans or other minorities are brought into a predominantly white environment, as contrasted with historically black colleges where considerations of diversity have quite different meanings.

*Frank H. Wu*

If you are going to be upwardly mobile, if you want to be successful, if you want to be a lawyer in a Wall Street firm or on K Street in Washington, D.C., or in the Loop in Chicago, you need to know how to behave like a white person. That is, you need to know what fork to pick up. You need to recognize the appropriate attire to wear on the tennis court. You need to know what food to eat and how to eat it. You need to know how to pronounce words, how to enunciate, how to "pass" on the telephone. If you are a person of color, you have to know how to do that. But no one has to learn how to be black. Unless you want to go out of your way to make a point, you do not have to assimilate that way.

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115. *Id.* at 336.

There is an interesting function that predominantly black institutions play. Sometimes people think, oh, in Howard you must talk about race all the time, right? Actually, no, because in a funny way race simply drops out. If in my first year Civil Procedure class I do not call on someone who is a black male and I instead call on the next person, when I was teaching at Michigan that black male might have thought—and perfectly reasonably—“Gee, I wonder why Wu didn’t call on me when my hand was up. Maybe it’s prejudice.” But you know what? In a funny way at Howard that vanishes, because the very next person sitting there, the one you do call on, is also a black male. So the person knows that whatever else is going on, it is not racial prejudice. And suddenly it is comforting to be in the norm, to be in the mainstream, to not have to worry about people not recognizing certain baseline experiences that are an important part of your culture.

One of the reasons we might be troubled about diversity is because we do not really answer the question of “diversity for what purpose and for whom?” And it may very well be that we simply are using people to do a little song and dance, you know, “You have to be a representative. You have to provide a flavor that otherwise would not be there.”

*Charles E. Daye*

This is one of the things my colleagues and I have spent quite some time considering in connection with our research project. Can we tease out the different dimensions along which race might matter? We start with a baseline of the social science data in the *Grutter* case, which established that minority students who feel isolated and alone do not generate the kind of discussions that they might otherwise participate in if they did not feel so isolated and alone.<sup>116</sup> You have to have enough minority students so that the

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116. *Grutter*, 539 U.S. at 318-19. This is the “critical mass” discussion. Justice O’Connor discusses the evidence submitted on the Michigan Law School’s efforts to assure that a critical mass of each student group was present. She referred to testimony that “indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race” and “that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no “minority viewpoint,” but rather a variety of viewpoints among minority students. *Id.* at 319.

student who is called on can realize that the professor is not playing some game, because there was more than one black male in his class and he did not call on any of them that day or he called on some other one that day.

But the larger question is, why would *racial* diversity matter? It may matter in a lot of ways. Does it matter because race influences the kinds of experiences a person will have in society that will help form how the person interprets events and stimuli? Does it matter in the kinds of student organizations that are offered and present on campus? Does it matter in the ways students interact with each other in study groups? Does it matter in the kinds of speakers students bring to the campus? Does it matter in the discussions outside the classrooms and around the hallways? We have a free speech board at our law school. The discussions on the free speech board are probably different because there are diverse students than they would be if we had all black students or all white students. And surely they are different than if we had some tiny number of minority students in a predominantly white school, because they probably would not put anything up there.

But we do not really know these things for sure. We do not really know, and this is what we are going to try to tease out in our study: *how* does *racial* diversity matter? Justice O'Connor referred to the benefits of educational diversity, but we do not quite know what those benefits are or how diversity matters. We think there will be individuals who will matriculate in institutions and learn about and from each other. We hypothesize that students who benefit from diversity will be better able to go out into the diverse world and be more effective because they have had a diverse educational background and experience in law school. But we do not know yet that empirical analysis will confirm that hypothesis. In a few years, we hope that we will know whether the hypothesis is correct.

*Athena D. Mutua*

I have several questions from the audience that ask, how do we know when we have achieved the goal of equality, or how do we know when diversity is achieved?

*Frank H. Wu*

Part of what has happened is that we seem to think that diversity is just an outcome. I would like to suggest that it is a *process*. And when people say, "Well, when does it end?" my answer is, "Never." When people say that I am just a cynic or a pessimist or whatever, I say that they are wrong. Diversity is like democracy itself. We do not want democracy to end. We want people to participate in it, and we want an ever-increasing number of people to do so. When you vote this fall and you are standing in line, imagine if the person in front of you says, "I'm sick and tired of this. We just voted two years ago. Why are we doing it again?" This person missed an important civics class. He does not get it. I would suggest that the same thing is true for issues of diversity, and these are perennial issues. Diversity is a process, not an outcome. So it does not make any sense to ask when does it end. When does *what* end? It is always with us. It is one of the welcome challenges that a civic culture presents.

*David L. Chambers*

That is sometimes the way people ask the question. But sometimes when people ask that question, they are really asking a different question. They are really asking, "When can affirmative action end?" That is, when can we stop taking race explicitly into account in the admissions process rather than just relying on whatever other criteria for admission we otherwise use and know that, as with gender, it will produce a diverse class. The answer to this question is, because we will always want racial diversity in our schools, we will take race into account until all the obstacles have been deal with that suppress the numbers of minority students who would get in without consideration of race. I do not think we can say how many years that will be. Over the last few years, I have spent a lot of time in South Africa, and I am stunned that there are white people there who worked to end Apartheid but who say, "Yes, we absolutely have to have affirmative action, but just for one generation." They believe that the playing field will be level in twenty years or so. That isn't going to happen there, just as it hasn't happened here. The effects of slavery, discrimination and stigma are much more enduring.

*Charles E. Daye*

I think we are really talking about how we will achieve social justice, and I do not know if we even have a model so we can say that "we will know it when we see it." We think we know what it might look like, but it is so complicated that we are not able to identify even the things that contribute to the lack of advantages that we have. For example, we are learning now that a mother's prenatal diet affects the development of the fetal brain *in utero*. We are learning more about the "hard wiring" of the brain and the connection between the mother's diet, her stress level while she is carrying the baby, and other factors that would affect the baby's likelihood of passing some test or getting a good score on an LSAT many years later. I think medical science will probably be working at such matters as this for a while. We would like to achieve a point at which who a person's parents are does not delimit the goals that the person can set for herself or himself. But we do not even know yet what all goes into that. We know that it is complicated. We know that we have not come close to achieving anything like the day when the circumstances of a child's birth will not have an adverse influence on that child's ability to achieve in life. So, I think we will not accomplish this in my lifetime, and I am not *that* old.

*Athena D. Mutua*

A member of the audience asks what law schools can do to address the disparate graduation rates and bar passage rates of African-American and Latino/Latina students.

*David L. Chambers*

I came to you with numbers about lower graduation and bar passage rates for minority students. In terms of the formal study of it, a major question that people would like to answer is whether extra counseling and tutoring helps during law school. It turns out that this is a difficult question to research. Not surprisingly, the students that have had tutoring were more likely to flunk out than the students that did not have tutoring. Of course, the only people that get tutoring are the students who are already in trouble. So we have not been successful so far in teasing out



how much difference it makes to provide tutoring or extra programming or some additional instruction before the first year of law school. So far as I know, it has not been done.

*Athena D. Mutua*

This question asks Professor Chambers whether Professor Montoya's report actually contradicted what you thought law schools and law students could do with regard to the educational "pipeline" issues that both of you discussed.

*David L. Chambers*

The question is, what can law students do to improve the educational process starting in elementary education, either to help improve the curricula or to inspire children who are in elementary school to start thinking big about their promise in their life? My only claim would be that there are only 180 law schools. Even if every law school in the country could adopt a school, and even if the law students could volunteer in that school like crazy, we would still touch only 1 percent or less than 1 percent of the schools. I am afraid that even at the volunteer level writ large, there is just very little that the law schools can achieve. But perhaps I am a cynic, and you should listen to Margaret Montoya and pay no attention to me.

*Margaret E. Montoya*

Let me reemphasize that the context that I am talking about is New Mexico. I do not know whether the model that I am proposing to you works outside of that context. But I do know that I can take a seminar, and I can say to the students in that seminar, "I want you to develop projects that are going to have public policy implications beyond this semester." What I mean by that is that I want you to identify the agency heads that are really overseeing these problems and talk with the legislators who have some interest in these problems and see the staffers for the governor. I know this is going to happen, because our law school has those contacts. It is a small state, and policy makers are interested in what law students can do for them. We have a track record of having done this in the

past, not only me but any number of my colleagues. So when I set out to give the students a public policy and law project, not only do I have every confidence in their initiative and creativity, but also I know that law students in New Mexico can do a lot. Next month we will have a national conference in which we will bring in someone from the Department of Justice, and we will talk about segregation. We will have the superintendents, school board members and principals there. This is not abstract. It is going to happen.

*David L. Chambers*

But you are talking about something very different. I was talking about going into the schools.

*Margaret E. Montoya*

We have begun to move in that direction as well, and I think we have achieved some traction. Although the number of law students may be small, they have the advantage of working in connection with a large and highly effective Hispanic retention program in New Mexico. So there is often already a system for my students to become involved with mostly Latino and Latina students. They do not have to invent the pathways to become involved. Those pathways are there, and they can improve on them. Now, I happen to think this is a model that may have applicability outside of New Mexico, but I know it works in New Mexico.

*Athena D. Mutua*

Are there any other concluding comments?

*Frank H. Wu*

I have just one very simple point: this is all real, and it is not just a matter of abstractions or phrases like "strict scrutiny." This determines who will sit on the bench, who will appear in courtrooms as attorneys and as defendants. We should always ask, what are the consequences? What do the empirical data show? What will happen if we adopt this program or that program? And the last thought I had was simply one word: vote.

*David L. Chambers*

I want to say that while we at Michigan are delighted with the outcome in *Grutter*, many of us are unhappy that the rationale for considering race in admissions remains primarily focused on diversity within the educational institution. For the first time, the Court in *Grutter* suggests that diversity in the bar in general may be an important social value. I hope we can build on this language. But I also wish that the Court had gone beyond and talked about the need to share the American pie more broadly and the need for a broader vision of social justice. As you think about the issues of affirmative action and the importance of having minority students in our schools, I hope that your own thinking will not be confined by the narrow vision that our courts have adopted.

#### AFTERWORD: SOME ADDITIONAL THOUGHTS AND COMMENTS

*Athena D. Mutua*

The panel presentations provoked a lively discussion, yet the large number of speakers and the time set aside for questions meant that both the presentations and discussion were short. I now turn to a few of the issues that undoubtedly would have emerged if time had permitted.

The presentations and the ensuing discussion raised a host of issues for further contemplation and study. I will take up three of those issues in my brief comments here. My first set of comments entails my belief that Professors Zedeck and Shultz's study has implications for the wider legal educational and professional community as it relates to the law school experience and entry to the profession via the bar. The study raises questions and invites inquiry into the efficacy of the law school experience to effective lawyering, the relationship of the bar to the effective practice of law, and the impact that both may play in narrowing the diversity of prospective lawyers. My second set of comments take up the social justice question as posed by Professor Wu: "Diversity for what purposes and for whom?" And finally, my last comment addresses the issue of cultural difference or cultural race as a basis of diversity.

A. *Effective Lawyering and Diversity: What do Law School and the Bar Examination have to do with it?*

Professors Zedeck and Shultz's empirical work, which identifies twenty-six factors that contribute to effective lawyering and which will be used as a basis for developing a test to assess these traits and abilities, is important for several reasons. First, it takes up the challenge posed by Justice O'Connor to law schools to develop race-neutral admission policies that yield diverse student bodies.<sup>117</sup> Second, it will potentially yield students who are better suited to the successful study and practice of law while potentially rendering more diverse student bodies. In this sense these assessment tools may marry merit and diversity in the context of a debate that erroneously has seen these two goals as incompatible. Third, it explicitly recognizes the limitations of law school reliance on LSAT and GPA scores for selecting law students, as these scores assess only one type of ability and, by the test-makers' own admission, merely predict how well an applicant will perform as a first year law student. These scores have even less predictive value on the question of whether a student will pass the bar. And they may say nothing at all about whether a student will become an effective lawyer.<sup>118</sup> Finally, in doing all of the above, the Zedeck-Shultz study de-mystifies notions of merit by exposing the fact that definitions of merit are socially constructed, rather than divinely given. In other words, people make tests, and whether one is "qualified" rests on whether one can meet some sort of preconceived or predetermined notion of what is necessary in a particular job category.

The study and the potential development of new assessment tools also raise a number of questions. One question is: Why might such a test potentially cull a more diverse student body? It seems that part of the answer is that the potential test is *intended* to do so in the sense that it is being designed in the context of a more diverse legal profession and is not meant to exclude some particular racial or ethnic group. In this way it differs from the LSAT test, which was initially designed with the intent to exclude southern and eastern Europeans and was first crafted dur-

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117. *Grutter*, 539 U.S. at 339-43.

118. See discussion *supra* pp. 542-50.

ing a time when African, Latino, and Native Americans were for the most part excluded from entry into the legal profession.<sup>119</sup>

Other questions are not so easily answered. For instance, one student attending the Mitchell Lecture asked, might the kind of test that Professor Zedeck is developing weed out potential students who could “grow” into good and effective lawyers through the law school experience? Does the test weed out students who may have a passion for law but do not seem particularly well suited to be “successful” as determined by the test? In asking, “Who gets in?,” is there room for life choice, not just talent?

A third question involves Professor Chambers’ observation that minority graduates of Michigan go on to have successful law careers, and are presumably “effective lawyers,” but that they often do less well in law school than white students and have more trouble passing the bar. Given these facts, what is the relationship between the law school experience and effective lawyering, on the one hand, and the bar examination and effective lawyering, on the other?

Put another way, the LSAT has some predictive value in regard to success in the first year of law school and the bar examination. The courses that are taught nationwide in the first year of law school are the courses that constitute the first one-third of all student grades (which often determine who serves on the school’s law review),<sup>120</sup> and are also the courses tested on the bar examination’s multistate section. If the LSAT assesses abilities which alone do not make for an effective lawyer, then the first year law school experience, and more importantly the bar examination may have a similar failing—that is, they may not adequately either prepare students for or assess their potential to be effective lawyers. Without engaging in a full analysis of

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119. See, e.g., Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1475–94 (discussing the formulation of merit standards and the history of the development of the LSAT during hostilities toward the increasing immigration of Eastern and Southern Europeans and exclusion of black people. She suggests these developments arose in part to preserve entry to the legal profession to the then-considered white elites.).

120. Professor Chambers notes in his presentation that employers tend to focus on students’ grades in their hiring decisions particularly for students who have recently graduated. See discussion *supra* pp. 574–75. Serving on law review also tends to open up opportunities. Thus, first year of law school often plays a significant role in the types of first jobs students’ can secure.

these ideas, they might suggest, at a minimum, that law schools review and reevaluate the package of skills and content they teach (as well as instructional methods), and that the legal profession review the efficacy of the bar examination, in light of Professor Zedeck's stage one research identifying the traits and abilities that shape effective lawyers. Otherwise, although the test Professor Zedeck develops may redefine merit in a way that more adequately corresponds to effective lawyering and yields greater student diversity, these skills may or may not be reflected, developed or evaluated through current law school curricula, or reflected in and tested on the bar. The result may be that even though a diverse group of students gain admission into law schools, current practices within law schools and bar examinations may nonetheless lag behind and narrow the diversity of prospective lawyers or job opportunities for these lawyers because of lower grades in first year courses and lower bar passage rates of minorities.

B. *"Diversity for what purpose and for whom?"*

Even as this Zedeck-Shultz study prompts us to think more seriously about diversity in admissions and the relationship of admission standards to the study and effective practice of law, it does not attempt to address the problems of the pipeline. These problems include the fact that some minorities may be less prepared than similarly situated whites to apply to law school and the fact that pipeline problems result in a small pool of minority law school applicants, as discussed by Professor Montoya. Her comments make it clear that those minorities who get to the law school admission stage are a mere fraction of those who start out in our K-12 educational system, where minorities experience very high drop-out rates and inferior schooling. She asks us to get involved in changing this problem.

And we should, in recognition that these problems are grounded in much larger social structures and forces, including segregated housing, the linchpin of a segregated and unequal educational system, and poverty, among others,<sup>121</sup> many of which build upon and reflect historical

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121. See, e.g., John O. Calmore, *Random Notes of an Integration Warrior*, 81 MINN. L. REV. 1441, 1444 (noting that the "structural linchpin" of U.S. racial

discrimination, oppression and exclusion. These forces no longer rely upon designations of race to keep racial groups segregated, impoverished, oppressed and in their place,<sup>122</sup> blacks in ghettos across the tracks, Indians on the reservations. Rather, with the failure and abandonment of integration as a policy,<sup>123</sup> these structures continue to be a part of the social construction of inequality that constitutes race, building on old patterns and forms of past racism resulting in new forms of colorblind racism.<sup>124</sup> In fact, as we prepare to celebrate fifty years of *Brown*, "many children still attend *racially segregated unequal schools*,"<sup>125</sup> a realization that takes us back to diversity as a tool of social justice, or to the question Professor Wu poses: Diversity for what purposes and for whom?

While Professor Wu applauds the Supreme Court's decision in *Grutter*, as do many of us, he does so primarily, it seems, because of the effect of the decision. The effect of the decision is that qualified minority students will continue to gain admission in law schools in sizable numbers and perhaps be in positions later to wrestle social justice from a society that appears unwilling to address the past, current, or future injustices created by prior and emerging forms of racism. But the question itself invites a more disturbing one, one posed long ago by Professor Derrick Bell, when, in analyzing *Brown*, he suggested that the U.S. decision to break with its segregationist past in *Brown*

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inequality is residential segregation, citing MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995) (discussing housing as lynchpin of segregation.)). See also Greg Toppo, *Integrated Schools Still a Dream 50 Years Later; Decades After Brown, Income, Not the Law, Separates the Races*, USA TODAY, April 28, 2004, at A1 (discussing the legacy of the *Brown v. Board of Education* decision and noting that while black and white students are no longer segregated by law they are segregated by where they live).

122. See Toppo, *supra* note 121 at A2.

123. See *id.* (mentioning that many communities and the policy of "Leave No Child Left Behind" abandon or retreat from integration).

124. See PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, & THE NEW RACISM* 53-85 (2004) (explaining that a new racism exists that draws upon past and sedimented patterns of old racial formations (slavery, segregation, etc.), but which is reorganized in response to globalization, transnationalism, and the proliferation of a mass media that recognizes and recycles old stereotypes of Black people). Collins notes that this new racism is "seemingly colorblind," *id.* at 85, and comments that colorblind ideology is part of the new racism, *id.* at 178.

125. Toppo, *supra* note 121, at A2 (emphasis added).

could not be understood without considering its value to whites. Its value to whites included its potential for solidifying U.S. credibility in the minds of third world peoples, whose support the U.S. sought in its anticommunist struggle.<sup>126</sup> The question, posed more strongly, is: Can minorities ever receive any measure of justice except as a tool of white interests?<sup>127</sup>

The answer, as Professor Daye points out, seems to be—not really, not according to the Supreme Court in the higher education context. The race of disadvantaged minorities cannot be taken into account as part of a process of eliminating the effects of past and present oppression (unless intentional discrimination is found). Rather, it can be considered only in the university setting where minorities contribute to a diverse educational environment (for whites?), in order to augment a “robust exchange of ideas;”<sup>128</sup> where the presence of minorities is needed to teach and demonstrate to white students that there is “no minority viewpoint;”<sup>129</sup> or in the legal profession, where their presence may be needed to “visibly” lend legitimacy to a system and a set of leaders by signifying that the path to leadership is “open to talented and qualified individuals of every race and ethnicity.”<sup>130</sup> The latter is so even though this system of leadership, often trained in law, is likely to remain overwhelmingly white given the predominance of white students in law schools, and in elite law schools particularly. Therefore, might diversity in admissions primarily serve whites by legitimating what can be argued to be an illegitimate system?

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126. See Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 20 (Kimberle Crenshaw et al. eds., 1995).

127. *Id.* at 22 (stating that “the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the Fourteenth Amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle- and upper-class whites.”).

128. *Grutter*, 539 U.S. at 324 (citing *Bakke*, 438 U.S. at 313).

129. *Id.* at 320 (quoting a witness for Michigan Law School).

130. *Id.* at 332 (mentioning the role of law schools in training many of the nation’s leaders). See also COLLINS, *supra* note 124, at 178 (explaining that the colorblind ideology of the new racism requires that Blackness be *seen*, as evidence that policies of colorblindness are working).



Further, given the overwhelming predominance of whites in law schools, particularly elite law schools, are not the terms "disfavored group" or "innocent" to describe white students vis-à-vis minority students as used in the *Grutter* decision perverse?<sup>131</sup> Referring to whites as a "disfavored group" is a good example of the way in which legal language and analysis sometimes has little relation to social reality.<sup>132</sup> Here the legal concept of a "disfavored group" actually distorts and obscures the social reality of white privilege and non-white disadvantage, and perhaps is meant to.<sup>133</sup> This is so, even though it is true that when schools' take race into account as a factor for admissions, they are factoring in the race of racial minorities and not the race of whites. This is because whites form the overwhelming majority of the student population, not because whites students or whiteness is disfavored. Similarly, the Court's use of the term "innocent"<sup>134</sup> to refer to those who are largely the beneficiaries of white privilege and non-white subordination in relation to non-whites who overwhelmingly bear the disadvantages of the history of white domination is simply scandalous. When a white student laughs and says, "I shouldn't have to suffer for my father's sins," I usually smile and reply, "My children shouldn't have to suffer for *your* father's sins, either." A social tax levied in favor of those who have been socially disadvantaged seems a small

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131. Justice O'Connor, in writing on behalf of the majority in *Grutter*, rarely uses the term "disfavored group" in reference to white students. She does so only when quoting someone else. The term, however, is widely used in Justice Thomas's dissent. See *Grutter*, 539 U.S. at 349 (Thomas, J., dissenting).

132. Neil Gotanda, *A Critique of "Our Constitution Is Colorblind"*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 257, 262-68 (Kimberle Crenshaw et al. eds., 1995) (making a similar point in which legal analysis, particularly use of "formal race" by the Supreme Court, is disconnected from and thus does not reflect social reality). Gotanda suggests the various meanings of the term race in Supreme Court jurisprudence, explaining that they cover four distinct ideas: status race, formal race, historical race, and cultural race. *Id.* at 257-58.

133. See, e.g., PEGGY McINTOSH, *WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES THROUGH WORK IN WOMEN'S STUDIES* (Wellesley Center for Research on Women, Working Paper No. 189, 1998); *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* (Richard Delgado & Jean Stefancic eds., 1997) (discussing the notion of white privilege).

134. Under strict scrutiny analysis the state must not only show a that a racial classification is narrowly tailored to further a compelling state interest but must also show that the racial classification does not unduly harm innocent third parties. See, e.g., *Grutter*, 539 U.S. at 326-27.

price to pay in the context of expanding law school opportunities.<sup>135</sup> Yet the Supreme Court seems unwilling to do anything about the disadvantages heaped on these *innocents* for this group's own sake.

Moreover, although Justice Thomas' opinion would do little, if anything, to address the justice claims of minorities, might he be on to something when he suggests that diversity advocates in law school settings are simply trying to construct or preserve a certain aesthetic, one in which different types of bodies are represented? Might it be that all white leadership, all white schools, pictures of all white classrooms in the context of a diverse America, make us aesthetically uncomfortable—but merely uncomfortable? Might this be so despite the fact that large segments of white American society apparently prefer all white settings given the failure of integration? If so, might the decision for diversity in higher education settings, in the absence of other mechanisms to address societal discrimination and oppression, satisfy this aesthetic discomfort, yet contribute little to social justice and perhaps dampen any thirst for it?

### *C. Cultural Race as a Basis for Diversity?*

And finally, when Professor Daye, in describing some of the motivation for his empirical study, posits that his "life would have been different had he been white," is he simply suggesting that absent social inequality, his life would have been different or is he suggesting that race means something more? On the other hand, Justice O'Connor seems to understand race as simply social inequality when she notes that race "unfortunately still matters," and hopes that in twenty-five years it no longer will. Is not race more complicated than this?

Professor Neil Gotanda, in critiquing the notion of a colorblind constitution, suggests that the term race has four

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135. I first heard Randall Kennedy suggest that affirmative action could be seen as a form of a social tax on those who are the beneficiaries of social injustice in favor of those who are members of groups who suffer social disadvantage. Further it seems to me that minorities are not immune from this kind of social tax. So, for example, all non-Native Americans could be considered beneficiaries of policies that resulted in the seizure of Native American land. All of us, therefore, should be subject to a social tax that runs in favor of Native Americans, a community that given our notions of private property should be some of the richest communities in the country instead of some of the poorest.

different meanings in judicial decisions.<sup>136</sup> Most of these meanings relate to the idea that the construction of race has been the construction of social and structural inequality through reference to different types of human bodies.<sup>137</sup> However, this construction of race has been wrought on peoples who have continued to live and produce culture in reaction to and despite oppression. These cultures, what Neil Gotanda calls "cultural race," include the songs, music, spiritual traditions, languages, and stories, among other things, of these subordinated groups.<sup>138</sup>

Often these are the things we pass down to our children—ways of being that reach back before colonial experience or constructed within the depths of oppression but often in spite of it.<sup>139</sup> And while many minorities wish for a time in which social inequality as aspects of race would be no more, might we want to hold onto the cultural aspects of differences produced in part by race—ways of being, thinking, and living shaped by historical oppression? These cultural representations—rituals and stories—are often not the typical stories about hard work and assimilation into the prevailing social order, including the racial hierarchy.<sup>140</sup> But rather, these are rituals about hard work without benefits, land stolen, languages suppressed and demonized, oppression enshrined in institutions and practice, and the struggles to overcome these; struggles rendering justice not just for one group but for many? Might Justice O'Connor want to consider these aspects of race? And might these cultural manifestations, not of future social inequality but of noble deeds meant to engender and inspire a noble spirit,

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136. Gotanda, *supra* note 132, at 257-58.

137. *Id.*

138. *Id.* at 269-72 (defining cultural race as "the customs, beliefs, and intellectual and artistic traditions of black America as well as institutions such as black churches and colleges." This definition might also apply to the various Native American and Latina/o cultures.).

139. Here I am thinking of John Calmore's description of Archie Shepp's music as authentic and self-referential black music. See John Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 315 (Kimberle Crenshaw et al. eds., 1995).

140. See, e.g., Ronald Takaki, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 139-65, 277-310 (1993) (discussing how the Irish and Jews, respectively, became white. Takaki suggests that theirs was a course of assimilation).

offer some of the diversity of thought that she might want to keep in the classroom in twenty-five years?

### CONCLUSION

The 2004 Mitchell Lecture raises a host of issues. In discussing only three of these, I suggest first that the Zedeck-Shultz project and the issues Professor Chambers describes raise larger questions about the efficacy of the law school experience and bar examination to effective lawyering and to diversity within the profession as a whole. Second, I suggest, drawing on Professors Montoya's and Wu's work, that the concept of diversity be used not simply as a tool for educating primarily whites but that it also be used as a tool for eliminating the societal discrimination suffered by minorities due to the effects of past and emerging forms of racism. Conceptualized in this way, diversity has implications for all levels of the educational system, not just for law school admissions. And finally, drawing upon Professor Daye's ideas, I posit that race may be a more complicated construction than Justice O'Connor allows, and that aspects of race, e.g., cultural race, may provide for some of the diversity of thought and motivation that she considers important to the robust exchange of ideas and the practice of law.

We hope the publication of these proceedings will stimulate further questions, discussions, and contemplation.