

ON AFFIRMATIVE ACTION AND “TRULY INDIVIDUALIZED CONSIDERATION”[†]

Andrew Koppelman & Donald Rebstock***

INTRODUCTION

In its most recent affirmative action decisions, the Supreme Court has declared that, in order for an admissions program to permissibly take race into account, it must give each applicant “truly individualized consideration.”¹ Each applicant, it has said, must be “evaluated as an individual.”² The rhetorical power of the opinion rests on the contrast between crude, mechanical sorting and an admissions process in which applicants are treated as the unique people they are, and in which each of them gets precisely the result that he deserves.

This rhetorical move is a cheat. Nobody ever gets exactly what he deserves. In any case, giving people what they deserve is not the business of an admissions office. The Michigan Law School process that the Court approved flunks this standard. So does Northwestern’s, which is even more individualized. So does any other possible admissions program. Truly individualized consideration is impossible.

The authors of this paper know something about the admissions process.³ Northwestern University School of Law has the most individualized law school admissions program in the country. We do not, however, delude ourselves that we are achieving perfect justice in our admissions decisions. We are making intelligent guesses, based on inevitably limited information, about the quality of our applicants. We are proud of the care with which we select our students. But we do not think that we are doing justice to the unique personalities of each applicant. No admissions process can do that.

[†] This Essay was previously published in the *Northwestern University Law Review Colloquy* on December 14, 2006, as Andrew Koppelman & Donald Rebstock, *On Affirmative Action and “Truly Individualized Consideration,”* 101 NW. U. L. REV. COLLOQUY 49 (2006), <http://www.law.northwestern.edu/lawreview/colloquy/2006/6/>.

* Professor of Law and Political Science, Northwestern University.

** Associate Dean of Enrollment, Management, and Career Strategy, Northwestern University School of Law. The authors thank Heather Benno and Marcia Lehr for research assistance. The views expressed herein are those of the authors alone and are not necessarily those of Northwestern University.

¹ *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 269 (2003) (noting admission program’s failure to provide applicants with requisite individualized treatment).

² *Grutter*, 539 U.S. at 337.

³ Mr. Rebstock oversees the admissions office, and he in turn reports to the Northwestern faculty, which includes Professor Koppelman.

The Supreme Court has tried to make a vain dream into a constitutional requirement.

In *Gratz v. Bollinger*, the Supreme Court invalidated the University of Michigan's use of affirmative action in its undergraduate admissions program because the program was excessively mechanistic in its use of race as a criterion, and thus failed adequately to treat applicants as individuals.⁴ In *Grutter v. Bollinger*, decided the same day, the Court upheld the same school's law school admissions program, because the law school "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."⁵ When a fixed value is assigned to race, as the undergraduate admissions program did, applicants are not treated as individuals and equal protection is violated. "[T]ruly individualized consideration demands that race be used in a flexible, nonmechanical way."⁶

The individualized consideration requirement is an odd one. As Robert Post has observed, the requirement originated in Justice Powell's opinion in *Regents of University of California v. Bakke*.⁷ For Powell, individualized consideration was relevant because it helped the courts to determine whether an affirmative action program was serving the compelling interest in diversity, understood as a broad range of differences among students that could contribute to the richness of the educational environment. If rigid quotas were used, then race was being singled out as a special qualification, and the interest in educational diversity was not really being served.⁸ The Court that decided *Gratz* and *Grutter* does not share Powell's view of the importance of educational diversity, since it is willing to allow universities to single out race as a special consideration in admissions in order to assemble a "critical mass of underrepresented minority students."⁹ It thus leaves the requirement severed from its rationale.

Here we are making a different point: the "highly individualized, holistic review of each applicant's file" that the Court insists on does not really treat people as individuals, rather than as members of categories. Some decisionmaking processes try to tease out the unique particularities of individuals. The clearest example is the discretionary exercise of mercy in the criminal justice system, preeminently with respect to the death penalty. But such individualization is impossible for the admissions process of any large educational institution. Try as we might to individualize, the admis-

⁴ *Gratz*, 539 U.S. at 269.

⁵ *Grutter*, 539 U.S. at 337.

⁶ *Id.* at 334.

⁷ Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law*, 117 HARV. L. REV. 4, 68 (2003) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315-18 (1978)).

⁸ *Id.* at 68-70. Ironically, the "quota" that was used in *Bakke* was less mechanistic than Powell assumed. See JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 19-24, 41-43 (1979).

⁹ *Grutter*, 539 U.S. at 318, 335.

sions process necessarily involves the crude use of rough and ready techniques of prediction.

This essay has four parts. Part I reviews the “individualized consideration” requirement laid down in *Gratz* and *Grutter*. Part II describes what an actual law school admissions process is, at an unusually prosperous, small, and selective law school. This process has many virtues, but it would be an exaggeration to say that it achieves truly individualized consideration. Part III contrasts admissions decisions with the one other area in which the Court has demanded individualized decisions: the administration of the death penalty. The admissions process is far cruder than anything the Court would accept in the death penalty context. Part IV argues that when the actual goals and methods of the admissions process are understood, it becomes clear that racial diversity is continuous with, rather than in violation of, those goals and methods.

I.

In *Grutter*, the Court upheld the University of Michigan Law School’s admissions program. The Law School is highly selective, admitting 350 students each year from a pool of more than 3500 applications. The admissions process seeks “individuals with ‘substantial promise for success in law school’ and ‘a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others.’”¹⁰ It also seeks “a mix of students with varying backgrounds and experiences who will respect and learn from each other.”¹¹ While no specific factor is determinative in the admissions process, the Law School is committed to

“one particular type of diversity,” that is, “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.” By enrolling a “‘critical mass’ of [under-represented] minority students,” the Law School seeks to “ensur[e] their ability to make unique contributions to the character of the Law School.”¹²

The Supreme Court held that the policy classified on the basis of race and was therefore subject to strict scrutiny. But it also held that such scrutiny was satisfied. The Law School had a compelling interest in attaining a diverse student body, and this program was necessary to that compelling interest.

Crucial to the result in the case was the Court’s determination that the program was sufficiently individualized.

¹⁰ *Id.* at 313–14.

¹¹ *Id.* at 314 (quotation marks omitted).

¹² *Id.* at 316 (citations omitted).

When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.¹³

Such consideration was provided by the Law School’s program. “Here, the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races.”¹⁴

The companion case, *Gratz*, involved the University of Michigan’s undergraduate program. The undergraduate program is huge. In the 2004–05 academic year, 21,293 students applied, and 13,304 were admitted.¹⁵ The undergraduate program’s admissions guidelines were far more mechanical than the Law School’s, assigning each applicant a certain number of points for each of the factors relevant to admission, including “high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, and leadership.”¹⁶ It also considered race. An applicant received twenty points, one-fifth of the total required for admission, if he or she was a member of an underrepresented ethnic or minority group.

This twenty-point bonus, the Court held, violated the Constitution. “[T]he result of the automatic distribution of twenty points is that the University would never consider [a minority student’s] individual background, experiences, and characteristics to assess his individual potential contribution to diversity. Instead, every [minimally qualified minority applicant] would simply be admitted.”¹⁷

The point was amplified in the concurrence by Justice O’Connor, who cast the deciding vote in *Grutter*. The undergraduate admissions system, she noted, “is a nonindividualized, mechanical one.”¹⁸ This contrasted fatally with that of the law school:

The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each

¹³ *Id.* at 336–37.

¹⁴ *Id.* at 337.

¹⁵ See U.S. NEWS AND WORLD REPORT, AMERICA’S BEST COLLEGES: THE 2006 DIRECTORY OF COLLEGES AND UNIVERSITIES 198 (2006).

¹⁶ *Gratz*, 539 U.S. at 253.

¹⁷ *Id.* at 273–74 (citation omitted).

¹⁸ *Id.* at 280 (O’Connor, J., concurring).

individual applicant. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter* requires: consideration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups.¹⁹

There is an odd mismatch between the rhetoric of treating a person as an individual, which appears ubiquitously in both decisions, and the idea that the individual is to be assessed in terms of "the contribution each individual's race or ethnic identity will make to the diversity of the student body." The implication is that some black students will contribute more to diversity than others, and that schools have a constitutional obligation to decide which of their black applicants is "really" black. It is hard to think of a requirement that is more insulting to the idea of individualized treatment.²⁰ With or without this strange proviso, if schools are going to assemble a "critical mass" of minority students, then at the margins race will have to make a difference that in some cases is decisive. The rhetoric of individualization is thus contradicted even within the rationales that the Court offers.

The upshot of the two opinions is that individualized consideration is a constitutional requirement for any admissions program that has an affirmative action component. This means that, while race may be assigned a weight that is sometimes decisive, this weight may not be formalized. We agree with Justice Souter's observation that "[s]ince college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race."²¹ The Court appears to have taken the side of inarticulate intuition. But it is worse than that. The intuition eludes articulation precisely because it rests on premises that are romantic nonsense.

II.

Since Dean Rebstock is the one of us who actually runs admissions at Northwestern, he will speak for himself in this section:

Prior to my arrival at Northwestern Law in 1996, I worked for seven and a half years as an admissions recruiter for Northwestern's Kellogg School of Management. Upon my arrival at the Law School, I was immediately struck by the relatively small set of requirements one had to fulfill in

¹⁹ *Id.* at 276–77 (citations omitted).

²⁰ See Post, *supra* note 7, at 73 n.332 (puzzling over the notion that two candidates from the same minority group might make different contributions to diversity).

²¹ *Gratz*, 539 U.S. at 295 (Souter, J., dissenting).

order to apply to law schools. As with law schools, applicants to business schools had to submit basic information on data forms, supply letters of recommendation and transcripts, and complete a standardized entrance exam. But nearly all of the top business schools also strongly recommended (Kellogg required) applicants to complete a personal evaluative interview and to respond to as many as ten very specific essay questions. Among law schools, evaluative admissions interviews were almost unheard of, and the individualized writing requirement was usually limited to an often generic and open-ended one to two page essay called a personal statement. This set of requirements continues to be the norm at most of our nation's law schools.

Furthermore, it appears from conversations I have had with pre-law advisors that the admissions outcomes for many students can be predicted solely on the basis of LSAT scores and undergraduate GPAs. While these two factors are highly relevant and correlate quite strongly with academic results in law school, they provide little evidence that is helpful in predicting an applicant's judgment, character, and potential for career success after law school. As a result, law school graduates are often very bright but lack sound judgment and strong values and ethics.

In their defense, all of the top law schools give personal attention to every piece of every application they receive. In that sense, they meet the Court's "highly individualized" criterion at least as well as Michigan's admissions program. And law schools have generally done a good job of assembling student bodies that are diverse not only by race and gender but also in terms of undergraduate institutions, majors, geographic representation, and opinions. But they ought to do more than the Court has required of them. Law schools should strive to glean more information from their applicants, and should give more weight to the likelihood of future career success in their admissions evaluations. Ultimately, our law schools, our employers, and our society will benefit from such efforts to further individualize admissions processes. The following describes how we have addressed this important issue at Northwestern.

Shortly after my arrival at Northwestern Law, we decided to increase our emphasis on enrolling the students who could best be prepared to meet the challenges of a rapidly changing, increasingly diverse legal profession. Without sacrificing our commitment to recruiting students who would succeed academically in law school, we placed greater emphasis on locating students with the personal qualities and life experience necessary to enable them to have highly successful careers. In our view, a successful career is one that will enable an attorney to make a positive long-term contribution to her community.

In today's increasingly competitive, complex, and global legal world, employers need graduates who can hit the ground running—people with strong interpersonal and communication skills, sound judgment and maturity, the ability to work effectively in teams, real world exposure to profes-

sional and business settings, refined and committed career focus, and motivation. In order to evaluate these additional characteristics, we have significantly increased the amount of individual information that we require from, and the amount of individual attention we devote to, each applicant.

Like all of the nation's top law schools, we continue to look for candidates with the highest intellectual capabilities. LSAT scores and academic records are a critical component in our admissions decisions. But we insist on more—we will not admit someone simply because their academic record is off the charts.

First, we implemented a comprehensive interviewing program. This is a huge undertaking of time and resources and has required the help of half a dozen staff members, more than 400 alumni volunteers, and approximately twenty current students. During the 2005–06 admissions cycle, we interviewed more than 3800 applicants (75% of our applicant pool) and more than three-fourths of our entering students.

The interviews, lasting thirty to forty-five minutes, are highly standardized and follow a professional job interview format. Each interviewer poses questions to solicit information related to a very specific set of selection criteria, including intellectual skills, interpersonal and communication skills, maturity, poise, sincerity and concern for others, career progression, career focus, leadership potential, extracurricular and community involvement, and knowledge of and interest in Northwestern Law. Following the meeting, the interviewer rates the candidate on all of these factors and submits a full page summary report that includes a numerical score and commentary on all of the above-mentioned factors.

The rewards have been significant. Because interviews greatly increase the amount of information we have about our applicants, our decisions have become more informed. These one-on-one appointments allow us to glean information about candidates that would otherwise be overlooked. Information from personal statements pales in comparison.

In the end, the need for interviews in the Law School admissions process seems obvious. Communication skills are vital in the profession and a law school education itself takes place in a highly interactive forum. No employer is likely to hire our graduates without first interviewing them. To me, it seems natural that we must do the same. Unless we do so, our admissions processes are incomplete.

In addition to interviews, we added questions in our application about short- and long-term career goals. And, like a small number of other law schools, we recently added some optional essays, which allow candidates to highlight their unique qualities and to articulate specific interest in our law school. We and our nation's other top law schools could improve our admissions process by taking the step that many business schools have, to require essay responses to specific questions.

Finally, we have greatly increased our emphasis on post-undergraduate full-time work experience acquired in professional settings. Presently, more than 90% of our students possess at least a year of full-time work experience. Our long-term goal is for all of our students to have at least two years of full-time experience. On a practical level, we have found that students with work experience generally achieve better grades in law school. Their diverse array of experiences enlivens student discussions and enhances the overall learning climate. Students with work experience enter recharged and ready to learn: they aren't burnt out academically, they've learned how to effectively manage their time and multiple projects, they've refined their problem solving skills, they have learned the value of working cooperatively with others, and they've given up successful jobs to enter law school. As a result, they are more motivated, more committed, and more directed about their future careers.

The heightened maturity of our students is evident in their daily interactions, something that—based on positive comments—employers have noticed as well. The interviews have positively impacted our recruiting effort. Applicants appreciate the personal attention and opportunity to make their case for admission in person. Likewise, we get the chance to highlight the Law School in a much more tailored and effective way. It may not be coincidental that the quality and diversity of our entering students has improved dramatically. Since instituting admissions interviews, our students' median LSAT has risen six points from 164 to 170 (the largest increase among top law schools during the same period). Similarly, the median undergraduate GPA of our entrants has improved from 3.5 to 3.7. We have successfully attracted one of the most diverse student bodies of any law school in the country. The gender and ethnic diversity of our students have grown and more than two-thirds of our students now arrive from areas outside of our home Midwest region, compared to less than half prior to the interview program.

III.

Northwestern's admissions process is thus nearly as individualized as it is practically possible for an admissions process to be. It is far more individualized than the process to which the Court gave its approval in *Grutter*. It does not, however, fully consider the "particular background, experiences, or qualities of each individual applicant,"²² as Justice O'Connor puts it. When we look into an interviewee's eyes, we are trying to make a quick decision about what category of person to put her in. We think the information we acquire at interviews is useful, but it hardly gives us a perfect window into the unique human being that she is.

²² *Gratz*, 539 U.S. at 276–77.

If we had unlimited resources, of course, we could do more. We could subject applicants to a battery of interviews. We could require them to come to Northwestern and work for a couple of weeks on a legal project, so that we could observe both their academic abilities and their personal traits. We could send agents to interview their friends and acquaintances, as the FBI does when someone is being considered for a cabinet-level appointment. Psychiatric examinations would also yield information that would be pertinent in at least some cases.

This would, of course, be ridiculous. And not only because it would be stupendously expensive. It would also be objectionably intrusive. Amy Gutmann has observed that the aspiration to give every member of society precisely what he deserves is utopian, because it presupposes

(1) that there is a social (and natural) essence to each human being included in which are his unique talents as well as his needs and desires; and (2) that citizens in a correctly organized society will freely distribute goods—income, power, praise, honor, and love—according to each individual’s essential qualities.²³

The trouble with this prescription is that it denies the value of “privacy understood as retreat from public scrutiny and recognition.”²⁴ In order for others to give me precisely what I ought to have, there must be no gap between my true self and what others take me to be. We do not think that such transparency is realizable or desirable. What we at Northwestern are confident of is that if we tried to achieve it, our applicants would not put up with it. We do not intend to try, because we do not think they ought to put up with it.

Northwestern University School of Law has one of the most individualized admissions processes in the country. Because Northwestern encourages students to work for a few years before they apply, it is likely that applicants’ histories are more distinguishable than they were at the time of college graduation. Yet our admissions decisions are still largely determined by grades and LSAT scores, with a bit more information provided by interviews. At the end of the day, we barely know our students when we admit them.

A revealing contrast is the kind of individualized consideration that the Court requires in death penalty cases. The Court’s rhetoric in *Gratz* and *Grutter* is strikingly reminiscent of its language in these cases:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense

²³ AMY GUTMANN, LIBERAL EQUALITY 115 (1980).

²⁴ *Id.* at 116.

not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.²⁵

But the differences are also apparent. In death penalty cases, the defendant must have the opportunity to elicit mercy from the sentencer by bringing forth any detail of personal history that might support a judgment of mitigation of sentence. The mitigating evidence might appropriately be considered over a period of days. The stakes are so high that it is worth expending enormous resources to make certain that this most extreme of penalties is not applied mistakenly.

The whole idea of discretionary mercy depends on the idea of individualized consideration, bringing forth idiosyncratic facts about the defendant which are overlooked by broad legal categories of prohibition and penalty.²⁶ Even in this case, it is doubtful how possible it is for the trier of fact to really comprehend the individuality of the defendant. Criminal defendants, and especially death-eligible defendants, are likely to be so different from jurors that any imaginative identification is very difficult. But here there is a moral obligation to make the effort.

The admissions process is necessarily sloppier. What would we think of a decision to impose the death penalty that relied entirely on a 30 minute interview with the defendant, together with a 300 word personal statement? Northwestern is one of the richest law schools in the country, but there are severe constraints on our admissions budget. And we are a small school, admitting only 240 students a year. Michigan is larger, and some law schools are much larger. And state undergraduate colleges are sometimes huge. The largest university in the country, Ohio State, accepted 12,822 freshmen in 2004–05, out of 18,954 applications. The same year, Minnesota-Twin Cities accepted 13,707 out of 18,537; University of Texas at Austin accepted 11,788 out of 23,008; Arizona State accepted 17,899 out of 20,789; the University of Florida accepted 11,928 out of 22,458.²⁷ We cannot imagine how, even if they manage to read every word of every application, these schools can make their decisions turn on “the particular background, experiences, or qualities of each individual applicant.” The numbers are just too large.

More importantly, mercy is not a scarce commodity. It is not the case that mercy to defendant A necessarily precludes mercy to defendant B. The

²⁵ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). *See also* *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (relying on the “uniquely individual human being” rationale); *Penry v. Lynaugh*, 492 U.S. 302, 316 (1989) (for sentencing process to be sufficiently individualized, jury must be permitted to consider mitigating evidence when death penalty is at stake), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 316 (2002); *California v. Brown*, 479 U.S. 538, 545 (1987) (same).

²⁶ *See* MARTHA NUSSBAUM, *Equity and Mercy*, in *SEX AND SOCIAL JUSTICE* 154, 175 (1999).

²⁷ U.S. NEWS AND WORLD REPORT, *AMERICA’S BEST COLLEGES: THE 2006 DIRECTORY OF COLLEGES AND UNIVERSITIES* 138, 157, 202, 237, 267 (2006).

aim of doing justice to each defendant permits refinement as exact as the state has resources to support.²⁸ A spot in the Northwestern entering class, on the other hand, is a notoriously scarce commodity.

The admissions situation is more like triage in an emergency room. The quantity of the good being sought is scarce. Demand exceeds supply. But even with medical triage, the analogy is an imperfect one. In the emergency room, the patients are ends, not means. There is no point to the exercise except to care for the sick.²⁹ With law school admissions, on the other hand, the real objects of concern are not the attorneys we train, but the public who will be their clients, and who will live in a society where they wield the power associated with their profession. We consider individuals, but we do so not for their sake but for the sake of the public they are going to serve. We individualize in the same way as the bricklayer fashioning a piece to go into an odd corner. He doesn't do it for the sake of the bricks.³⁰

IV.

Admissions is inevitably social engineering. When we admit students to Northwestern, we are determining, in part, what the next American ruling class will look like. If one is engineering the structure of American society, one cannot ignore the fact that one of the deepest persistent problems that America faces is its continuing legacy of racism and racial stratification. It is highly improbable that this can be remedied without the growth of a black elite. The aggregate racial composition of our law school matters. And we take that into account when we make our admissions decisions.

It has lately been argued that, in law school admissions, racial preference produces a systematic mismatch between the abilities of blacks and the abilities of whites, thus producing law school classes with black students disproportionately at the bottom, many of whom should never have gone to law school and who eventually fail the bar.³¹ This is not an implausible story. It is probably true some of the time.

²⁸ Or as crude as public order can tolerate. It is also possible for mercy to be extended wholesale, through general amnesties. "General amnesties for convicts serving shorter sentences are a regular business in European justice." JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 92 (2003). Such amnesties do not, of course, involve individualized consideration at all.

²⁹ It is because it is so uncertain how claims on years of life should be weighed against one another that the question of how to allocate health care dollars is so intractable. See Daniel Wikler & Sarah Marchand, *Macro-Allocation: Dividing Up the Health Care Budget*, in *A COMPANION TO BIOETHICS* 306 (Helga Kuhse and Peter Singer eds., 1998).

³⁰ The more apt medical analogy would be to triage in the battlefield, where priority is given to troops who can be treated and returned to combat. See *id.* at 312.

³¹ See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *STAN. L. REV.* 367 (2004). But see Ian Ayres & Richard Brooks, Response, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 *STAN. L. REV.* 1807 (2005); David L. Chambers et al., Response, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 *STAN. L. REV.* 1855 (2005); Michele Landis Dauber, Response,

Racial preferences have now been in place for enough years to provide a rich lode of data regarding which kinds of programs (if any) produce the positive results that proponents of racial preference hope for, and which (if any) produce the negative consequences critics fear. It would probably even be possible to disaggregate these effects in cases where both are present—to determine, say, the point past which a school is digging so deep into the applicant pool to find black students that those thereby admitted are unlikely to be able to perform to the school's standards.

One of the most disheartening features of the endless debate over reverse discrimination is that most of the scholarship that has been undertaken on the issue has been the work of philosophers puzzling out whether it violates the rights of whites, rather than empirical social scientists investigating whether it ameliorates the condition of blacks. None of these claims can be assessed without an examination of the evidence, but for the most part the evidence has not even been gathered.³²

Our own experience shows that it is possible to run an affirmative action program in a way that is good for the students in it and avoids counterproductive results. Our 2004–05 entering class of 243 students included 34% minorities, of whom 20 were African-American. During the past few years, six to eight percent of applicants have been African-American. The entering class percentages have been in the same range. The mean LSAT scores of African-American admits has been slightly lower than the overall class. The mean GPA has been the same. We are aware of no difference in the academic performance of African-American and white students after they are admitted. We do not have perfect knowledge of the applicants, but we know them well enough to be able to make intelligent predictions about whether they will succeed or fail.

But at this point we have left the blather about “truly individualized consideration” far behind. Even if the allegation of systematic mismatch is correct with respect to admissions policies at some law schools, it is a claim about aggregate effects, not individualized consideration. The Supreme Court's most recent pronouncements pressure admissions officers to focus on irrelevancies.

CONCLUSION

It is nearly impossible to treat a person as the unique individual she is. We struggle to do it all the time with our families, who continue to surprise us. The place where the Court has consistently and coherently insisted on individualized consideration is the death penalty, yet the death penalty in

The Big Muddy, 57 STAN. L. REV. 1899 (2005); David B. Wilkins, Response, *A Systematic Response to Systematic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005); contra Richard H. Sander, Reply, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005).

³² One of us has been making this complaint for years. See ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 99–103 (1996).

the United States continues to be notoriously maladministered.³³ Individualization is a matter of degree. Treatment can be more or less individualized. To call treatment “truly individualized,” on the other hand, implies that individualization has reached a kind of maximum that is impossible for large organizations, and may not be possible even in personal interaction. The *Gratz* and *Grutter* Court’s rhetoric presupposes that each person’s essence is in some way knowable, and that goods should be allocated in a way that is consistent with that essence. But this aspiration cannot be achieved unless we can bring about a state of affairs in which there is no gap between my true self and what others take me to be. Such transparency is neither realizable nor desirable. *Gratz* and *Grutter* are pursuing a vain dream, and in the process are sacrificing real goods.

³³ See, e.g., John Blume et al., *Explaining Death Row’s Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165 (2004) (documenting that killers of blacks remain far less likely to receive the death penalty than killers of whites).

