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# Admissions of a Director

by SARAH C. ZEARFOSS\*

Whenever I am called upon to use the term “diversity,” I brace myself, anticipating the listener’s cynical eye roll. Employing that word is often assumed to be an act of disingenuousness. Although “diversity” means simply “differing one from another,”<sup>1</sup> and although the University of Michigan Law School’s admissions policy explicitly states that “we do not . . . mean to define diversity solely in terms of racial and ethnic status,”<sup>2</sup> there are many – including those who support race-conscious admissions policies – who nonetheless seem certain that the universe of diverse characteristics considered by the Law School Admissions Office begins and ends with race.

Indeed, when I lamented this cynicism to a friend with whom I went to law school – a friend who disagrees vehemently with my

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1. AMERICAN HERITAGE DICTIONARY (4th ed. 2000).

2. UNIVERSITY OF MICHIGAN LAW SCHOOL, REPORT AND RECOMMENDATIONS OF THE ADMISSIONS COMMITTEE 12-13 (1992), available at <http://www.law.umich.edu/newsandinfo/lawsuit/admissionspolicy.pdf> [hereinafter Policy]. In the fall of 1991, a faculty admissions committee took up the task of drafting a new policy, one explicitly modeled after the program described in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and one designed to provide guidance to the Admissions Office, for which a new admissions director had recently been hired. The committee’s undertaking was the first thorough review of the Law School’s admissions policy since the 1970s, and was correspondingly exhaustive. Five professors, two senior administrators, and several students met regularly, looking at hundreds of application files, reviewing existing data, and developing correlation studies of law student performance. The resulting policy was adopted unanimously by the Michigan Law faculty on April 22, 1992. The Law School’s development of its policy occurred wholly independently of, and without reference to, the admissions policies developed and relied upon by the undergraduate admissions office of the University of Michigan, at issue in *Gratz v. Bollinger*, 539 U.S. 244 (2003). Given the markedly different administrative contexts and a decentralized University culture, this is unsurprising.

views on admissions policies – he cheerfully told me that instead of “diversity,” I could use the political right’s terminology. This sounded promising – but it turns out the term he had in mind was the colloquial phrase denoting equine droppings.

The jolting phrase was, presumably, my old friend’s way of signaling his doubt that a commitment to “diversity” is anything more than a smokescreen for admitting a certain number of students of color who, all other things being equal, would not have been admitted. If so, then he’s wrong about that. As reflected in policy and practice, the University of Michigan Law School assigns a far broader meaning to diversity than its critics assume, and the effect of our commitment to enrolling a diverse class is manifest across the student body as a whole, not merely in the ranks of those students who are Native American, Hispanic, or African American.

## I.

### A. Where I Began

My encounter with the diversity maelstrom was sudden. I had been working for two years as an administrator at the Law School when, in the midst of the 2000-01 admissions season, I was offered the position of the Assistant Dean and Director of Admissions. The Admissions Office was adjusting to a recent move to a new set of offices, a new software system, and multiple maternity leaves, not to mention the high-profile lawsuit that had consumed much staff time. Understandably, then, the Law School exercised its managerial prerogative to waive the usual two weeks’ notice, and I assumed the new position within days of the offer, on March 1, 2001. At the time, the trial in our lawsuit had recently concluded but no decision had been rendered.

During a two-month transition period, my predecessor would complete making decisions on the year’s applications, and I would handle the rest of the director’s duties – managing staff, recruiting admitted students, and so on. But on March 27, before I completed my first month on the job, a federal district judge in Detroit ruled that the Law School’s admissions policy was unconstitutional, and declined to issue a stay.<sup>3</sup>

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3. *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001). Six days later, in response to our motion, Judge Friedman reaffirmed his decision to deny a stay. *Grutter v. Bollinger*, 137 F. Supp. 2d 874 (E.D. Mich. 2001). Two days after that, however, the Sixth Circuit reversed and granted the stay. *Grutter v. Bollinger*, 247 F.3d 631 (6th Cir. 2001).

As a result, we were, in essence, without an admissions policy. Now, I had obviously been well aware that there was a lawsuit: as an alumna and employee of the Law School, I had followed the proceedings with some interest. And certainly, any litigant in a complex case recognizes that there is at least some possibility of an adverse outcome. Nonetheless, the proceedings became intensely personal once I became responsible for running the Admissions Office. Suddenly, a bomb had exploded in the midst of our admitting and recruiting, and people expected me to have some ideas about how to handle it. All in all, I learned an excellent lesson, one that would have been quite useful had I still been practicing law: the fact that a lawyer can view a loss with some long-range equanimity, confident about ultimate success, doesn't mean that the losing client will feel less panicky in the meantime.

As we awaited the outcome of the Law School's appellate motion to stay the district court's ruling, all application-reading ceased and we focused instead on recruiting. The major spring recruiting event at Michigan Law is what we call the Preview Weekend, when we invite our admitted students to Ann Arbor and fête them while presenting visions of a scholarly life in our community. The first one was scheduled to begin on March 29, two days after the decision. Having read none of the files and made none of the decisions up to this point, it felt a little odd to be in charge of the Preview Weekend – like hosting a party where I knew none of the guests. Nonetheless, as the prospective students gathered in our Lawyers' Club lounge, I went around the room introducing myself. One young man accosted me: "Why," he queried, "does the Law School have the admissions policy it does? Why do you not want to admit simply the best students?" I stared at him a bit blankly. We *did* want to admit the best students. Didn't we? What on earth was he asking?

## **B. Where I Am Now**

Over time, the meaning of his question has become clear to me. That student, and many others, think that schools like Michigan Law that consider race as one of many factors in the admissions process maintain, in actuality, a two-tiered system: one group, consisting of white and Asian American applicants, is admitted for reasons of "merit" while another, consisting of every other racial group, is admitted for reasons other than "merit."

Some, like Justice Thomas, characterize the motive as aesthetic;<sup>4</sup> they think we simply want a certain look in our classrooms, that our goals are superficial rather than substantive. There are some more generous-minded souls who think we are well-intentioned in seeking to enhance and broaden the range of perspectives brought to the classroom, but that we are misguided in treating race as a factor that will achieve that end.<sup>5</sup> And some, as I am aware from the many emails I have received on the topic, are simply hopelessly inarticulate in conveying what their objection to our policy actually is. But in all events, none of our detractors thinks that an admissions system that considers race as a factor could possibly be one honestly aimed at seeking merit in all its students.

But after two and a half years in this position, having had the opportunity to read approximately 14,000 applications, select and recruit two classes, and unearth enormous amounts of data in order to assist our lawyers in preparing the Law School's appeals in *Grutter*, my understanding of what our admissions process is designed to achieve, and how we go about achieving it, is solid. Were that prospective student from March 2001 my interlocutor today, I could say with total certainty that we are indeed seeking to matriculate the best law students in the country.<sup>6</sup> Trouble is, the notion of "best" is not self-defining.

## II.

### A. The What and Why of Our Goals

An admissions process at a selective school ought to have multiple goals that it seeks simultaneously to satisfy, and it is therefore necessarily complex. At the Law School, our admissions policy commences with a recognition of our history of educating many of the most accomplished lawyers in the country: "esteemed legal practitioners, leaders of the American bar, significant contributors to legal scholarship and/or selfless contributors to the

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4. *Grutter v. Bollinger*, 539 U.S. 306, 349, n.3 (2003) (Thomas, J., dissenting).

5. See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996) (noting: "With the best of intentions . . . the University of Texas School of Law . . . discriminates . . . by giving substantial racial preferences in its admissions program.").

6. "Our goal is to admit a group of students who individually and collectively are among the most capable students applying to American law schools in a given year." Policy, *supra* note 2, at 1.

public interest.”<sup>7</sup> The policy states our commitment to continuing that course by admitting only those who “have the potential to follow in these traditions.”<sup>8</sup> Elsewhere, the policy describes our mission as a search for students who have “substantial promise for success in law school.”<sup>9</sup> The phrasing may be laconic, but the overall purport of the policy is plain: an unambiguous commitment to excellence in our student body.

The policy sets as a floor a standard of “expect[ing] [an] applicant to do well enough to graduate with no serious academic problems.”<sup>10</sup> If one is satisfied that this quite minimal hurdle has been crossed for an individual applicant, how do we make a decision in an individual case about whether to admit or deny? We certainly can’t admit everyone who crosses that threshold, or we wouldn’t have room to move through the hallways; indeed, we must deny admission to four out of five of our applicants. There has to be, therefore, some system for rationally choosing some fraction of those who we think could “do well enough to graduate with no serious academic problems,” while optimizing the number of people who have “substantial promise for success.”

To do so, we must come to grips with the meaning of the “substantial promise” standard. It can’t reflect simply an aspiration that those we admit finish with good grades – after all, since we are not Lake Wobegon, 50% of any class entering the Law School will necessarily end up graduating in the bottom half.<sup>11</sup> Certainly someone whose law school grades were low but who was an active campus leader, or a lively classroom participant – and anecdotal evidence abounds that the best classroom participants often turn out to be modest scorers on exams – cannot be classed as one of those dreaded “admissions mistakes.” What about the graduates who have a distinguished legal career despite not having attained an illustrious transcript? Institutional folklore has it that at least one of our famous graduates was a mediocre student at best – but no one would wish to rescind the offer of admission. Or what about the people who succeed dramatically in one area of the law school, but not in others?

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 2. See also *id.* at 10 (“We reiterate . . . that no student should be admitted unless his or her file as a whole leads us to expect him or her to do well enough to graduate without serious academic problems.”).

11. GARRISON KEILLOR, LAKE WOBEGON DAYS (1995).

A patent law professor tells me that some of her most intellectually alive, deep-thinking students are routinely largely unknown to the rest of the faculty. Further, having gone back to examine the files of all those she has extolled to me (the woman has an amazing fifteen-year memory for students who have impressed her), it is undeniable that virtually none of her all-stars would have been admitted had our admissions process involved simply selecting the candidates with the highest combination of Law School Admission Test (LSAT) score and undergraduate grade-point average (UGPA).

These various students are valued at least as highly by the faculty and by the Law School community as a whole as those whose graded performance is consistently impressive. It should come as no surprise to anyone that an admissions office with the freedom to choose from among large numbers of well-qualified applicants will seek this type of variety, and that to do so, it will take “‘soft’ variables”<sup>12</sup> into account, rather than scrutinizing solely the score data. Admissions officers frequently say that admissions is an art and not a science as a way of describing the need to use our experience and our intuition in order to look beyond scores and discern the potential for contributions to the institutional community. It is the “art” in admissions that lets us draw conclusions about promise and potential from information other than scores.

In our admissions policy, we recognize that non-score information in the application can be useful in several ways. First, we may learn information that leads us to conclude the LSAT and UGPA are not predictive of law school performance;<sup>13</sup> we may learn, for example, that the applicant has a history of outperforming the predictions of standardized tests, or we may learn that his college career was marred by some personal tragedy. More generally, the application “may tell us something about the applicant’s likely contributions to the intellectual and social life of the institution.”<sup>14</sup>

That latter piece must be broken into two components. First, by looking closely at an entire academic record, rather than solely at the UGPA, we may learn information that suggests an applicant will “have more to offer both faculty and students” than someone else with a similar, or even higher, UGPA. There is, obviously, an abundance of factors in an academic record that reveal greater academic depth than a mere number can, such as a wide-ranging,

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12. Policy, *supra* note 2, at 5.

13. *Id.* at 9.

14. *Id.* at 5.

fearless curriculum, or advanced study and mastery of a particular subject.<sup>15</sup> Equally important, though distinct, is the “information in an applicant’s file [that] may . . . suggest that that applicant has a perspective or experiences that will contribute to the diverse student body that we hope to assemble.”<sup>16</sup>

## B. Implementing the Goals

It is unusual to hear any scholarly critic of affirmative action take issue generally with these goals and the exercise of this sort of discretion. What is criticized as a matter of policy is the inclusion of race as any part of the process, and what is universal among the critics is a conviction that race far outweighs any other consideration.<sup>17</sup> The argument that race ought not play any role in the process is, of course, well-trodden ground, and I have nothing novel to contribute to that discussion. But I do have something to say in response to the surprisingly common view about the prominence of race in our decision-making: it is a perception that is dramatically inaccurate. As

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15. As a general matter, I have found fixation on the UGPA is not conducive, and indeed may be counterproductive, to making the best admissions decisions. Knowing that an applicant has a 3.6 (our median UGPA for the most recent entering class) does not tell me where she earned it. I therefore cannot know the median at that school (is she in the middle of the pack with a 3.6, or is she in the top 5%?), and I likewise do not have any basis for assessing the competitiveness of her fellow students. I do not know whether she took many courses in basket-weaving, or whether she majored in astrophysics. And so on. The UGPA itself is merely one small component of the range of information central to interpreting undergraduate performance.

16. Policy, *supra* note 2, at 5. There are some, I think, who are a bit mystified by our interest in these sorts of soft variables, and who might question the worth of having all these different voices in the classroom. Much has been written on the pedagogical value of this sort of diversity, and I can add little to that. From my personal experience, I would simply note that having long held views challenged by classmates taught me to be a better lawyer. Hearing a former police officer speak to search and seizure was illuminating; hearing a former military officer’s take on the United Nations was enlightening; and hearing a fraternity brother’s earnest arguments about statutory rape was mind-blowing to me, a graduate of an all-women’s college (and I like to think my views expanded his frame of reference as well). Moreover, judging a candidate’s scholastic achievements in the context of the rest of his life simply creates a much fuller picture: tort law may not take “account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men,” OLIVER WENDELL HOLMES, *THE COMMON LAW* 108 (1881), but law school admissions offices ought to try to.

Our application is designed to give ample opportunity to applicants to tell us about all these qualities we seek. We ask, therefore, about the applicant’s parents’ educational level and employment; when the applicant learned English; whether the applicant had responsibility for care of dependents, alongside questions about more traditional extracurricular activities; and so on. Most significant for this purpose are the opportunities we give to applicants to write up to two essays in addition to a personal statement, explaining any element of the application that is not clear from the other questions we ask.

17. The plaintiffs termed it a “super factor.” *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 836 (E.D. Mich. 2001).

I will discuss, there are numerous factors, wholly independent of considerations of race, that play an enormous role in our admissions process.

### *1. Leapfrogging*

In the course of gathering data for our lawsuit, we carefully studied the extent to which “soft variables” – that is, factors apart from the LSAT and UGPA – matter in our admissions process.<sup>18</sup> To that end, we examined the data for the applicants to the class entering in 2001, which was, at the time, the most recent class for which we had the data.<sup>19</sup> Comparing the LSAT and UGPA of each student who enrolled in 2001 to the list of those who had been denied revealed something surprising, even to us: 20%, or 76 students, of an enrolled class of 362 had both lower LSAT and UGPA than at least 100 applicants who had been denied; another nearly 30%, or 103, had both lower LSAT and UGPA than at least 23 and as many as 99 of the denied applicants.

In other words, our commitment to matriculating a class that is not merely promising and talented, but interesting and diverse, meant that half of the class entering in 2001 was admitted in favor of a moderate or significant number of denied candidates whose scores were higher. Internally and informally, we at the Law School came to refer to this group as “leapfroggers,” a shorthand term which has the virtue of vividness, and which we used to connote the abundance of energy, initiative, and ambition these students had demonstrated. To some degree, though, the imagery implicitly validates the notion that the score criteria are the sole “real” measure of “merit.” To the extent the term suggests that only rarely can a few extraordinary applicants persuade us to glance away from a numerical grid of LSAT and UGPA that otherwise inflexibly governs our decisions, it is misleading. Our process does not consist of framing a presumption based on the LSAT and UGPA, with a subsequent quick glance through the file to see if anything offers a rebuttal. In fact, the data show definitively that this is not the way the system works at all; if half the class are “leapfroggers,” then leapfroggers are, in fact, the norm.

Now, those who are convinced that we use the term “diversity”

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18. Jeffrey S. Lehman, our former Dean and current President of Cornell University, conceived the design of this research.

19. We have not yet performed this particular exercise with respect to subsequent classes – although we may well do so in connection with our ongoing internal commitment to monitoring our policy and its effect.

as a smokescreen might anticipate that the leapfroggers are always underrepresented minorities<sup>20</sup> but that clearly cannot be the case. Even our most ardent detractors know that nowhere near 50% of our student body are underrepresented minorities.<sup>21</sup> And in fact, as it turns out, the biggest beneficiaries – racially speaking – of Michigan's willingness to look beyond the numbers are white and Asian American.<sup>22</sup>

Specifically, of the seventy-six “significant leapfroggers” – those whose numbers were lower than 100 or more of the applicants who were denied admission – thirty-five, or fewer than half, belonged to the category of underrepresented minorities,<sup>23</sup> while forty-one were from groups where race, as such, would *not* have been a factor in making them an offer of admission.<sup>24</sup> For the “moderate leapfroggers” – those whose scores were surpassed by twenty-three to ninety-nine of the applicants who were denied admission – the ratio is even more striking: about 85% self-identified as white or Asian American. Given this, it is not surprising that for every Native American, African American, or Hispanic student whose LSAT and UGPA placed him or her in the bottom quartile of scores in the entering class, there was at least one white or Asian American.<sup>25</sup> For every underrepresented minority getting a shot at Michigan Law, there is a white or an Asian American who is too.<sup>26</sup>

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20. The Policy does not use the term “underrepresented minority,” although that is the term frequently employed in discussions of affirmative action. The Policy instead speaks of “a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.” Policy, *supra* note 2, at 12.

21. Between 1992 and 2003, the aggregate percentage of Native Americans, African Americans, and Hispanics in the entering class ranged from 12.5% (2001) to 20.1% (1994).

22. To be clear, not all underrepresented minorities in the entering class of 2001 were among the group of those whose scores were lower; indeed, many minority applicants were themselves “leapfrogged” – that is, were denied despite having higher scores than some students in the entering class.

23. Twenty-two were African American, eleven were Hispanic, and two were Native American.

24. Thirty-one were white and nine were Asian American; one chose not to identify his race.

25. In 2001, of the ninety people in the bottom quartile of LSAT and UGPA scores, 60% self-identified as white or Asian American.

26. If all I have said is true, then how is it we have been criticized for admitting such a small percentage of whites with certain scores, in comparison with minorities having the same scores? At trial, an expert witness for the plaintiff calculated what he termed “the relative odds of acceptance” for individual minority groups relative to whites, and concluded that “the relative odds of acceptance for Native American, African American, Mexican American and Puerto Rican applicants were many times greater than for Caucasian applicants.” *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 836-37 (E.D. Mich. 2001). There are many more whites with any given

## 2. *The World Beyond the Numbers*

The premise of the leapfrogger study was that many students are admitted for reasons other than their scores, and the data show that most of them demonstrably were admitted for reasons other than race. If we weren't thinking about scores and we weren't thinking about race, about what, then, were we thinking? Going back to those files confirmed the initial, obvious supposition: these students were admitted because their applications revealed them to be exceptional on the basis of their "soft variables." That is, admitting these candidates answered the exhortation of our admissions policy that we seek to admit students who will contribute to "the intellectual and social life of the institution"<sup>27</sup> in ways and to a degree that their LSAT and UGPA alone fail to reveal.

The natural question, of course, is: "How so?" And that gets at the tricky part of this exercise. Some of these files contained extremely compelling personal stories – stories, I assure you, that you would love to hear.<sup>28</sup> These are not stories, however, that are appropriate for sharing with a broad audience because to the extent that they're extremely compelling, they're also so unique as to make the individuals identifiable. I am left, therefore, with the less riveting course of describing general categories.<sup>29</sup>

Most compelling were the rare students who had overcome extraordinary obstacles that left me wondering how they were able to stand upright, let alone fill out law school applications and supplement them with respectable LSATs and UGPAs. People had been abandoned by their parents at young ages; some raised

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combination of scores than there are members of particular minority groups with those scores – hence the term "minority." According to the National Statistical Report of the Law School Admissions Council for 2001, there were 7058 whites in the national pool whose LSAT was between 155 and 164, and whose UGPA was 3.5 and above; in contrast, there were 168 African Americans. Of those, again according to LSAC data, 794 whites applied to Michigan Law in 2001 and thirty-one African Americans did. Thus, even if every time we admitted an underrepresented minority with low numbers, we admitted a white with identical scores, the so-called "relative odds of acceptance" would nonetheless be heavily in favor of the individual underrepresented minority because there are just many more whites – in the country, and more narrowly, within the pool of law school applicants.

27. Policy, *supra* note 2, at 5.

28. Or at least, anyone who is an admissions officer would love to hear them. I suspect that most admissions officers have enormous trouble resisting the impulse to make offers to any applicant whose personal story is compelling, because fundamentally, what draws people to admissions work is an abiding interest in hearing other people's stories.

29. The admissions policy attempts that general descriptive task by noting that "[o]ne might, for example, give substantial weight to an Olympic gold medal, a Ph.D. in physics, the attainment of age 50 in a class that otherwise lacked anyone over 30, or the experience of having been a Vietnamese boat person." Policy, *supra* note 2, at 11.

themselves and siblings from the time of their early teens. People had been raised in extreme poverty, to the extent that they had no running water throughout their childhood. People had suffered serious physical disability or chronic disease. Scholastic achievement in the face of these odds is, to me, astonishing.

Other students had truly remarkable backgrounds of community or public service. I do not mean people who work for a U.S. representative during a summer, or for a year or two after college, answering constituent mail.<sup>30</sup> Rather, there were applicants whose years of service were significant, and whose depth and breadth of contribution were noteworthy. The applicant who worked for very low pay as an investigator for a well-regarded legal services organization, and who evinced a high degree of motivation to continue such service as an attorney; the applicants who endured a high level of personal discomfort and life disruption to volunteer in third-world countries; the applicants who challenged themselves by serving as teachers in underfunded urban schools all stood out as outstanding and desirable additions to the class.

Some applicants had backgrounds that simply set them apart, and provided them with experiences from which their fellow students could learn. Military service, entrepreneurship, Ph.D.s and M.D.s, and impressive athletic accomplishments all made a difference for some applicants. Other applicants had personal qualities that are unusual and that we value accordingly: some were non-U.S. citizens whose country of origin had significant cultural differences from the United States; some were lesbian and gay; some were older, returning to school after a hiatus of decades; some were of ethnicities that, while not formally mentioned in our admissions policy, we view as important voices – Arab American, for example, or Hmong.<sup>31</sup>

One difficulty in assessing these files and attempting to judge, after the fact, what might have made the difference for an applicant, and the extent of the difference it made, is my sense that students' stories do not fall neatly into discrete categories of "LSAT and UGPA not predictive" and "likely to contribute to social life" and "likely to contribute to intellectual life." For example, an applicant who grows up in China and learns English in high school might be

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30. To be clear, I do find that sort of experience valuable; it is not, however, so unusual in the applicant pool as to be a factor that, without more, will overcome significant weaknesses in the LSAT and/or UGPA. Indeed, I remember having a dim suspicion when I was a first-year at Michigan Law that I was the sole student who had not worked on "The Hill."

31. Members of these groups would ordinarily be classified as white and as Asian American, respectively.

someone for whom we think an LSAT score is not predictive, given the language issues, but might also be someone whose background we could reasonably expect would lead him to make special contributions to both the social and the intellectual life at the Law School.

There is, moreover, the problem of intersectionality. This same Chinese applicant might have grown up in poverty, and become a student activist during college. We have in this one applicant, therefore, the obstacle of socioeconomic disadvantage overcome as well as a strong suggestion of leadership. We must understand his achievements in light of the extraordinary hurdles in his path, but we are also attracted to his demonstrated potential for leadership, and intrigued by his unique voice. A military officer might be gay; a Ph.D. may have an extraordinary record of public service; and so on. Which factor led to admission? And which factor, had it been absent, would have put the applicant in the “no” pile? And mightn’t the combination result in a whole that is greater than the sum of its parts?

Finally, when looking past the numbers to a candidate’s soft factors, we are looking for something more than the fact of a particular experience; rather, we seek evidence that the experience will be of value in the classroom. If a student will not speak, then it doesn’t matter what he has to say. If a student is inarticulate, then his interesting experiences will not advance the classroom dialogue. We find indications of willingness and ability to contribute in the candidate’s power of expression in his or her personal statement and essays; in the content of recommendation letters; and implicitly, overall, in the care that is taken with the application as a whole. Bottom line, one candidate with certain numbers and a certain set of experiences might fare quite differently from another with identical numbers and similar background, simply because one was able to persuade us, and one was not.<sup>32</sup>

It is for all these reasons that I tend to be pessimistic about the possibility of dissecting our process and describing with statistical precision what, precisely, is the animating principle at work when we make a decision to admit or deny a particular applicant. I have been urged to code essays and letters of recommendation as “great,” “good,” “mediocre,” and so on, in an attempt to get quantitative information about the weight of race independent of other variables. Putting aside my self-interest in not pursuing a task that could

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32. The make-up of the rest of the applicant pool will also have an effect, of course. The more unusual a particular individual’s background is within our pool, the more likely that background is to make a positive difference in the outcome.

radically increase my workload, I would resist such a plan because I am convinced it would be futile, and suspect it would be misleading.

### III. Verifying the Claims/Guarding the Guards

When the Supreme Court opinion issued on June 23, 2003, I was personally elated. While I had had a great deal of confidence that the Law School's policy would be found constitutional, I had internalized the lesson from my first weeks in the position and had attempted to prepare myself mentally for a summer to be spent in an all-consuming attempt to craft a new policy. And thanks to the casual remark uttered by one of our civil procedure professors about a worst-case scenario, I occasionally allowed myself to imagine a fall and winter spent in weekly trips to the federal courthouse in Detroit, reporting to the district judge about every offer and every denial of admission I made. But the majority opinion seemed to have examined our policy and practices carefully and fairly, and the outcome put to rest my anxiety.

One element of the opinion, however, struck me initially as quite troubling. Justice Rehnquist's dissent states that the Law School's use of the term "critical mass" to describe its goal for the make-up of minorities in an entering class "is simply a sham,"<sup>33</sup> instead, he asserts, the Law School's goal is "'outright racial balancing.'"<sup>34</sup> His evidence for this proposition is the relation of our offer rates to the overall applicant population; specifically, he observes that "the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying 'some attention to [the] numbers.'"<sup>35</sup> His dissent goes on to set out tables showing data from between 1995 and 2000, illustrating the tracking between percentage in the applicant pool and percentage in the group of admitted applicants.<sup>36</sup>

When I read this on the afternoon the opinion issued, I was convinced that it was simply an error; when I performed the

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33. *Grutter v. Bollinger*, 539 U.S. 306, 367 (2003) (Rehnquist, J., dissenting).

34. *Id.* (citation omitted).

35. *Id.* (citation omitted).

36. Interestingly, the numbers set out by Justice Rehnquist are themselves inaccurate; they appear to have been taken from data put forth by one of the plaintiff's expert witnesses, rather than from the Law School's records, and are larger than the actual numbers of offers made. Nonetheless, his fundamental observation about the similarity in percentages remains basically accurate, and it is therefore not worth setting out a point-by-point data comparison.

arithmetic, though, I discovered to my dismay that it was not. Next, I became convinced that the data from 2001 would show something radically different; otherwise, I reasoned, the dissent would have included that data in the table as well. Once again, I performed the arithmetic, and once again, I discovered I was wrong.<sup>37</sup>

My next, rather desperate, supposition was that for the two years that I made the admissions decisions, 2002 and 2003, the data would reveal a different story. That would be disturbing, of course, because it might suggest some past problem in our process, but at least it would be redeeming of *me*. I was denied even this pathetic consolation, though, as the phenomenon repeated itself.<sup>38</sup>

There were other aspects of data relied on by the dissents that were easily rebuttable.<sup>39</sup> Justice Rehnquist's apparently damning argument, however, seemed to be making a more valid observation. Except for this, I finally realized: it was surprising news to me. The day the opinion issued was the first day in my life I had ever done the math to figure out what percentage of the applicant pool consisted of

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37. For 2001, Native Americans comprised 0.9% of the applicant pool, and received 1.1% of the offers; African Americans comprised 8.1% of the applicant pool, and received 8.3% of the offers; and Hispanics comprised 5.2% of the applicant pool, and received 5.3% of the offers.

38. For 2002, Native Americans comprised 0.7% of the applicant pool, and received 1.3% of the offers; African Americans comprised 7.3% of the applicant pool, and received 9.1% of the offers; and Hispanics comprised 5.9% of the applicant pool, and received 6.1% of the offers. For 2003, Native Americans comprised 1.1% of the applicant pool, and received 1.6% of the offers; African Americans comprised 8.5% of the applicant pool, and received 6.8% of the offers; and Hispanics comprised 7.2% of the applicant pool, and received 6.8% of the offers.

39. Consider, for example, Justice Kennedy's dissent, which focuses on the percentages of enrolled minorities as the smoking gun, rather than on the percentages of offers extended compared to the percentage of applications (thus setting forth a theory wholly inconsistent with that of Justice Rehnquist). Justice Kennedy first propounds a rather odd theory about the Law School's having a moving target quota for minorities, *Grutter v. Bollinger*, 539 U.S. 306, 371-72 (2003) (Kennedy, J., dissenting) – a theory for which there is not a smidgen of evidence, and which not even the plaintiffs hinted at, and which simply omits data from any year that conflicts with the theory. He then extols Amherst College as the standard against which Michigan Law School comes up short: “[T]he Law School program compares unfavorably with the experience of Little Ivy League colleges. Amicus Amherst College, for example, informs us that the offers it extended to students of African-American background during the period from 1993 to 2002 ranged between 81 and 125 out of 950 offers total, resulting in a fluctuation from 24 to 49 matriculated students in a class of about 425. The Law School insisted upon a much smaller fluctuation, both in the offers extended and in the students who eventually enrolled, despite having a comparable class size.” *Id.* at 372-73 (citations omitted). This criticism is nothing short of mystifying. The Law School's offers to African Americans during the same period ranged from 87 to 138, out of 1024 offers total, resulting in a fluctuation from 21 to 37 matriculated students in a class size that averaged 350. In other words, Amherst's offers to African Americans varied by 35%, while the Law School's varied by 37%; the number of African-American students enrolled at Amherst ranged from about 6% to about 12%, while at Michigan Law School, the range was about 6% to about 11%. If the data reveal an important difference between Amherst's practices and the Michigan Law School's, it escapes me.

African Americans, and what percentage of our offers were made to African Americans. It is quite clear that the numbers show a correlation, just as Justice Rehnquist observed – but it is also quite clear, again, to me if to no one else, that this was not the result of a conscious effort to have the two numbers correspond. My anxiety on this point was ultimately put to rest by concluding that my lack of *mens rea* obviated the *actus reus*.

A more critical flaw in the reasoning, though – since I cannot reasonably expect that detractors of the Law School’s admissions policy to accept on faith my claim of good intentions – is a parallel observation that Justice Rehnquist failed to make. The percentage of offers to whites and Asian Americans also tracks those groups’ percentages in the overall applicant pool. Put another way, we see the same pattern for every single racial category represented in the applicant pool – not just for particular minorities. No one, though, has suggested that a desire to satisfy a quota for whites and for Asian Americans drives our admissions practices. Indeed, I think it likely that the same phenomenon would be revealed for other categories that appear in similar numbers in our applicant pool – people whose last names begin with C or M, for example, or people hailing from California and New York. Data about such groups is the sort of data the Admissions Office spent lots of time unearthing during the course of the lawsuit. We know, for example, that between 1992 and 2002, the percentage of people in the entering class whose last name began with S varied by only 4.1% (9.7% for the low in 1995, and 13.8% for the high in both 1996 and 1998), far less than the 7.6% variation for underrepresented minorities.<sup>40</sup> Thus far, no one has accused us of having a quota for people whose last names begin with S. It may simply be that when some group consistently appears as a relatively fixed percentage of our applicant pool, odds are that they will appear in similar numbers in the pool of admitted students.

#### IV. Conclusion

To be clear: I do not purport here to give a comprehensive listing of what we mean when we say “diversity.” The possibilities are endless. But the concept is real, it is not narrowly limited to race, and it has far-reaching effect in our admissions decisions. While it is true that the only way to deduce the intentions of the relevant actors in the admissions debate is by looking closely at the numbers, it is not a

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40. See *supra* note 18 and accompanying text.

straightforward inquiry. Indisputably, statistics can illuminate, to some degree, the black box of the mind of the admissions officer. That said, admissions decisions are fundamentally complicated and multi-faceted, and thus not susceptible to easy quantitative analysis. Again, admissions is an art and not a science; as a result, one candidate with certain numbers and a certain set of experiences might fare quite differently than another with identical numbers and similar background. When I am asked, as I often am, “why was I denied?” my answer is never satisfactory – not because I wish to obscure, but because our complex admissions process makes a truly comprehensive and accurate answer enormously difficult to construct. If it is difficult to answer that question for any individual applicant, we must be correspondingly leery about statistics that purport to answer the question for denied applicants as a whole.