COLOR ME COLORBLIND: DEFERENCE, DISCRETION, AND VOICE IN HIGHER EDUCATION AFTER *GRUTTER*

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* J.D., Georgetown University Law Center; LL.M., Harvard Law School. Many thanks to Libby Adler, Gary Peller, Matt Jabaily, Vishaal Kishore, Efrat Arbel, Jonathan Burton-MacLeod, and Iain Frame for their comments on previous drafts of this paper. I am also thankful to Harvard Law School, which partially funded this project through its Summer Academic Fellowship Program. A very special thanks to Janet Halley.

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INTRODUCTION

The summer of 2003 was the Supreme Court's summer of love. In one week in June, the Court handed down both *Lawrence v. Texas*[1] and *Grutter v. Bollinger*.[2] The Court had finally embraced multiculturalism, and the Constitution had come out of the closet. *Lawrence* had decriminalized[3] and, by many accounts, decloseted homosexual sodomy.[4] The Court's decision in *Grutter* was hailed as bringing down a similar closet, a twenty-five year regime of "winks, nods, and disguises" in higher education admissions.[5] The "winks, nods, and disguises" arose from uncertainty about the validity of Justice Powell's tiebreaking concurrence in *Regents of University of California v. Bakke*,[6] which stated that diversity could be a compelling state interest, and about the effects

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1 539 U.S. 558 (2003).

2 539 U.S. 306 (2003).

3 *See Lawrence*, 539 U.S. 558.

4 *See, e.g.*, James W. Paulsen, *The Significance of* Lawrence v. Texas, 41 HOUS. LAW. 32, 37, 38 (2004) (noting that "the Court's decision to frame the issue as protecting an individual's liberty to engage in private conduct free from state intervention creates a ruling that sweeps broadly" and that "it is hard not to come away with the impression that . . . *Lawrence*'s effects will likely ripple across the nation for years to come"); Lambda Legal, *Lawrence v. Texas*, http://www.lambdalegal.org/our-work/in-court/cases/lawrence-v-texas.html ("The mere existence of sodomy laws often had been used to justify wholesale discrimination against LGBT people. In striking down those laws, this historic ruling removed a major roadblock in the battle for LGBT rights. No longer can gay people be considered 'criminals' because they love others of the same sex.").

5 *See* Gratz v. Bollinger, 539 U.S. 244, 305 (2003) (Ginsburg, J., dissenting). The use of diversity in admissions processes became a "longstanding and widespread practice" and "an entire generation of Americans has been schooled" in accordance with its principles. Brief for Judith Areen et. al. as Amici Curiae Supporting Respondents at 18–19, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241). Thomas J. Kane estimated that "a marked degree of racial preference is given within only the top 20 percent of all four-year institutions." WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 15 n.1 (1998).

6 Regents of Univ. of Cal. v. Bakke, 438 U.S. 317, 320 (1978).

of subsequent lower court decisions—most notably the Fifth Circuit's rejection of the diversity rationale in *Hopwood v. Texas*.[7]

Now, *Grutter* offered a clear statement that higher education officials could adopt race-conscious admissions for the purpose of assembling a diverse student body. *Grutter*'s holding seemed to permit tentative diversity-conscious admissions policies to come into the light.[8] It appeared to soften the harsh rules of racial regulation by introducing flexible standards sensitive to American realities. These standards promised breathing room for race consciousness (rather than strict colorblindness), qualitative (rather than quantitative) evaluation of applicants, and substantive equality (rather than formal equality). Specifically, *Grutter* appeared to sanction three new liberties for higher education administrators: deference to academic judgment in the event of a legal challenge, discretion in the admissions office, and appreciation of minority students' voices.

These liberties appeared to signal permission to depart from a colorblind mandate. First, regarding deference, the Court revitalized a category of review, untapped since *Korematsu v. United States*, of strict scrutiny with deference.[9] *Grutter* proved that the Court's searching review of racial classifications was not "fatal in fact"[10] and that racial classifications were not categorically forbidden. Second, the Court permitted administrators to exercise discretion when selecting students, as long as the school gave careful attention to each application, a policy now known as "individualized review."[11] It was thought that individualized review would offer administrators freedom from the rigidity of racial quotas or test scores.[12] Finally, nested within that discretion, individualized review allowed administrators to listen to "minority voices."[13] For the first time, admissions officers could openly credit what students told them about growing up a non-white in America. In sum, *Grutter* promised administrators the freedom to do their jobs and serve *all* the aspiring students of our diverse nation, lifting the troubling mandate of colorblindness.

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[7] 78 F.3d 932 (5th Cir. 1996) (*Hopwood I*) (holding that diversity is not a compelling state interest).

[8] *Grutter*, 539 U.S. at 329. The Court and administrators complying with the *Grutter* decision use the phrase *race conscious*. Others have used race consciousness to signal a more radical racial equality agenda. *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990). To minimize confusion, I use the term *diversity conscious* when referring to *Grutter* and the admissions policies it permits.

[9] 323 U.S. 214 (1944).

[10] *See Grutter*, 539 U.S. at 326; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1988).

[11] *See Grutter*, 539 U.S. at 327–28.

[12] *See id.*

[13] *See id.*

Five years have passed since *Grutter* came down, and it is time to begin evaluating its effects.[14] The results are somewhat unexpected. Just as scholars have critiqued the perception that *Lawrence* marked the demise of the same-sex closet,[15] this Article will argue that the question of whether *Grutter* challenges colorblindness remains open. Instead, the freedoms bestowed by *Grutter* have, paradoxically, intensified colorblind regulation. Reinscribed in the once revolutionary category of "race consciousness"[16] is the familiar struggle between colorblindness and radical race consciousness.

This Article will describe how deference, discretion, and voice perform that reinscription. First, it will argue that the alternatives to strict scrutiny's fatalism appear to be increased formality, record keeping, and research. Staying out of court requires a cautious approach to race consciousness, and vulnerability to lawsuits discourages challenge to the colorblind status quo. Second, it will argue that diversity-conscious individualized review reinforces colorblindness because the diversity standard has, in practice, itself become a colorblind calibration.[17] Finally, this Article will review candidates' personal statements, examining how they perform a highly standardized practice of articulating the colorblind values. Operating together, courts, administrators, and students are producing a type of racial knowledge called *diversity* which, on the surface, openly acknowledges group-based race consciousness. More careful review, however, reveals that the knowledge also reaffirms individualist values of colorblindness.

Thus, this Article offers a response to those racial justice advocates regretting *Grutter*'s limitations.[18] I argue that *Grutter* in fact extended

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[14] Indeed, if the majority's twenty-five year clock on the permissibility of race-conscious admissions is literally interpreted, we are a fifth of the way through the experiment. *See id.* at 543 (stating, "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

[15] *See, e.g.*, Libby Adler, *The Future of Sodomy*, 32 FORDHAM URB. L.J. 197, 228–29 (2005) (identifying five "danger signs" in the *Lawrence* decision for "[l]egal actors interested in maximizing the room for benign sexual variation, minimizing the suspicion and politics of shame that plague sex, and interrupting the cycle that reproduces the injured gay identity"); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004); Jose Gabilondo, *Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual*, 21 WIS. WOMEN'S L.J. 1, 23 (2006) ("Decriminalizing gay sex certainly reflects a move up the brain stem, but this marginal victory seems radical only as part of a homely progress narrative built on backward-looking historical arguments.").

[16] *See* Peller, *supra* note 8.

[17] I often refer to the diversity-conscious admissions process as *standardization*, that is, the translation of racial, athletic, artistic, and other extracurricular *bodies* into a broad scale that can account for, and compare, all applicants. Standardization is quite a different idea from the transition from rules to standards that I discussed above.

[18] *See, e.g.*, Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 197 (2003) ("[T]he approval of

the Court's colorblind hold on race relations to the minute and routine administration of higher education admissions policies. As a result, colorblindness has diffused into actions that appear to be quintessential exercises of freedom and race consciousness. Part I provides some background on the history of the term *race consciousness* and its multiple meanings in civil rights legal culture. Part II questions the assumption that the Court increased the independence of administrators by sanctioning deference to academic judgment and individualized review. It argues that strict scrutiny with deference is not the equivalent to the "abandon[ment] of strict scrutiny."[19] Rather, strict scrutiny with deference is a new category that establishes a new method of regulation; it is a reorganization of the division of labor between the Court and the administrators. Part II further argues that the concept of individualized review promotes a colorblind standardization of race. With strict scrutiny plus deference and individualized review, *Grutter* established a new administrative framework that would reproduce colorblindness within race consciousness. Parts III and IV examine colleges' and universities' compliance with *Grutter*. Part III reviews *Grutter* compliance manuals and describes how strict scrutiny with deference shapes deference in a way that ensures administrators' loyalty to principles of formal equality and colorblindness. Part IV discusses the regulatory valence of discretion as it is practiced. The substantial weight still accorded to academic scores, the elaborate techniques for standardizing, comparing, and evaluating applications, and the routine training and monitoring of application readers combine to make the exercise of discretion a highly mechanized and normalizing event. Part IV further argues that, like deference, discretion ultimately reinforces—rather than challenges—colorblindness.

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limited forms of race-consciousness may invite complacency rather than vigilance."); Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 172 (2004) (arguing that the Court's expected twenty-five year time limit on affirmative action is unrealistic); Kathryn R.L. Rand & Steven Andrew Light, *Teaching Race Without a Critical Mass: Reflections on Affirmative Action and the Diversity Rationale*, J. LEGAL EDUC. 316, 317 (2004) ("We identify two significant limitations on the practical applicability of *Grutter*'s rationale: first, regardless of ideological bias, students come to the discussion with firmly held, if ill-informed, opinions on race and affirmative action, and these opinions simply may be reinforced in a homogeneous classroom; and second, while beneficial in theory, a spirited debate over affirmative action may detrimentally affect the educational environment for the few students of color in the classroom."); Girardeau A. Spann, *The Dark Side of* Grutter, 21 CONST. COMMENT. 221, 230 (2004) ("Although *Grutter* has now authorized the use of affirmative action to promote diversity, it has nevertheless reaffirmed the traditional prohibition on using affirmative action to remedy general societal discrimination.").

[19] *See, e.g.*, *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting); *see also* Martin D. Carcieri, Grutter v. Bollinger *and Civil Disobedience*, 31 U. DAYTON L. REV. 345 (2006); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945 (2004); Roger Pilon, *Principle and Policy in Public University Admissions:* Grutter v. Bollinger *and* Gratz v. Bollinger, 2003 CATO SUP. CT. REV. 43, 50 (2003).

Part V turns to student voice. While student voices are generally viewed as authentic and, therefore, insulated from judicial and administrative regulation, Part V argues that personal statements function as a keystone of racial regulation in the *Grutter* regime. In order to shed light on the regulatory and reproductive function of personal statements, Part V compares personal statements with a similar literary genre, the Roman Catholic confession. This analogy is appropriate because confessions, like personal statements, are presumed to be authentic, empowering, and deeply individual. The final section of Part V focuses on a particular racial knowledge produced by personal statements. It identifies a strand of racial knowledge called *diversity* and argues that this knowledge rearticulates colorblind values within the category of *difference*.

I. THE STRANGE CAREER OF RACE CONSCIOUSNESS

The meaning of *race consciousness* has changed since Professor Gary Peller published his landmark article, "Race Consciousness," in 1990.[20] While the term still operates as a challenge to conservative integrationism, it also houses tensions for progressives who hold both individualist and group-oriented values. Group-oriented values include advocacy of group rights to remedy historical and present oppression, while individualists are more likely to advocate equal access, opportunity, and upward social mobility. The meaning of race consciousness has changed as the balance between individual and group values has shifted. *Grutter* provided the most recent impetus for a substantial rebalancing, as education officials and scholars debated how to administer deference, discretion, and voice. In the years since 2003, *Grutter* has overseen the reinscription of individualist, colorblind values within a group-oriented, race-consciousness agenda.

In 1990, Peller contrasted two ideological positions on racial justice: integrationism and race consciousness.[21] He linked integrationism to a racial justice agenda of colorblindness as the cure for discrimination.[22] "[I]ntegration means overcoming prejudice based on skin color . . . . The ideal [is] to transcend stereotypes in favor of treating people as individuals, free from racial group identification."[23] Integrationists support the centralization and professionalization of educational institutions as a way to eradicate racial distortions, pursuing a "neutral, acultural form that, precisely because of its impersonality, would treat everyone alike."[24]

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20 *See* Peller, *supra* note 8.

21 *See generally id.*

22 *Id.* at 770.

23 *Id.* at 769.

24 *Id.* at 782.

Colorblind integrationism entails commitments to the ideals of truth, universalism, upward mobility, and progress.[25] Peller argues that these commitments have "worked to legitimate the very social relations that originally were to be reformed."[26] Specifically,

> Integrationists tend to understand racism as a particular, identifiable deviation from an otherwise rational decisionmaking process that is not itself based in the history of social struggle between groups and worldviews. This narrow image of the domain of racial power characterizes the tendency of liberal integrationism to become part of a self-justifying ideology of privilege and status. The realm of "neutral" social practices from which to identify bias and deviation constitutes a whole realm of institutional characteristics removed from critical view as themselves historical, contingent and rooted in the particularities of culture—a realm that is itself a manifestation of group power, of politics.[27]

Thus, a key practice of colorblind integrationism identifies a set of practices as racial, while maintaining that other practices, such as professionalism and meritocracy, have no racial politics. Peller argues that those neutral realms are themselves sites of racial politics.

Peller contrasts colorblind integrationism with race consciousness, which, he argues, derives from a more radical tradition of black nationalism in the 1960s.[28] Race consciousness resisted the integrationist mindsets that dominated civil rights discourse at the time. Unlike colorblind integrationists, who perceived racism as arbitrary and irrational when practiced by either whites or blacks, "nationalists viewed race in the particular context of American history, where racial identity was seen as a central basis for comprehending the significance of various social relations as they are actually lived and experienced, and within which the meaning of race was anything but symmetrical."[29] Black nationalists used a colonialism metaphor to "captur[e], in one image, the totalizing sense of alienation between whites and blacks that the rejection of common nationality represented, the depiction of structural and systematic

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25 *Id.* at 772, 779.

26 *Id.* at 762–63.

27 *Id.* at 779.

28 *Id.* at 758–60.

29 *Id.* at 791. According to Peller, race consciousness is useful to the extent that it can critique the neutral integrationist norms. The concept of race consciousness is "a form of social practice that could pose nationhood against the false universalism of liberal ideology while nevertheless resisting the tendency to reify the particular as if it were somehow natural, freestanding, and self-contained." Gary Peller, *Notes Toward a Postmodern Nationalism*, 1992 U. ILL. L. REV. 1095, 1095 (1992).

power exercised by the white community."[30] This description of race consciousness closely approximates Duncan Kennedy's definition of the radical strand of critical race theory. According to Kennedy, race conscious scholars focus on how neutral norms and "rules of the game," even as adjusted with anti-discrimination and affirmative action policies, might reproduce or accentuate differences in education, income, wealth, and employment.[31]

A well-known example of the group-based strand of race consciousness is Professor Mari Matsuda's argument that victims of discrimination "speak with a special voice to which we should listen."[32] Matsuda calls this method "looking to the bottom."[33] In her canonical article by the same title, Matsuda advocates "a new epistemological source for critical scholars: the actual experience, history, culture, and intellectual tradition of people of color in America."[34] Matsuda believes that "looking to the bottom for ideas about law will tap a valuable source previously overlooked by legal philosophers."[35]

Since the publication of Peller's article, the parameters of race consciousness have broadened to include more progressives with individualist loyalties.[36] Individualist values are not incompatible with race consciousness because individualists have no a priori commitment to assimilation or integration.[37] However, individualist values are distinguishable from group-oriented values in the sense that they accept the "rules of the game in the white community," including a commitment to legally enforceable rights derived from property and contract, upward social mobility, meritocracy, professionalism, a limited government safety net, and a skepticism of collectivism and mobilization.[38] The blending of race consciousness with individualist values appears in statements such as Professor Ilhyung Lee's: "[T]he rationale for race conscious policy is to ensure equal access and equal opportunity toward the end of racial justice . . . ."[39]

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30 Peller, *supra* note 8, at 810–11.

31 *See* Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 How. L.J. 85, 120 (2002).

32 Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 63 (Kimberle Crenshaw et al. eds., 1995).

33 *Id.*

34 *Id.*

35 *Id.*

36 *See, e.g.*, Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1223 (2002); Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 CONN. L. REV. 535, 577 (2001).

37 *See* Duncan, *supra* note 31, at 118–19.

38 *See id.* at 119–20.

39 Lee, *supra* note 36, at 577.

In 2003, race consciousness was transformed again under the auspices of *Grutter*. Many scholars and commentators understood *Grutter* as a long-overdue constitutional embrace of race consciousness. Professor Alfred L. Brophy praised the decision because it "open[ed] up great possibilities for race-conscious action in school desegregation" and "revitalize[d] race as a category of legal analysis."[40] Higher education leaders responded with a press release stating,

> American higher education welcomes today's U.S. Supreme Court decisions in [*Gratz* and *Grutter*] . . . . These decisions enable our institutions to maintain their strong commitment to be welcoming places to students of all races and walks of life and to continue to pursue a wide range of legally permissible means of attaining a diverse student body.[41]

The *Grutter* decision suggested that colorblind integrationism in higher education was no longer constitutionally required. Rather, with their newly granted deference and discretion, administrators could openly seek the multicultural, vibrant, robust exchange of ideas that can happen only when students are confronted with worldviews different from their own. *Race consciousness* was no longer a dirty word that insinuated reverse discrimination;[42] it was invoked with abandon throughout the *Grutter* opinion itself,[43] and also began to appear in guides for designing admissions policies.[44] Even conservatives viewed the *Grutter* opinion as legitimating race consciousness.[45]

The text of *Grutter* itself, however, did not resolve emerging and continuing conflicts between the individualist and group-oriented strands of race consciousness. Upon a first reading, *Grutter* appears to exemplify group-based race consciousness with its embrace of a key tenet of critical race theory: recognition of minority voices.[46] Individualized review can be seen as group-oriented because it values personal statements

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40 ALFRED L. BROPHY, REPARATIONS: PRO & CON 61–62 (2006).

41 American Council on Education, *Joint Statement by National Higher Education Leaders on Today's Decision by the Supreme Court in* Gratz v. Bollinger *and* Grutter v. Bollinger (June 23, 2003), http://www.acenet.edu/AM/Template.cfm?Section=search&template=/CM/HTMLDisplay.cfm&ContentID=3710.

42 *See* Peller, *supra* note 8, at 790.

43 The majority uses the term more than twenty times when describing the Law School's permissible policy. *See* Grutter v. Bollinger, 539 U.S. 306, 309 (2003).

44 *See, e.g.*, ARTHUR L. COLEMAN & SCOTT R. PALMER, THE COLLEGE BOARD, ADMISSIONS AND DIVERSITY AFTER MICHIGAN: THE NEXT GENERATION OF LEGAL AND POLICY ISSUES 9 (2006).

45 *See, e.g.*, Stephen B. Presser, *A Conservative Comment on Professor Crump*, 56 FLA. L. REV. 789, 799 (2004) (referring to *Grutter* as a "thinly disguised quota system").

46 For a brief overview of critical race theory, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberle Crenshaw et al. eds., 1995).

that discuss a student's group experiences specifically as *black* or *Latino*. The ability to give careful consideration to personal statements, in addition to test scores and grades, gives administrators a new access to "the bottom" and a new ability to assemble an incoming class that will benefit from stories previously excluded.

A closer reading, however, suggests that the race consciousness of *Grutter* strengthened the individualist strand of race consciousness. As I discuss below, individualist values have had a strong hand in governing the seemingly unregulated liberties of discretion, deference, and voice. As a result, the administrative effect of *Grutter* has been to reinscribe colorblind values under the umbrella of race consciousness. The remainder of this Article will track the unfolding of this process, beginning with the Court's establishment of colorblind mechanisms for higher education admissions and then reviewing the ways in which administrators and students have continued the effort. This Article will examine how deference, discretion, and voice are sites of conflict between individualist and group-based race consciousness and how this conflict tends to be resolved in a way that reinforces colorblindness.

II. THE REGULATORY READING OF *GRUTTER V. BOLLINGER*

The legal academy and the bar welcomed *Grutter* as a move away from colorblindness and toward race consciousness. This reading of *Grutter*, however, overlooks aspects of the decision that signal a new technique of racial regulation. Particularly, the *Grutter* opinion raises and answers two key questions regarding the legal administration of race: (1) how should a school administer a policy that is subject to strict scrutiny with deference; and (2) how should a school translate race into an applicant's file? This part will review the Court's approach to these questions, highlighting early indications that *Grutter* would encourage a colorblind race consciousness. The subsequent parts will examine how schools and students have followed the *Grutter* Court's lead, administering the freedoms of deference, discretion, and voice with a paradoxically regulatory colorblindness.

A. STRICT SCRUTINY WITH ACADEMIC DEFERENCE

Writing for the majority in *Grutter*, Justice O'Connor breathed new life into her admonishment in *Adarand Constructors Inc. v. Pena* that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'"[47] Before *Grutter*, the fatality of strict scrutiny, though not a formal reality, was

[47] 515 U.S. 200, 237 (1995).

certainly a functional one.[48] Constitutional law scholar Girardeau Spann predicted that the Court would soon pronounce strict scrutiny to be fatal, as it "would be consistent with the history of the Court's equal protection jurisprudence since *Korematsu*, and it would satisfy the draconian pronouncements of Justices Scalia and Thomas."[49]

When the *Grutter* majority announced that it would *both* use strict scrutiny to review the University of Michigan Law School's admissions policies *and* accord academic deference to the expertise of the administrators, it was lambasted by Justices Thomas, Rehnquist, and Kennedy.[50] The dissenters argued that the majority's new "strict scrutiny with deference" standard was a sham.[51] Justice Thomas denounced the Court's "unprecedented deference to the Law School" as "antithetical to strict scrutiny."[52] He argued that the majority's deference unconstitutionally "tolerate[d] institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination."[53] Chief Justice Rehnquist echoed Justice Thomas, stating, "Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."[54]

Justice Kennedy's dissent contained the most vehement condemnation of the Court's application of strict scrutiny with deference. For him, the majority's approach constituted an act of violence against the standard. He accused the majority of "abandon[ing],"[55] "suspending,"[56] and "damaging"[57] strict scrutiny. For him, the Court had "abdicate[d] its constitutional duty to give strict scrutiny to the use of race in university admissions."[58] Justice Kennedy insinuated that the majority had acted in bad faith, chastising it for its failure to engage in "scrutiny that is real, not feigned."[59] He continued, "Were the courts to apply a searching standard to race-based admissions schemes, that would force educational

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48 *See, e.g.*, City of Richmond v. J.A. Croson, 488 U.S. 469, 496–99 (1989) (holding that societal discrimination was not a compelling interest); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282–84 (1986) (holding that preserving the number of minority teachers in Jackson, Michigan, was not a compelling interest); Palmore v. Sidoti, 466 U.S. 429, 434 (1984) (holding that the "best interest of the child" was not a compelling reason to consider race when making custody decisions).

49 GIRARDEAU SPANN, THE LAW OF AFFIRMATIVE ACTION 167 (2000) (referencing Korematsu v. United States, 323 U.S. 214 (1944)).

50 Grutter v. Bollinger, 539 U.S. 306, 378–88 (2003) (Rehnquist, C.J., dissenting).

51 *Id.* at 362 (Thomas, J., dissenting).

52 *Id.*

53 *Id.* at 350 (Thomas, J., dissenting).

54 *Id.* at 380 (Rehnquist, C.J., dissenting).

55 *Id.* at 394 (Kennedy, J., dissenting).

56 *Id.* at 395 (Kennedy, J., dissenting).

57 *Id.* at 394 (Kennedy, J., dissenting).

58 *Id.* at 395 (Kennedy, J., dissenting).

59 *Id.* at 394 (Kennedy, J., dissenting).

institutions to seriously explore race-neutral alternatives. The Court, by contrast, is willing to be satisfied by the Law School's profession of its own good faith."[60] According to Justice Kennedy, "[d]eference is antithetical to strict scrutiny, not consistent with it."[61]

The view that deference and strict scrutiny are irreconcilable, however, did not carry the day. Writing for the majority, Justice O'Connor emphasized that strict scrutiny of race-based classifications often includes at least some degree of deference. "Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context."[62] Deference, Justice O'Connor writes, plays an important but limited role in that examination:

> Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.[63]

Strict scrutiny, therefore, still includes a very searching review of the importance and sincerity of administrators' decisions.[64] Deference is reserved only for those officials who make complex judgments informed by administrative expertise. Strict scrutiny with deference, therefore, keeps schools that pursue diversity-conscious policies vulnerable to challenge, but carves out an escape route for those administrators who can demonstrate their expertise when making academic decisions.

This is a novel method of regulation. The *Grutter* majority traded a juridical role advanced by the dissenters (strict scrutiny must be near-fatal) for a disciplinary one (strict scrutiny should incentivize administrators to self-regulate). As a result, strict scrutiny with deference reorganizes the division of labor between educational officials and the Court. Strict scrutiny shifts the primary policing duties from the courts to the admissions offices of the universities. Only those administrators who exercise (and can prove) well-reasoned academic judgments will receive deference. After *Grutter*, it is the performance of administrators, rather than the racial category alone, that will receive searching review.

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60 *Id.* at 394 (Kennedy, J., dissenting).

61 *Id.*

62 *Id.* at 327.

63 *Id.* at 328.

64 *See id.* at 327.

A variety of indicators could be used to evaluate that performance. Schools that choose race consciousness must have good administrators who unify their missions, develop policies, amass records, periodically review their policies, form committees, and make a case that the policy will likely work. Moreover, good administrators' treatment of race must be a package of *legal* components (necessitated by the vulnerability triggered by strict scrutiny) and *professional* components (necessitated by the Court's dispensation of deference only to expert academic judgment).

Grutter did not permit administrators to do whatever they wanted. Instead, it adopted a self-policing standard, which integrated the Court's racial jurisprudence into the mechanics of higher education administration. This new approach will make mini-Supreme Courts out of higher education institutions and judicial review will in part play out as administrative review. As detailed in subsequent sections, colorblindness does not disappear with this reorganization; rather, the diffusion of authority ensures that it penetrates deeper into routine administrative decisions.[65]

B. INDIVIDUALIZED REVIEW

Having reorganized the division of labor between the Court and the schools, the *Grutter* Court next outlined a specific policy that would help establish the basis for deference—individualized review.[66] I argue that when the Court translated racial categories into a diversity standard it introduced colorblindness into a purportedly race-conscious program.

Individualized review begins with the applicant's file.[67] The existence of the file is so commonplace that it is easy to forget the problems that the file purports to solve: how can an admissions officer observe and judge an applicant who often lives across the country and with whom the admissions officer has no personal relationship? How should an admissions officer compare one person's life to another's? The file compiles and processes information, and makes it possible to compare thousands of individual applicants.

The *Grutter* majority begins not with the problem of evaluating individual people, but with a description of the Law School's file review process:

> The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class of around 350 students. . . . The [Law School's] policy requires admissions officials to evaluate each applicant based on all the information available in

65 *See* discussion *infra* Parts III and IV.

66 *Grutter*, 539 U.S. at 334.

67 *Id.* at 312–15.

> the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. . . . [T]he policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. So-called "'soft variables'â' such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas of difficulty of undergraduate course selection," are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution."[68]

Focusing on the process of reviewing files, rather than on the fiction of the file itself, privileges an assumption that the file is a *person* comparable with other persons.[69] The applicant is supposedly compensated for the loss of individuality that occurs as she translates herself into a file because admissions officers individually consider each element of that file.[70]

The idea that it is possible to translate intelligence, drive, and even character into the fiction of the file has become unremarkable. The *Grutter* Court's implication that it is possible to translate race the same way has received equally little attention. While it's easy to elide the difference between racial experiences in American life and what appears in the file, it is crucial to remember that the Court's opinion is geared only toward the latter. The opinion opens an inquiry about how to standardize race through the file; it is not directly concerned with "real" race.

The doctrinal solution to the problem of translating race, set forth by Justice Powell in *Regents of University of California v. Bakke*[71] and endorsed by the *Grutter* Court, is to measure how much *diversity* each file could contribute to the incoming class.[72] Diversity does not disturb the alleged colorblind requirements of the Equal Protection Clause because, unlike a categorical racial declaration, it does not automatically exclude

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68 *Id.* (citations omitted).
69 *Id.*
70 *Id.*
71 438 U.S. 265, 314–15 (1978).
72 *Grutter*, 539 U.S. at 337.

any applicant.[73] Justice O'Connor's opinion constantly emphasized this inclusiveness. She reiterated the Law School's recognition of "many possible bases for diversity admissions," and stressed that diversity could not be defined "solely in terms of racial and ethnic status."[74] The Court found that "the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."[75]

Twice quoting Justice Powell's opinion in *Bakke*, the majority emphasized the constitutional necessity of this inclusiveness. "[A]n admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to *place them on the same footing for consideration, although not necessarily according them the same weight.*'"[76] This language suggests that diversity is a constitutional aim only if it is defined in a way that first standardizes every racial, athletic, musical, and artistic human body onto the same scale. Once diversity is standardized in this way, the merits of each applicant can be fairly compared and weighed.

The Court embraced the diversity standard because it could both assess and benefit all applicants. As evidence of the diversity standard's broad assessment capabilities, the Court recounted the seemingly endless incarnations of diversity: "Admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community services, and have had successful careers in other fields."[77] As for diversity's ability to benefit all applicants, the Court said,

> [T]he Law School seriously weighs many other diversity factors that can make a real and dispositive difference for nonminority applicants as well [because it] sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.[78]

As further proof that diversity could help anyone, the Court cited the Law School's evidence that it "can (and does) select nonminority applicants who have greater potential to enhance student body diversity

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[73] *Id.* at 316.

[74] *Id.* (quoting Appellees' Brief at 111, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241)).

[75] *Id.* at 337.

[76] *Id.* at 334, 337 (quoting *Bakke*, 438 U.S. at 317 (Powell, J., concurring) (emphasis added)).

[77] *Id.*

[78] *Id.* at 338.

over underrepresented minority applicants."[79] Thus, the diversity standard applies equally to every applicant. The benefits and burdens of the program are distributed to applicants with blindness to color.

Finally, the Court approved of individualized review because the individual—the candidate herself—is a key performer of the racial translation.[80] The Court characterized personal statements as the applicants' "opportunity" to "highlight their own potential diversity contributions."[81] It is the student who translates herself from a member of racial category to one of a diversity standard; admissions officials then just make the comparisons:

> 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. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable.[82]

Some scholars have argued that even though the diversity captures and could benefit anyone (that is, it is colorblind), diversity can still be race conscious because it is less mechanized. Professor Lani Guinier, for example, has stated that the *Grutter* Court did well to distinguish between "considerations of race that are nuanced, on one hand, and 'mechanistic' on the other."[83] But this view hinges on whether, and under what circumstances, a file can accurately represent a person.[84] If the student-to-file translation is roughly accurate, individualized review seems to make the file more humane: consider everything about the applicants, treat them equally, and evaluate them fairly. But when the fiction of the file is acknowledged, diversity becomes a much more mechanical prescription.[85] The *Grutter* decision effectively gave admissions officers two normalizing mandates: first, place all applicants on the same footing by translating individual bodies into measurable units and, second, measure and select them based on their relative diversity value. Diversity in this context does not challenge the mechanization of trans-

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79 *Id.* at 341.

80 *Id.*

81 *Id.*

82 *Id.* at 337.

83 Lani Guinier, *The Constitution Is Both Colorblind and Color-Conscious*, CHRON. HIGHER EDUC., July 4, 2003, at B11.

84 *Id.*

85 *Id.*

lating students into files; rather it extends that mechanization to new dimensions of the self.

The Court's use of the terms "individualized review" and "holistic review" obscures the fictional and standardizing aspects of file-making by highlighting the individualized process of reviewing those files. Holistic review presumes that nothing is lost in the translation from racial body to diverse file. Far from humanizing the application process, individualized review further standardizes its subjects. It is a process that "makes each individual the mirror and measure of his fellow."[86] Moreover, the *individuality* of individualized review is an inch wide and a mile deep. It is narrow because all differences, including racial differences, must be measurable by the diversity standard. Within that standard, however, diversity produces an infinite number of categories of individualized differences.

In sum, to read the *Grutter* opinion as providing freedom for race consciousness is to miss two paradoxical points: (1) academic deference is not pure liberty; it also infuses the Court's juridical strict scrutiny authority into a self-regulating administrative apparatus; and (2) discretion does not purely result in more individualized considerations of race; it also standardizes the racial characteristics and experiences of applicants and makes them interchangeable with other differences. The following sections argue that administrators and applicants have heard, even if others have not, the regulatory note in the *Grutter* opinion. Further, this regulation has patently colorblind implications.

III. ADMINISTRATION OF STRICT SCRUTINY WITH DEFERENCE

For administrators, *Grutter*'s potential for race consciousness is accompanied by a new set of burdens. Deference, for the *Grutter* Court, also requires a substantial amount of self-policing. This section examines a key compliance manual published by the College Board, *Admissions and Diversity After Michigan*,[87] to explore how administrators have complied with *Grutter*, and how their compliance has reinforced, rather than resisted, colorblindness.

A. THE MECHANICS OF SURVEILLED DEFERENCE

While admissions policies were never free of red tape, micromanaging, and legal oversight,[88] the *Grutter* decision generated a vast new

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86 Francois Ewald, *Norms, Discipline, and the Law*, 30 REPRESENTATIONS 138, 151 (1990) (discussing peer comparisons as a means of normalization in industry).

87 COLEMAN & PALMER, *supra* note 44.

88 *See, e.g.*, Len Niehoff & Butzel Long, *Affirmative Action and Diversity Programs: Issues in University Admissions and Financial Aid*, Nat'l Ass'n of Coll. & Univ. Atty's Fall

literature on compliance.[89] This literature differed from earlier compliance guides in its specificity, authority, and broad applicability.[90] Diversity was no longer an experimental option; the role of compliance literature was no longer to survey a range of potentially applicable cases and make educated guesses.[91] *Grutter* signaled an overhaul. The post-*Grutter* literature examined in this section urges administrators to undertake a substantial review their admissions policies, their mission statements, and their record keeping practices. Strategic planning should be initiated; committees should be established; conferences should be held.

Although the popular story posits that *Grutter* gave administrators new liberties, compliance literature suggests that *Grutter* has operated quite differently. Administrators have taken to heart the Court's invocation of strict scrutiny. They have begun to makeover their administrative personas with increased sensitivity to strict scrutiny's shadow of litigation. Compliance also requires administrators to pursue policies that produce a clean and extensive record in preparation for likely litigation.

1. *Infusing the Institution with Strict Scrutiny*

Part of being a professional administrator is having, and documenting, educational goals sound enough to defend against liability. After *Grutter*, the College Board published *Admissions and Diversity* to help administrators develop and evaluate their admissions policies.[92] According to this manual, drafting educational goals requires recognition of the link between legal risk and diversity-related goals.[93] "[T]he ultimate objective [is] achieving [educational] goals while minimizing legal risk."[94] For ease of comprehension, the manual provides a diagram that "illustrates the two dimensional nature of the policy development process. It shows the duality of consequences that flow from policy deci-

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Workshop (Oct. 1998) (discussing federal court decisions on higher education admissions and diversity policies); D. Frank Vinik & Susan H. Ehringhaus, *Conducting a Self-Audit of Your Admissions Practices and Procedures and Recording and Retaining Admissions Data*, Nat'l Ass'n of Coll. & Univ. Atty's Fall Workshop (Sept. 15, 2000) (describing some of the practical and legal difficulties of admissions policy).

89 *See, e.g.*, COLEMAN & PALMER, *supra* note 44 (exploring post-*Grutter* options for achieving diversity in admissions policy); Susan O. Bradshaw, *Between a Rock and a Hard Place: Post* Grutter *Admissions Practices*, Nat'l Ass'n of Coll. & Univ. Atty's Continuing Legal Education Workshop (March 2–4, 2005); Scott Palmer, et al., *Diversity in Student Admissions and Financial Aid: Meeting and Documenting* Grutter *Threshold Requirements*, Annual Conference of the Nat'l Ass'n of Coll. & Univ. Atty's (Mar. 21–23, 2007) (discussing the *Grutter* threshold requirements).

90 *See supra* note 89.

91 Niehoff & Long, *supra* note 88.

92 COLEMAN & PALMER, *supra* note 44.

93 *Id.* at 1.

94 *Id.*

sions: relative success in achieving diversity goals and exposure to legal risk."[95] The diagram looks like this:

HIGH RISK Don't Achieve Goals	HIGH RISK Achieve Goals
LOW RISK Don't Achieve Goals	LOW RISK Achieve Goals

In other words, valid educational aims should also limit legal risk.[96] Every goal-oriented decision is also a legal decision about the exposure of the university to litigation.[97]

Administrators are advised to publicize their diversity goals in the form of a mission statement. "Higher education institutions must be able to justify their race- and ethnicity-conscious programs with compelling interests, which are clearly defined and central to the achievement of each institution's mission."[98] Mission statements, therefore, have a heightened legal significance running alongside their administrative purpose of unifying and guiding administrative decisionmaking. *Grutter* expanded the audience of a model mission statement beyond institution members and potential applicants to lawyers and judges who will review them when evaluating the constitutionality of the university's policies.

In addition to reassessing administrative goals, schools are also advised to adjust the "key strategies" and "action steps" they use to implement those goals in a way that limits liability.[99] For example, after *Grutter*, the administrative machinery of strategic planning has become intertwined with strict scrutiny. Strategic planning is a quintessentially administrative exercise. The exercise employs triads like "situation, target, path" and "see, think, draw" in order to help administrators set and pursue institutional goals.[100] Compliance with *Grutter* has come to mean that strict scrutiny considerations should be incorporated into this exercise.[101] *Admissions and Diversity*, warns that the Court's deference does

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95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.* at 9.

99 *Id.*

100 Wikipedia, *Strategic Planning*, http://en.wikipedia.org/wiki/Strategic_planning (last visited Nov. 17, 2007) (citing JOHN NAISBITT, MEGATRENDS: TEN NEW DIRECTIONS TRANSFORMING OUR LIVES (1982); Robert W. Bradford & J. Peter Duncan, *Simplified Strategic Planning* (2000); Toyohiro Kono, *Changing a Company's Strategy and Culture*, LONG RANGE PLANNING, Oct. 1994, at 85; Philip Kotler, *Megamarketing*, HARV. BUS. REV., Mar.–Apr. 1986)).

101 COLEMAN & PALMER, *supra* note 44, at 9.

not excuse administrators from strategic planning; to the contrary, "strict scrutiny analysis centers precisely on these elements."[102]

For example, if a school, using the "situation, target, path" triad decides that its target is to recruit and retain a critical mass of minorities, it must assess its situation and chart a path that gives it the best chances for surviving strict scrutiny. Because each school has a different situation and path, administrators cannot generally rely on the fact that the Court in *Grutter* accepted Michigan's critical mass rationale.[103] Instead, compliance—and, therefore, insulation from challenge—has come to mean that each school must carefully frame its own critical mass objectives and support those objectives with general and institutional-specific evidence. *Admissions and Diversity* advises administrators that:

> Critical mass objectives should be:
> - Directly associated with and framed in light of core educational goals;
> - Not tied to rigid numerical targets . . . ;
> - Associated with the existing underrepresentation of minority students on campus—with the concept of "underrepresentation" being defined specifically with respect to ranges of minority/subgroup students at which the educational benefits of diversity can be achieved on campus (rather than with respect to external data regarding, for instance, numbers or percentages of minority high school students in an institution's service area);
> - Based on institution-specific analysis, which may include data regarding the stages (and ranges) at which critical mass benefits are likely to be achieved both in classroom and social settings; and
> - Factored into the admissions process in the context of multiple, and sometimes competing, objectives.[104]

Compliance with *Grutter*, therefore, involves significant research, various analyses based on institution-specific data, and minute levels of administrative decisionmaking.

In sum, when a school chooses diversity, it should undertake review of its entire administrative apparatus. Vague administrative goals must be clarified. Even articulate administrative goals and planning mechanisms must now incorporate a new sensitivity to *Grutter*'s strict scrutiny requirements.

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102 *Id.* at 9.

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

104 COLEMAN & PALMER, supra note 44, at 40.

2. *Record-building Requirements*

Grutter also incentivized extensive record-keeping. The *Grutter* Court admonished schools to engage in "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[105] Compliance manuals have expanded on this requirement: administrators should "periodically evaluate their programs to ensure continued compelling interests and the implementation of appropriate race- or ethnicity-conscious strategies advancing those interests; and they must make changes when necessary (for instance, as institutional goals change or as evidence indicates that policies are not having the desired effect)."[106]

According to *Admissions and Diversity*, schools should first identify "what policies and programs are diversity-related and subject to strict scrutiny."[107] The process is not an abstract one. Rather, schools are advised to dig deep into their archives to "identify individuals involved in [the] development [of diversity-conscious policies] and locate copies of documents related to the establishment and implementation of those policies after their adoption."[108]

Admissions and Diversity further directs schools to review their overarching admissions practices. Schools are counseled to establish a "process . . . by which the actual implementation of admissions practices can be evaluated, after the fact, with respect to policy statements and legal issues of concern (such as ensuring legitimate individualized review, authentic consideration of multiple diversity factors, and appropriate weighing of race and ethnicity in that process)."[109] A school should be in the position to show that it has an ongoing policy of evaluating its admissions practices to ensure they are both effective and compliant.[110]

Schools are further advised to document their reasons for adopting specific diversity-conscious goals. According to *Admissions and Diversity*, schools that adopt a critical mass objective must document the "multiple evidentiary bases" that justify it.[111] Those bases include both general social science evidence that "defines the critical mass theory and explains its potential application" as well as

> institution-specific research that provides educational perspectives about critical mass, which may include statements from professors describing in multiple set-

105 *Grutter*, 539 U.S. at 342.
106 COLEMAN & PALMER, *supra* note 44, at 9.
107 *Id.* at 14.
108 *Id.*
109 *Id.* at 31.
110 *Id.*
111 *Id.* at 40.

> tings the points at which they have observed and experienced the attainment of the educational benefits associated with a critical mass of minority students.[112]

Admissions and Diversity also advises schools to extensively document reasons why race-neutral alternatives are not sufficient to achieve their diversity goals.[113]

In sum, academic deference is not a license for administrators to run wild, but rather a roster of requirements for schools that choose diversity, building an atmosphere of self-regulation.

B. THE COLORBLIND EFFECTS OF STRICT SCRUTINY WITH ACADEMIC DEFERENCE

Grutter did not change the fact that every diversity-conscious admissions program will trigger strict scrutiny. Whether the court will grant deference has been interpreted to be a question of fact. To be successful in court, a school should be able to document its underlying commitment to colorblindness despite the temporary, limited use of racial classifications.

Strict scrutiny has strong ties to colorblind ideology. The two merged formally in the Court's decisions in *City of Richmond v. J.A. Croson Co.*[114] and *Adarand Constructors Inc. v. Pena*,[115] which held that all racial classifications, even well-intentioned ones, are subject to strict scrutiny. According to Justice O'Connor's opinion in *Croson*, strict scrutiny is not reserved for invidious racial classification; it is also triggered by "benign" categorizations: "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[116] In a concurring opinion, Justice Scalia further tightened the link between strict scrutiny and colorblind ideology.[117] Scalia wrote that he "shared the view expressed by Alexander Bickel that '[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'"[118]

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112 *Id.*

113 *Id.* at 49–53.

114 488 U.S. 469 (1989).

115 515 U.S. 200 (1995).

116 *Croson*, 488 U.S. at 493.

117 *Id.* at 521 (Scalia, J., concurring).

118 *Id.* (Scalia, J., concurring).

Given this tight link between strict scrutiny and colorblindness, diversity-conscious programs that flaunt race consciousness are not likely to do well. Not surprisingly, compliance manuals emphasize the link when they remind administrators of the rigors of strict scrutiny. For instance, the authors of *Admissions and Diversity* discuss the strict scrutiny standard in an extensive four page section titled, "The Law Matters."[119] The section begins:

> [I]t is . . . important to remember that institutions act at their peril if they do not heed the lessons of the Michigan cases and other federal law . . . . [I]t is clear that race- and ethnicity-conscious admissions policies must satisfy 'strict scrutiny' standards in order to withstand any legal attack.[120]

Receiving deference is possible if a school can demonstrate that it has investigated race neutral alternatives.[121] The *Grutter* Court advised administrators to "draw on the most promising aspects of . . . race-neutral alternatives as they develop."[122] The authors of *Admissions and Diversity* interpreted this as a mandate for administrators to pursue race-neutral objectives and "regularly review their race- and ethnicity-conscious policies to determine whether the use of race or ethnicity continues to be necessary and, if necessary, if the policies merit refinement in light of relevant institutional developments."[123] One specific method suggested is to create a committee that explores race-neutral policies and makes recommendations.[124] Specifically, this committee would:

> [P]eriodically research . . . and evaluat[e] race-neutral alternatives . . . [maintain] a record of practices . . . along with the accompanying evaluations regarding their viability . . . [and document] the entire array of race-neutral practices pursued by the institution [by maintaining] an ongoing record of research regarding the effectiveness of those practices in achieving institutional diversity goals.[125]

The record should document "a pattern that reflects serious consideration, experimentation, and evaluation leading to research-based policy changes."[126] This pattern "is more likely to reflect the kind of deliberate

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119 *See* COLEMAN & PALMER, *supra* note 44, at 5–8.
120 *Id.* at 5.
121 *See id.* at 9, 50.
122 Grutter v. Bollinger, 539 U.S. 306, 342 (2003).
123 COLEMAN & PALMER, *supra* note 44, at 50.
124 *See id.* at 53.
125 *Id.*
126 *Id.*

and earnest consideration of alternatives that may justify some federal court deference to academic judgments regarding race-neutral alternatives."[127]

Receiving deference also appears to be tied to a school's ability to demonstrate that the diversity-conscious policy is a temporary deviation from an ideal of colorblindness.[128] The Court praised Michigan's position that it "would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."[129] The Court emphasized its "expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[130] Schools are advised to show that their policies are a necessary, temporary evil.[131] The authors of *Admissions and Diversity* state: "Race- and ethnicity-conscious programs cannot be designed to continue forever."[132] The authors counsel schools to administer "an appropriately resourced process of rigorous, periodic review of race- and ethnicity-conscious policies."[133] If the schools do not engage in this process, diversity-conscious programs face a "substantially greater risk of successful legal challenge."[134]

Judicial deference to academic judgment is one possible way to avoid strict scrutiny's fatality, but it does not neutralize strict scrutiny's ideology of colorblindness. Rather, in many ways, deference is conditioned on a school's ability to show its colorblind commitments despite the use of racial classifications.

IV. ADMINISTERING INDIVIDUALIZED REVIEW

In 1966, B. Alden Thresher, Emeritus Director of Admissions at MIT, famously described the college admissions process as "the great sorting."[135] He called it a "social process of great complexity, not fully understood by the students themselves, by their parents and advisers, or by the educators, including admissions officers, who participate in it."[136]

Both the supporters and critics of *Grutter* agreed that the decision would fundamentally change the sorting methods. For *Grutter's* support-

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127 *Id.*

128 *See* Grutter v. Bollinger, 539 U.S. 306, 342 (2003).

129 *Id.* at 343 (quoting Brief for Respondent at 34, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) ("The Law School has studied this issue for many years, and would like nothing better than to find a race-neutral admissions formula that would produce meaningful diversity without doing unacceptable damage to its other educational goals.")).

130 *Grutter*, 539 U.S. at 343.

131 *Id.* at 342.

132 COLEMAN & PALMER, *supra* note 44, at 19.

133 *Id.* at 9.

134 *Id.*

135 B. ALDEN THRESHER, COLLEGE ADMISSIONS AND THE PUBLIC INTEREST 3 (1966).

136 *Id.*

ers, the decision authorized a departure from numerical measures of ability and from racial quotas. Professor Monique Lillard wrote,

> "The thing that is clearest about *Grutter* is . . . chiefly, highly individualized decision-making as to each individual candidate. . . . What the law school presented was decision-making that Justice O'Connor was prepared to acknowledge was individualized, quite non-standardized, quite subjective, and very non-quantitative . . . which is an ideal of purely individualized non-stereotyped decision-making."[137]

The authors of the Harvard Civil Rights Project stated that the decision "reinforce[s] the importance of flexible and holistic admissions policies that employ a limited use of race."[138] Detractors, too, viewed the decision as permitting more discretion for selecting students, though they characterized it less favorably. They argued that the case represents a leap into the subjective, the irrational, and the emotional. For instance, according to Professor Joel Goldstein, under *Grutter* "[i]ndividual admissions officers might pursue their own agendas and consider race to the exclusion of other forms of diversity."[139]

As discussed above, however, the process of individualized review outlined by the Court provided no guarantee against mechanization. Further, as administrators put individualized review into practice, they have turned toward a more standardized, rather than a more humanized, process. This standardization is carried out in a way that reinforces colorblind ideology.

A. ADMINISTRATIVE REVIEW OF THE FILE, GENERALLY

Extensive document accumulation was a staple of the admissions process well before the *Grutter* decision. As the *Grutter* Court recognized, the primary element of an admissions model is the applicant file.[140] At minimum, the undergraduate admissions file includes a basic application with the applicant's background, a high school transcript, and standardized test results.[141] In addition, institutions often collect coun-

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137 Monique C. Lillard et al., *The Effect of the University of Michigan Cases on Affirmative Action in Employment: Proceedings of the 2004 Annual Meeting, Association of American Law Schools, Sections on Employment Discrimination Law, Labor Relations and Employment Law, and Minority Groups*, 8 EMP. RTS. & EMP. POL'Y J. 127, 129 (2004).

138 THE HARVARD CIVIL RIGHTS PROJECT, REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES 2 (2003).

139 *See, e.g.*, Joel K. Goldstein, *Beyond* Bakke*:* Grutter-Gratz *and the Promise of* Brown, 48 ST. LOUIS U. L.J. 899, 931–32 (2004).

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

141 *See* GRETCHEN W. RIGOL, ADMISSIONS DECISION-MAKING MODELS: HOW U.S. INSTITUTIONS OF HIGHER EDUCATION SELECT UNDERGRADUATE STUDENTS 13 (2003).

selor recommendations, teacher recommendations, essays or personal statements, lists of activities and achievements, additional test scores, interview reports, and information about the applicant's high school.[142] Application files for the University of Michigan Law School contained similar information and documents.[143]

Standardization is the rule even for the organization of records within the file. Some offices have "detailed lists of the order in which the material is to appear in the file. This . . . approach has the advantage of assuring that each reviewer approaches each applicant from a particular perspective."[144] Although file organization varies from institution to institution, common first pages of the file are the actual application, the transcript, or the personal statement.[145]

GPAs are also standardized. Many undergraduate institutions recalculate a high school student's GPA because high school calculation methods vary widely.[146] Some recalculation formulas accord extra weight to Advanced Placement ("AP") courses while others do not.[147] Whatever the approach, it must be applied consistently.[148] The standardized GPA is then often added with other elements such as class rank and test results to compute an academic index.[149] Compilation of this data helps formalize the individual candidates, allowing institutions to gauge a candidate's individual aptitude and to comparatively "evaluate all applicants on a similar basis."[150]

There is even discussion of standardizing faculty recommendations for students applying to graduate school.[151] The Educational Testing Service ("ETS") surveyed graduate schools about characteristics they sought in candidates.[152] The survey produced twenty to thirty characteristics (both cognitive and noncognitive) that served as the basis for a patented prototype of an electronic recommendation form.[153] The form rates candidates according to cognitive ability, motivation, and ability to work with others.[154] The College Board supports this move, declaring

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142 *See id.*

143 *See Grutter*, 539 U.S. at 314–15.

144 RIGOL, *supra* note 141, at 14.

145 *Id.*

146 *Id.*

147 *Id.*

148 *See id.* at 15.

149 *See id.*

150 *Id.*

151 *See* GRETCHEN W. RIGOL, SELECTION THROUGH INDIVIDUALIZED REVIEW: A REPORT ON PHASE IV OF THE ADMISSIONS MODELS PROJECT 12 (2004).

152 *Id.* at 12.

153 *Id.* at 12–13.

154 *Id.* at 13.

that this "timely research holds promise for making it easier for counselors and faculty to provide standardized assessments of applicants."[155]

In sum, even before *Grutter* doctrinalized individualized review, the exercise of compiling the file was an exercise in standardization.

B. EXAMPLES OF INDIVIDUALIZED REVIEW

Grutter's individualized review requirement is not the antithesis, but rather the intensification of standardization. A synonym for individualized review is "whole file review."[156] In a whole file review, admissions committees examine all the documents included in the applicant's file.[157] Thus, individualized review does not prevent candidates and their qualities from being translated into files; rather it ensures that more candidates and more qualities are so translated. According to one admissions dean, "Whole-file review means just that, not full-life review."[158]

The "getting-to-know-you" process of individualized review occurs over the course of minutes, not hours or days, and application readers are valued for their efficiency.[159] On average, a reader will spend between fifteen and twenty minutes on a file with one or more essays and recommendations.[160] Schools value readers with experience and who can process a file quickly. "[E]xperienced readers are extremely familiar with all components of the application, and they know where to look for specific information and can quickly identify unusual or outstanding factors."[161] The best readers learn to look for and evaluate difference efficiently because of familiarity with the file format.

Although individualized review varies from school to school, the standardizing effects of the process do not appear to have been meaningfully challenged. The College Board report, *Selection through Individualized Review* (hereinafter *Individualized Review*), details five types of individualized review based on practices at selective institutions.[162]

Most of these types are highly structured, using methods like "buddy systems"[163] to standardize qualitative judgment calls. At one highly competitive university, a two-person team reads each file.[164] First, each reader sub-rates an application on three weighted axes: aca-

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155 *See id.* at 13.
156 *See id.* at 1–2.
157 *See id.* at 3.
158 *See id.*
159 *See id.* at 17.
160 *See id.* at 23–24 (explaining that the process may take longer if the reader is new).
161 *Id.* at 24.
162 The report indicates that similar approaches are employed at less competitive colleges as well. *See id.* at 4.
163 *Id.* at 17.
164 *See id.*

demics (60%); communication (based upon the applicant's essays, short answer responses, and teacher and counselor comments) (20%); and character, leadership, and initiative (20%).[165] The subratings serve as guidelines for assigning an overall rating on a scale of 1 to 5, with a score of 1 being the highest.[166] This flexibility, however, is limited by replication requirements. If a reader and her buddy reach the same rating, review of the file is complete.[167] Files assigned a score of 1 or 2 are admitted, files with a score of 3 are held until the process is completed, files with a score of 4 are waitlisted or denied, and files with a score of 5 are denied.[168] If the two readers disagree, however, a dean, director, or senior associate reviews the file for a final rating.[169]

Another competitive school employs an even more structured buddy system. Three readers review each application, and each of the readers rate academics and personal qualities on a more "highly structured" nine-point scale that includes both academics and "personal qualities."[170] According to Gretchen W. Rigol of the College Board, "the process is both thorough and efficient, and an emphasis is placed on training to assure fairness and consistency."[171] This school does not use a committee to make decisions "in part because of a concern that the dynamics of the committee can be unpredictable."[172] Committees are viewed as unpredictable and less objective, and the school sharply limits its discretion.

Complex numeric rating systems are often combined with buddy systems to further control discretion. One highly competitive university assigns three different ratings—for personal achievement, life challenges, and academics—and combines those ratings on a "decision grid."[173] Applicants with exceptionally high academic ratings are generally accepted regardless of their scores on the other components. Administrators then focus on borderline applications, which are "reread to verify the ratings, since a single number could make the difference between acceptance and denial."[174] The numeric scoring is subject to intense quality control. "There is an extensive training program, and all readers must be certified. In addition, readers are constantly monitored to assure consistency."[175]

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165 *See id.* at 4.
166 *See id.*
167 *See id.* at 4–5.
168 *See id.* at 5.
169 *See id.*
170 *See id.*
171 *Id.*
172 *Id.*
173 *Id.* at 6.
174 *Id.*
175 *Id.*

An even more structured rating system uses computer generated academic achievement indexes based on the student's class rank and test scores. Readers index "personal achievement" using a "holistic review of the entire application, including two essays."[176] While holistic review might sound very flexible, the school limits discretion by intensively training readers. Readers are trained by a faculty member experienced in the specific type of holistic review used to grade AP exams and the writing section of the SAT.[177]

The most discretionary review style employs a "committee model" in which a committee discusses and votes on each applicant.[178] The committee model is nevertheless front-loaded with standardization. Readers first evaluate applications based on the transcript, test scores, teacher evaluations, and school recommendation.[179] Readers then review the student's life experience and "other competitive factors that distinguish the applicant."[180] The full admissions committee does not make any decisions until after readers process the files and compile summaries.[181] Moreover, even under this most discretionary approach, subjectivity is checked by potentially coercive boardroom dynamics: at least a majority must approve the applicant's admission.[182] The College Board approves of this model in part "because of the belief that any personal biases that one committee member might have are offset by others on the committee."[183] Thus, one of the acknowledged goals of using a committee is to use board members to correct for the irrational biases of the others. Here, then, the committee is an objective, predictable mechanism for correcting individual discretion.

Therefore, although individualized review or whole file review sounds like a process that humanizes the standardization of the file, in practice, discretion is controlled by formalizing mechanisms such as buddy systems, intense numeric scoring techniques, and committee politics.

C. TRAINING AND MONITORING OF READERS

Even admissions policies that leave room for discretion try to ensure that readers employ that discretion in a trained way. Training tools include official definitions of desirable qualities and "rangefinder" appli-

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176 *Id.* at 7.
177 *Id.*
178 *Id.* at 5.
179 *Id.*
180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.* at 6.

cations to keep readers in sync.[184] Discretion is thus extensively calibrated by training and monitoring of readers.[185]

Specific definitions of desirable qualities are commonly used to help readers select the best applicants. Sometimes, readers use definitions as general, non-binding guideposts. In other cases, readers must determine how each applicant scores for each defined characteristic. For example, an application process might require the reader to rate an essay's spelling, depth of vocabulary, sentence structure, organization, and originality, and then combine the totals of each category to compute a total score.[186]

"Range finders," or sample files, are another common method for standardizing discretion. Range finder files are applications "that have been 'normed' by experienced readers."[187] The range finder method might use several sample files for each point on a five-point rating scale. For example, trainers might provide sample files in the "1" and "2" ranges so that readers can learn the difference. Smaller institutions might develop the sample cases as a training exercise, while larger institutions often extensively develop collections of "norming files" prior to training.[188]

Every individualized review program studied by the College Board required reader training.[189] Training ranged from an informal buddy system that paired new and experienced readers to intensive one-week programs that included "hands-on training, homework, and eventual certification."[190] In general, training programs introduce readers to the types of students and specific qualities sought by the institution, familiarize readers with the school's rating scale, and provide readers with examples of files from past years. A school may require only one training period, or it may have ongoing training throughout the evaluation period to keep readers calibrated.[191] Many schools use calibration sessions, in which readers review the same group of files and then discuss how their ratings diverged.[192] Calibration sessions can involve the entire group or a subset of the group, and they can convene as often as weekly.[193]

Training programs are intense. For example, one medium-sized university uses ten experienced admissions staff and five part-time

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184 *Id.* at 19.
185 *Id.* at 17.
186 *Id.*
187 *Id.* at 19.
188 *Id.*
189 *Id.* at 17.
190 *Id.*
191 *Id.*
192 *Id.*
193 *Id.*

outside readers.[194] Everyone must attend training during the annual staff retreat, even veteran readers.[195] At the retreat, readers review detailed class profiles of the past five years, scoring guidelines, and sample files representing a range of applications received the year before.[196] "This training occurs before the fall school-visiting season in order to assure that admissions staff recruit the types of students the institution wishes to admit."[197]

A second, larger school employs a four-step training process. First, evaluators read or reread written training materials. Readers then must attend a three-hour overview of the process. Third, readers score twenty files as homework. Finally, readers must attend a group "norming session" with twelve to fifteen people in each group.[198] "If a reader rates all files appropriately during the first set, they are 'certified.' Readers may continue with two additional sets until they are either certified or disqualified from reading."[199] Thus, schools check and recheck readers to ensure that their discretion is in step with the school's norms. Only those readers who successfully complete the program are certified and permitted to review actual applications.[200]

In addition to pre-fall training, some institutions regularly monitor inter-reader reliability after the application process has begun.[201] One school monitors readers by preparing weekly reports for each reader that include "the number of files read, the number of times a reader agreed with a second reader, and the number of readings that resulted in a third review (when ratings were more than one point apart)."[202] Another institution requires experienced readers to "shadow" new readers to ensure they are applying the guidelines properly.[203] The College Board reports that within most institutions, "agreement among readers ranges from 90 to 97 percent. If there are particular readers who are frequently out of sync with the others, additional training is provided."[204]

Another strategy for ensuring consistency includes measuring the deviation between two readers and using a third reader if the first two readings deviate by 0.5 to 1 point.[205] Other institutions use "experienced

194 *Id.* at 20.
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.* at 21.
202 *Id.*
203 *Id.*
204 *Id.*
205 *Id.*

team leaders who review and confirm all final decisions."[206] Yet another approach recycles files randomly throughout the reading process or even to the same reader, to ensure that ratings are the same the second time.[207]

Schools use exceedingly structured individualized review policies and rigorously train the people who read the files. Far from humanizing the application process with discretion or individualizing it by taking into account applicants' unique characteristics, individualized review further standardizes it.

D. HOW INDIVIDUALIZED REVIEW FUNCTIONS AS COLORBLINDNESS

Standardized individualized review procedures reinforce colorblindness in two ways. First, they legitimate the ideal of a colorblind meritocracy. Consideration of personal statements and other soft variables paradoxically strengthens meritocracy, because individualized review still prioritizes merit as the primary determinant of an applicants' fortune. Subjective or qualitative characteristics continue to play supporting roles. The perception that schools consider subjective qualities creates an appearance of going beyond the numbers while also ensuring that the numbers remain a large part of most decisions. Second, individualized review uses the diversity standard for evaluation of soft variables. The diversity standard is itself colorblind.

1. *The Diversity Standard Ratifies Colorblind Meritocracy*

The critique of merit, raised frequently by Critical Race Theorists, focuses on the false dichotomy between merit and race consciousness.[208] Dispelling that false dichotomy means "challeng[ing] the objectivity of the category of merit by viewing it in terms of the particular social practices by which whites historically distributed social goods."[209] The critique has roots that stretch back decades.[210] For instance, during the 1965–66 school year, the Yale undergraduate admissions office—in language perhaps more palatable at that time—adopted a policy that "seriously consider[ed] the possibility that SAT scores might reflect cultural deprivation rather than lack of intelligence."[211]

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206 *Id.*

207 *Id.*

208 *See, e.g.*, Mari Matsuda, *Who is Excellent?*, 1 SEATTLE J. FOR SOC. JUST. 29, 30–31 (2002) ("[S]tudents are taught that there are two boxes. One is labeled excellent, the best, academic standards. The other is labeled Black, brown, woman, affirmative action, compromise. . . . [A student] somehow learn[s] that a Black woman could not possibly be the best person to teach him what he needs to know.").

209 Peller, *supra* note 8, at 806–07.

210 JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF EXCLUSION AT HARVARD, YALE, AND PRINCETON 383–84 (2005).

211 *Id.* at 384.

Today, the critique of merit is widespread. Scholars continue to argue that racial disparities in test scores, while fluctuating over the years, remain significant today.[212] Susan Sturm and Lani Guinier cast doubt on the ability of the SAT to assess merit. They noted that the SAT better predicts parental income than first-year grades.[213] "The linkage between test performance and parental income is consistent and striking. . . . [The] correlation between income level and test performance persists within every racial and ethnic group."[214] In a landmark study of affirmative action in higher education, William Bowen and Derek Bok found a "marked disparity in test scores between black and white applicants."[215] This critique, however, has not diminished the SAT's importance. Along with high school GPA, the SAT score is one of the two most important means for evaluating applicants.[216]

In the law school context, many of the briefs filed with the Supreme Court in *Grutter* challenged the plaintiff's presumption that standardized tests objectively measure merit.[217] The LSAT is required for admission to all ABA approved law schools (and many non-ABA approved law

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212 BOWEN & BOK, *supra* note 5, at 19.

213 Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal,* 84 CAL. L. REV. 953, 988–89 (1996).

214 *Id.* (citing raw data provided by the College Entrance Examination Board). For more critiques of the SAT, see generally JAMES CROUSE & DALE TRUSHEIM, THE CASE AGAINST THE SAT (1988).

215 *Id.*

216 NICHOLAS LEMANN, THE BIG TEST: THE SECRET OF HISTORY OF AMERICAN MERITOCRACY 155–56 (1999); *see also* William C. Kidder & Jay Rosner, *How the SAT Creates "Built-In Headwinds": An Educational and Legal Analysis of Disparate Impact,* 43 SANTA CLARA L. REV. 131 (2002) (citing GEORGE H. HANFORD, LIFE WITH THE SAT: ASSESSING OUR YOUNG PEOPLE AND OUR TIMES 90 (1991) (characterizing the SAT as the gatekeeper of higher education)) (stating that, according to former College Board President George Hanford, "the SAT served as the most widely used and possibly the most important single talent search device the country had").

217 *See, e.g.,* Brief for a Committee of Concerned Black Graduates of ABA Accredited Law Schools as Amici Curiae Supporting Respondents at 4, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Brief for Concerned Black Graduates] ("[T]he record in this case demonstrates that traditional admissions criteria are in fact flawed. These measures are not reliable predictors of academic merit or performance after graduation for all candidates. The student intervenors in this case directly challenged Petitioner's presumption that standardized tests constitute objective measures of merit, and that affirmative action necessarily amounts to a preference for "lesser qualified" students of color. They presented evidence that heavy reliance on standardized aptitude test scores constitute built-in racial preferences for White applicants."); Brief of Massachusetts Institute of Technology et al. Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241); Brief for the National Center for Fair & Open Testing (Fairtest) as Amicus Curiae Supporting Respondents at 4, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) ("[T]he SAT and LSAT are not neutral, objective measures of 'merit' . . . .").

schools)[218] even though racial disparities in LSAT scores[219] and questions about the LSAT's predictive capabilities[220] have generated criticism similar to that leveled against the SAT. One brief argued, "[T]he record in this case demonstrates that traditional admissions criteria are in fact flawed. These measures are not reliable predictors of academic merit or performance after graduation for all candidates . . . . [The record demonstrates that] heavy reliance on standardized aptitude test scores constitutes built-in racial preferences for White applicants."[221]

Despite these attacks, standardized tests continue to play a prominent role in the admissions process, even after *Grutter*. As noted above, the individualized review process frequently considers merit and diversity separately and then balances them, with merit receiving more weight.[222] The fact that there is a balancing process tends to deemphasize the higher weight accorded to merit or academics. For instance, one school studied by the College Board advised readers to weight academics at 60%, communication at 20%, and character at 20%.[223] Diversity does not even warrant a category of its own; presumably it is considered a subset of "character, leadership, and initiative" along with athletics, community service, and participation in student government.[224] Diversity is thus limited to some portion of 20%; academics are privileged with 60%. This balancing method affirms the meritocratic, individualist values within the rhetoric of raceeconsciousness.

Rather than resisting the values of colorblind meritocracy, individualized review carefully preserves and ratifies them. The rhetoric of diversity criteria has obscured the substantial weight still accorded to colorblind academics. Actual assessment of a candidate's diversity contribution is confined to the diversity—or, more broadly, character—sege

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218 Law School Admission Council, *About the LSAT*, http://www.lsac.org/LSAT/about-the-lsat.asp (last visited May 5, 2008) ("The Law School Admission Test (LSAT) is a half-day standardized test required for admission to LSAC-member law schools, most Canadian law schools, and many non–ABA–approved law schools.").

219 *See, e.g.*, William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving 'Elite' College Students*, 89 CAL. L. REV. 1055, 1057 (2001) (arguing that racial and ethnic gaps in LSAT scores are larger than those in undergraduate grades, law school grades, or later success in the legal profession).

220 *See* Brief for Concerned Black Graduates, *supra* note 217, at 4; LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 38–41 (1997) (arguing that LSAT scores explain at most twenty-one percent of the variance in law school grades for all students by the third year of law school and even less for the first two years); *see also* Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1 (1994).

221 Brief for Concerned Black Graduates, *supra* note 217, at 4.

222 RIGOL, *supra* note 141, at 4.

223 *Id.*

224 *Id.*

ment of the application. The next section will examine how colorblindness is reinscribed even there.

2. *The Diversity Standard Is Itself Colorblind*

In addition to ratifying the weight given meritocratic categories over diversity, the diversity standard also re-deploys colorblind values within the race-conscious assessment. Even when diversity is being evaluated openly, the individualist strand of race consciousness, which treats race as a "voluntary, willed association,"[225] triumphs over the group-subordination analysis, which posits that "*power* determine[s] the distribution of social resources and opportunities, rather than reason or merit."[226] Diversity individualizes racial difference in a way that obscures group power and subordination.

The *Grutter* Court emphasized that diversity must be a measure that would capture and benefit *all* students.[227] As discussed above, the Court affirmed the diversity rationale precisely because of its capacity to translate all applicants into neutral terms and then identify relational deviations from those terms.[228] Quoting Justice Powell, the Court held that "an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and *to place them on the same footing for consideration, although not necessarily according them the same weight.*'"[229] Thus, the Court translated racial categories into a diversity standard, making racial diversity interchangeable with speaking several languages or traveling abroad:

> [T]he Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well . . . [because it] sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.[230]

Through the concept of diversity, the Court deployed the integrationist move of stripping from race its context, history, power, and politics.

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225 Peller, *supra* note 8, at 794.

226 *Id.* at 790.

227 *See* Grutter v. Bollinger, 539 U.S. 306, 334, 337 (2003).

228 *Id.* at 334, 337.

229 *Id.* (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (Powell, J., concurring)) (emphasis added).

230 *Id.* at 338–39.

In June 2007, the Court reiterated that the constitutionality of racial considerations hinges upon its translation into individualized diversity. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court wrote,

> The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. . . . The point of the narrow tailoring analysis . . . was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity.[231]

That is, difference cannot be constitutionally considered unless everyone has access to it. The category of difference cannot exclude anyone.

Grutter's race-conscious depoliticization of race, therefore, sounds quite similar to the colorblind integrationists' use of neutrality. Diversity reenacts the integrationist practice of identifying "'neutral' social practices from which to identify bias and deviation [and] constitute[ ] a whole realm of institutional characteristics removed from critical view."[232] Diversity renders race a neutral social practice by interchanging it with travel, family hardship, or community service. Bias and deviation is measured by one's diversity capacity, and the personalization of race as individual experience isolates it from a political context or critique.

In complying with *Grutter*, administrators individualize race to the point where even a white person can join in. One post-*Grutter* compliance manual provides this hypothetical:

> Applicant A belongs to an underrepresented minority group, comes from a middle class family, and has average grades and test scores. She is a solid, but unremarkable candidate. Applicant B has poorer grades and test scores, but comes from a disadvantaged background and is an accomplished jazz saxophonist. She is White. A reviewer may decide to admit Applicant B over Applicant A because Applicant B will contribute more to the diversity of the student body than Applicant A.[233]

While some radical redistributivists might support an ultimate outcome that admits the disadvantaged Applicant B, race-conscious redise

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231 127 S. Ct. 2738, 2753 (2007) (citations omitted).

232 Peller, *supra* note 8, at 779.

233 BINGHAM MCCUTCHEN LLP ET AL., PRESERVING DIVERSITY IN HIGHER EDUCATION: A MANUAL ON ADMISSIONS POLICIES AND PROCEDURES AFTER THE UNIVERSITY OF MICHIGAN DECISIONS 30 (2004).

tributivists might critique the way the manual (and those who use it) reduces an applicant's race to an individualized circumstance like jazz saxophone playing. The manual tritely attempts to disassociate saxophone playing and disadvantaged backgrounds with blackness and averageness with whiteness.[234] It assumes that disadvantaged backgrounds and test scores are as randomly, apolitically, and individually distributed as skin color and saxophone talent.[235]

In sum, while diversity appears to give administrators the freedom to embrace race consciousness, it actually reinscribes within race consciousness the colorblind practice of translating race into neutral, apolitical, individual characteristics.

E. CONCLUSION

This section has argued that, like deference, the discretion permitted by individualized review is not administrative anarchy. Both structural and disciplinary mechanisms inhibit the thoughtful, engaging, subjective exercise or review imagined by *Grutter*'s supporters. Individualized review—with its multi-tiered review processes, demands for efficiency, and extensive training programs—has intensified the practice of standardizing applicants. Further, explicit diversity considerations comprise a relatively small portion of the file, and that portion reinforces colorblindness by ratifying meritocracy and individualizing race.

V. PERSONAL STATEMENTS: PRODUCING THE BOTTOM AND REPRODUCING COLORBLINDNESS

Can students save individualized review? Administrators praise personal statements as the best, and sometimes the only, way to get to know the student.[236] For students, essays are commonly considered an opportunity to control their destinies, to write about the thing about which they are most knowledgeable, and to reflect on turning points or obstacles overcome in their own lives. Personal statements supplement the examination-like qualities of GPAs and standardized test scores. They ratify the truth of the entire file by providing administrators with an additional truth-telling device. Under this view, personal statements are authentic, empowering, and unique.

Given the personal statement's link with individual authenticity, it appears to be the perfect method for making race conscious admissions a reality. *Grutter*'s permission to consider racial experiences disclosed in personal statements seems to heed Professor Matsuda's call to "look to

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234 *Id.*

235 *Id.*

236 ERIC OWENS, LAW SCHOOL ESSAYS THAT MADE A DIFFERENCE 17 (2d ed. 2006).

the bottom" and tap the "concrete experience of oppression" to examine "right and wrong, justice and injustice."[237] Under this theory, the personal statement can provide an experiential starting point from which we can build an understanding of race and racism from the ground up. Defenders of *Grutter* might argue that personal statements could range from the colorblind to the race-conscious ideologies, and that such a range might be precisely what administrators seek.

The access to racial insights from personal statements looks to be substantial. Students are urged to detail their racial experiences so that administrators can make fully-informed admissions decisions. According to one coaching manual,

> Sometimes applicants want to . . . say, for example, "I am an Asian American from Missouri." Expressed in such a general way, your background provides almost no insight into your character. If you choose to talk about your background in the context of how it has shaped your perspective and influenced your choices, that's a different story. If you go this route, however, remember to be highly specific; you do not want to be thought of as an applicant who was trying to fit into a preconceived notion of identity.[238]

It appears, then, that a critical purpose of the personal statement, sanctioned by *Grutter*, is to learn much more about the authentic, individual experiences of students of color. By elaborating on how her background influenced her life, an applicant can inform both admissions officers and, later, her peers in class, about the complexities and banalities, triumphs and disadvantages, of living a racialized life.

A review of actual personal statements, however, indicates that these essays are not rife with authentic, highly differentiated statements from the bottom of our diverse society.[239] Rather, they are highly standardized, and they articulate the colorblind values underlying *Grutter* and the administrative processes discussed above. Like the Court and the admissions policies, personal statements have effectively reinscribed colorblindness within race consciousness. Operating together, Courts, administrators, and students are producing a type of racial knowledge called *diversity* that, on the surface, openly acknowledges group-based

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237 Matsuda, *supra* note 32, at 63.

238 OWENS, *supra* note 236, at 17.

239 Given the confidentiality requirements of the Family Educational and Privacy Rights Act, codified at 20 U.S.C. § 1232g (2002), and the reluctance of students to share their personal statements directly with me, this section relies upon personal statements published by coaching manuals. These statements therefore serve the dual, perhaps contradictory, purposes of being both authentic and models. They also illustrate a further trend toward standardization.

race consciousness but, when digging deeper, reaffirms individualist values of colorblindness.

Comparing personal statements with the similar literary genre of the Roman Catholic confession sheds light on how personal statements create this particular type of racial knowledge. The confession is an apt analogy because it is also presumed to be authentic, empowering, and individualized, though the opposite is frequently true. As discussed below, the power relationship between the priest and the penitent, and the extensive literature on how to give a good—and avoid a bad—confession, undermine the notion that confessions liberate one's authentic soul.

After reviewing this critique of the Roman Catholic confession, this section will apply it to the personal statement. It argues the power relationship between applicant and admissions officer, and the literature about what constitutes an excellent essay, undercuts the presumption that personal statements can challenge colorblindness.

The final section of this part analyzes one way that the racial knowledge of diversity standardizes both white applicants and applicants of color. I argue that the colorblindness within the diversity standard, discussed above, incentivizes students to portray themselves as different but not too different. In other words, because diversity can be racial but can also be any other extracurricular activity, applicants must distinguish themselves without marking themselves as permanently different. Generally, this exerts on white students a desire to differentiate themselves from what they consider mainstream white culture, while students of color often try to demonstrate how race is not a permanent situation, but rather a set of insights accessible to anyone.

A. ONE CRITIQUE OF THE ROMAN CATHOLIC CONFESSION

In the Middle Ages, the Catholic Church forged a strong link between truth and confession. In 1215, the Fourth Lateran Council required every Christian to confess to a priest.[240] In the centuries that followed, the Church further refined confessional techniques. By the second half of sixteenth century, for example, confessions had their own house within the House of God: the confessional box.[241]

Today, we confess to discover the truth about ourselves. We have inherited from the Church the general idea that confessions are liberating expressions of a deep, authentic self. Critics, however, have demonstrated that they often operate as constraining and self-producing, and Michel Foucault's critique is perhaps the most famous. In *The History of*

240 THOMAS N. TENTLER, SIN AND CONFESSION ON THE EVE OF THE REFORMATION 16 (1977).

241 *Id.* at 82.

Sexuality, he describes how power relationships between a priest and a penitent undermine both liberating and authenticating beliefs about confession.[242] Confession, for Foucault, is the production of "men's subjection: their constitution of subjects in both senses of the word."[243] First, confessions make individuals "subjects" in the sense that they are dominated by another individual. "[O]ne has to have an inverted image of power in order to believe that all these voices which have spoken for so long in our civilization—repeating the formidable injunction to tell what one is and what one does, what one recollects and what one has forgotten, what one is thinking and what one thinks he is not thinking—are speaking to us of freedom."[244] Second, confessions create their subject, the penitent. The *self truth* is produced by power relationships, such as those between priests and penitents. "[T]ruth is not by nature free. . . . [I]ts production is thoroughly imbued with relations of power. The confession is an example of this."[245]

Through this compulsory speech act, therefore, a truth is not revealed but rather produced. Truth and power reinforce one another; truth would not be the truth if it did not have to be forced out. In his book exploring the link between law, literature, and confession, Yale Professor of Comparative Literature Peter Brooks discusses the shadow that the power bond between confessor and confessant casts on "truth."[246] As Brooks writes, "'Truth' is to be sought in those places that have been marked by censorship. It is not the voluntary confession that interests the analyst, but the involuntary—that which can be coerced from the analysis and in the course of analytic work."[247] The power bond between confessor and confessant "contains, and activates, elements of dependency, subjugation, fear, the desire for propitiation, the wish to appease and the wish to please. It leads to the articulation of secrets, perhaps to the creation of hitherto unrealized truth—or perhaps the simulacrum of truth."[248] Thus, the power relationship between priest and penitent affects the very truth being revealed and the very self revealing it.

B. TRUTH AND AUTHENTICITY

If a confession does not simultaneously affirm and explore the self, then it lacks authenticity. Brooks notes, "Without the sense of the self

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242 MICHEL FOUCAULT, HISTORY OF SEXUALITY 60 (Robert Hurley trans., 1978).
243 *Id.*
244 *Id.*
245 *Id.*
246 PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE 53 (2000).
247 *Id.*
248 *Id.* at 35.

and its narrative, there could be no confession; and without the requirement of confession, internally or externally mandated, there would be no exploration of this selfhood."[249] I confess, therefore I am. Truth is the lifeline of self, and it binds self and speech act.

As in religious confessions, the truth is supposed to be at the heart of the personal statement. Harvard Law School advises applicants that "candid, forthright, and thoughtful statements are always the most helpful."[250] The University of Michigan's introduction to the personal statement reads:

> Each entering class is composed of accomplished people who bring a spectrum of experiences and perspectives to our community. Your personal statement provides you with an opportunity to demonstrate the ways in which you can contribute your talents and experiences. Successful applicants have elaborated on significant personal, academic, and professional experiences; meaningful intellectual interests and extracurricular activities; factors inspiring them to obtain a legal education; and/or significant obstacles, challenges, or disadvantages met.[251]

The application to Yale Law School requires two essays.[252] In the first, applicants may address any subject they wish, but that choice is considered an indicator of a self-truth: "Faculty readers look to this essay to get a glimpse of your character, intellectual passions, analytical abilities, and writing skills. The choice of a topic—personal anecdote, an academic subject, or current events—can be illuminating."[253] Yale's introduction to the second essay advises applicants to "highlight aspects of your background that you believe will be of interest to the Admissions Committee. We are particularly interested in aspects of your background that may not be evident from other parts of your application."[254] Applications routinely conclude with a certification form that applicants must sign, affirming that all statements are truthful and acknowledging that the discovery of untruthful information could result in rescission of an admissions offer or other discipline.[255]

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249 *Id.* at 97.

250 HARVARD LAW SCHOOL, APPLICATION FOR ADMISSION TO HARVARD LAW SCHOOL JURIS DOCTOR PROGRAM 3 (2006–2007).

251 MICHIGAN LAW SCHOOL, APPLICATION TO JURIS DOCTOR PROGRAM A4 (2006–2007).

252 YALE LAW SCHOOL, STEPS IN APPLYING AS A FIRST-YEAR, http://www.law.yale.edu/admissions/firstyearapplication.htm (last visited Jan. 10, 2007).

253 *Id.*

254 *Id.*

255 *See, e.g.*, HARVARD LAW SCHOOL, *supra* note 250, at 2.

In addition to these official prescriptions, a vast literature of coaching manuals offers insider tips that emphasize the importance of providing a truthful self narrative. One manual, *Law School Essays that Made a Difference*, advises, "[T]ell the truth, and find your unique angle."[256] It continues, "Not only will a unique and interesting essay be more effective; it will also be far more enjoyable to write. Who *are* you? Why are you different?"[257] Another manual, *Great Personal Statements for Law School*, cautions, "You will hear a lot (in this book too) about 'positioning' themes and thinking 'strategically' about your essays, but none of that will make any difference if you don't first respond in an honest, self-revealing way to the invitation the personal statement extends to you."[258] Interestingly, both manuals imply that telling the truth is not only strategically important but also an "invitation," something to *enjoy*. The manuals downplay the fact that speaking is done in exchange for admission and instead highlight how writing a personal statement is an important, meaningful, even healthy introspective exercise.

An applicant's unique truth is commonly equated with a deep secret. In this genre, the depth of a secret measures the depth of the individual; and the fewer people who know, the more likely it is true. Past successful applicants, whose advice is published in coaching manuals, emphasize the importance of telling deep truths. One advised, "I believe the key to an effective personal statement is to be genuine. Don't write about what you think the admissions board wants to hear. If this is something you really want, something you truly believe you were meant to do, it should come easy."[259] Another said, "[T]he best piece of advice I received was from within. . e . Your job is to be true to the whispered calling inside. Those dreams you have of success that you won't dare share with even your best friend have been born because you can."[260] A third wrote, "Let your personal statement be a true reflection of who you are and write it from that perspective. Sit down, soul search and then begin writing. . . . Write your personal statement for yourself. You want this statement to be how you perceive yourself."[261]

An undergraduate admissions officer at Duke University discussed an essay that got her attention because it was written with "a raw honesty

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256 OWENS, *supra* note 236, at 17.

257 *Id.* at 6, 17.

258 PAUL BODINE, GREAT PERSONAL STATEMENTS FOR LAW SCHOOL 23 (2006).

259 Stephanie M. Brown, *Stephanie M. Brown*, *in* PROFILES & ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS 50, 52 (Evangeline M. Mitchell ed., 2004).

260 Kimberly B. Kirby, *Kimberly B. Kirby*, *in* PROFILES & ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 124, 125.

261 Funmi E. Olorunnipa, *Funmi E. Olorunnipa*, *in* PROFILES & ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 173, 174–75.

about [a student's] struggles with anorexia."[262] The officer quoted several passages from the essay:

> I hated the girl in the mirror, I hated her fat chipmunk cheeks, her rounded forehead, her pug nose. I hated everything about her and wanted her to go away . . . . [Anorexia] is about power and control, it's about dealing—or not dealing—with issues of sexuality, it's about perfection and self-hatred. It takes a lot of energy to hate yourself this much.[263]

The applicant's statement is actually three layered confessions, each one seemingly more self-revealing than the last. She is anorexic. Even more, she confesses that her anorexia is not about food or body consciousness, but is instead a symptom of a deeper psychological pain. More still, she confesses to one of the deepest psychological ways a person can be sick: she spends every hour of every day hating and destroying herself. She is unique not just because she is destroying herself, but also because she knows and confesses that she is destroying herself. She has had to overcome intense self-destructive obstacles to make that confession. Thus, she exists—both to herself and to the admissions officer—as a unique individual because she can and does tell this story.

This understanding of self-truth as raw honesty, however, is undermined by the many ways penitents and applicants are advised to access this honesty. In both religious and academic contexts there is a specific process. According to Thomas N. Tentler, religious confessions have historically needed foundations in a specific methodology.[264] In an extensive study of confession, Tentler found that the religious penitent was expected to soul search in a thorough and organized manner:

> [Confession] is to be done methodically, deliberately, and extensively. . . e [I]t was not uncommon for an author to commend a general examination of one's whole life, and suggest other helps to the recollection of sin such as review from one's youth to the present of his various companions, occupations, habitations, ages, and so on.[265]

Religious confessions, therefore, were not truthful unless they dislodged deep secrets through a methodical examination of the penitent's personal history and daily life. No detail is too big or too small.

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262 RACHEL TOOR, ADMISSIONS CONFIDENTIAL: AN INSIDER'S ACCOUNT OF THE ELITE COLLEGE SELECTION PROCESS 116 (2001).

263 *Id.* at 116–17.

264 *See* TENTLER, *supra* note 240, at 109–10.

265 *Id.* at 110.

Admissions guidebooks suggest techniques very similar to the centuries-old religious method of "review[ing] from one's youth to the present of his various companions, occupations, habitations, ages, and so on."[266] *Great Personal Statements for Law School* recommends that applicants "find [their] self-marketing handle," which reflects the "key uniqueness factors from [their] personal, professional, academic and community lives."[267] Echoing a fifteenthecentury religious manual, which advised a penitent to search his conscience "as if he expected to find some great treasure there,"[268] *Great Personal Statements for Law School* advises applicants to "data-mine your life."[269] It cautions, "Your memory can deceive you. .e . The goal here is to find different ways to bypass your inhibitions and trick your mind into disgorging details you overlooked, significant events you've taken for granted, passions you forgot you once had."[270]

Great Personal Statements for Law School suggests several specific techniques for accessing the sub-conscious. In one technique—"visual mapping or clustering"— candidates should "jot[e] down whatever events, skills, values or interests" are generated by several theme words.[271] "If you go with the flow here you may gain insights into what you value most and the interconnections between your themes."[272] Another exercise involves "let[ting] your mind linger over each section of the resume, recalling the challenges, breakthroughs, and changes each stage of your career has offered you. . . . [T]his exercise can generate useful material and a timeframe for understanding your development."[273] For the more inhibited applicant, use of a tape recorder is encouraged to turn on the taps. The applicant can either record herself speaking extemporaneously or answer life questions, like "What makes you happiest?" and "What has been your greatest failure and what have you learned from it?"[274] Stream of consciousness writing will "unwittingly produce ideas, phrases, and insights that may actually wind up in your essays."[275]

Finally, the book advises applicants to use these techniques routinely for best results. "Nothing will get you into the discipline of writing better than a daily regimen. The operative word here is *daily*—anything less frequent will prevent you from writing naturally and une

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266 *Id.*

267 BODINE, *supra* note 258, at 7.

268 TENTLER, *supra* note 240, at 110 (quoting Jean Gerson, *Opus Tripartitum*).

269 BODINE, *supra* note 258, at 8.

270 *Id.* at 9.

271 *Id.*

272 *Id.*

273 *Id.* at 9–10.

274 *Id.* at 10.

275 *Id.*

selfconsciously."[276] Self-discovery is most effective when practiced regularly. "The mere act of translating your thoughts into words—in whatever form—forces those thoughts to the next level of concreteness and leads you in new directions."[277]

The content of the confession is affected not only by the *technique* that produces it, but also by the *desire* that produces it. J.M. Coetzee has noted, "[C]onfession reveals nothing so much as the helplessness of confession before the desire of the self to construct its own truth."[278] If the act of confessing is tied up with the desire to construct a self-truth, then "[w]e are now beyond all questions of sincerity."[279] Each confession "might yet be not the truth but a self-serving fiction, because the unexamined, unexaminable principle behind it may not be a desire for truth but a desire to *be a particular way*."[280]

As in the religious context, personal statements cannot reveal a truth that exists independent of the power relationship that elicits it. At a basic level, admissions officers are acutely aware that their two-way power bond with applicants has repercussions for the integrity of truth. Schools are constantly on guard against plagiarism. One coaching manual asked administrators at top law schools, "What steps do you take to recognize and prevent plagiarism? Do you have an institutional policy on plagiarism?"[281] Though answers varied, all agreed that it was a problem and that they had strategies for discovering and disciplining it.[282] For example, when administrators at UC Berkeley School of Law suspect plagiarism—in particular, personal statements downloaded from the internet—they employ an administrative solution: "We're aware of the sites. We do have a policy on plagiarism; anytime we see it, we'll report it to the misconduct committee." At Georgetown University Law Center, "[p]lagiarism is a recognized threat. . . . Each application contains the writing sample from the LSAT exam, so the admissions committee will be aware if the personal statement reads differently from the applicant's sample." Michigan is more pro-active, employing a system of "comparing notes": "[W]e will search through other applications and search for the essays on the Web and in various databases to which we have access. Every year we uncover a few plagiarists."[283]

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276 *Id.* at 11.

277 *Id.*

278 J.M. Coetzee, *Confession and Double Thoughts: Tolstoy, Rousseau, Dostoevsky*, 37 COMP. LITERATURE 193, 220 (1985).

279 *Id.*

280 *Id.* at 220–21.

281 OWENS, *supra* note 236, at 42.

282 *Id.*

283 *Id.* at 42–43.

Administrators also watch for fabrication. The College Board notes that "[a]dmissions officers and the public have become increasingly concerned . . e that students might attempt to exaggerate or fabricate information in hopes of convincing readers of disadvantages they have had to overcome."[284] The College Board recommends a "thorough reading of the entire file" to "identify information that seems out of line."[285] Some schools have formal verification procedures, such as requiring counselors to verify specific information, requesting students to verify certain facts, and calling students at home and speaking with the students' parents if administrators suspect misrepresentation.[286]

These concerns about plagiarism and fabrication are minor, however. The personal statement remains a staple of the application process, and administrators just prepare to "uncover a few plagiarists" each year.[287] The assumption seems to be that if not fabricated or plagiarized, a personal statement is truthful and, by extension, the overwhelming majority of personal statements are true. The process and expectation of ferreting out liars helps preserve the underlying faith in the truth of personal statements.

The problem, however, is that all applicants, like all penitents, seek "the keys."[288] The power of the administrator to grant admission, and the desire to be admitted, blur the line between confessing a true self and confessing a wish for the self. In their advice to future applicants, for example, successful applicants have elided the two concepts in as little as two sentences. One successful applicant advised, "The admissions committee is interested in the type of person you are and what you will bring to the law school community. Therefore, I believe that your personal statement should give the reader a sense of who you are."[289] The message seems to be: give the committee what they want, which also happens to be "who you are." One Harvard Law graduate said, "Think about yourself holistically. What are your strengths? What are your weaknesses? Why should you be the first person accepted into next year's 1L class? What mutually beneficial relationship are you going to

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284 RIGOL, *supra* note 141, at 15.

285 *Id.*

286 *Id.*

287 OWENS, *supra* note 236, at 42--43.

288 The priest's power of "the keys" is the power of absolution after confession. *See* TENTLER, *supra* note 240, at 57. The phrase is derived from Matthew 16:19, in which Christ tells St. Peter, "And I will give thee the keys of the kingdom; and whatever thou shalt bind on earth shall be bound in heaven, and whatever shalt loose on earth shall be loosed in heaven." *Id.*

289 Ebony-Azizi Sylla, *Ebony-Azizi Sylla*, *in* PROFILES & ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 220, 220.

have with the school to which you are applying?"[290] Another writes, "The point of an essay is A) to give the law school their first look at your writing, but B) more importantly to allow them to understand more about you. Admissions officers read many applications, and it is of the utmost importance that you set yourself apart by being genuine and dynamic."[291] All of these statements show slippage from advising students to describe "who you are" to justifying "why the law school should want you."

Descriptive and desiring selves become further conflated when coaching manuals tell candidates to "[t]ailor your statement to your school."[292] *Great Personal Statements for Law School* devotes three pages to the subheading "Why Our School?"[293] It lists four categories of school-specific information that applicants should address in their personal statements: "academics, extracurricular features, general and 'cultural' features, and campus visit and personal interaction."[294] Applicants are thus urged to describe their cultural features in ways that illustrate a perfect fit with the school's cultural features. In a similar vein, a few pages after Susan Estrich warns applicants "that the worst thing is a phony, and you're dealing with people who are in the business of spotting them a mile away,"[295] she advises, "Schools are like dates. We all want to feel like we're special to you, and worthy of your attention. We want to be wanted."[296] Estrich is not contradicting herself; she's trying to be helpful. But the nature of the advice is that you have to be *you*, and the definition of *you* must convincingly articulate your desire to be a part of that school.

Although truth-telling is the heart of personal statements, the applicants' and schools' desire to be desired constantly influence the content of that truth. Like in the religious confession, the truth in the essay emerges from a structured method of self-analysis. The truth revealed is a tangle of the self as perceived and the self as it wants to be seen.

C. EMPOWERMENT AND POWER

Religious confessions and personal statements both appear to empower the speaker. Religious confession is often viewed as a liberating act and a way to take charge of one's destiny. According to Foucault:

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290 Nicole Lawson, *Nicole Lawson*, *in* PROFILES & ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 129, 129.

291 Anthony Webb, *Anthony Webb*, *in* PROFILES & ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 241, 241.

292 *See, e.g.*, Charla Blanchard, *Charla Blanchard*, *in* PROFILES & ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 48, 48.

293 BODINE, *supra* note 258, at 40–42*e*

294 *Id.* at 41*e*

295 SUSAN ESTRICH, HOW TO GET INTO LAW SCHOOL 75 (2004).

296 *Id.* at 77.

> [W]e no longer perceive [confession] as the effect of a power that constrains us; on the contrary, it seems to us that truth, lodged in our most secret nature, "demands" only to surface; that if it fails to do so, this is because a constraint holds it in place, the violence of a power weighs it down, and it can finally be articulated only at the price of a kind of liberation.[297]

In the religious context, the power of the priest demanding the confession becomes obscured, and instead the penitent experiences power only when there are obstacles to confession. The urge to reveal ourselves to others seems natural, and satisfying that urge is liberating.

The personal statement is similarly viewed as a liberating part of the application process. Numbers—GPA and test scores—can only reveal so much about an applicant. Grades and test scores are classic authoritarian exercises of power and constraints on self-expression.[298] As noted above, these measures are often criticized as structurally favoring wealthy, white students while silencing others.[299]

Personal statements, on the other hand, are viewed as an alternative to the numbers game, providing a chance for students to overcome structural biases. For example, when eight law school admissions officers were asked whether they would eliminate personal statements if given the opportunity, all eight answered, "No."[300] The UC Berkeley administrator emphasized that it would "be irresponsible to use just two numbers to make a decision."[301] The Duke official said, "Given that we can't have face-to-face contact with every applicant, [the personal statement] is the best way for us to see what applicants are like beyond their academic records."[302] The associate dean for admissions and financial aid at George Washington University finds personal statements to be "sometimes more useful than the LSAT or the writing sample."[303] The assistant director of admissions at UCLA stated, "The human element of a personal statement cannot be replaced in any other part of an application."[304] The assistant dean of admissions at University of Michigan said the personal statement "provides a real window into the applicant's personality and character."[305] The University of Pennsylvania's dean of admissions noted that the personal statement is his "favorite part of the

297 FOUCAULT, *supra* note 242, at 60.
298 *See supra* Part IV.D.
299 *See id.*
300 OWENS, *supra* note 236, at 43–44.
301 *Id.*
302 *Id.* at 43.
303 *Id.*
304 *Id.*
305 *Id.* at 44.

application" and that it "bring[s] the applicant to life."[306] The personal statement is viewed as lifting the silencing constraints of numbers and offering the applicant the chance to be her true self.

Admissions officers, however, are not simply passive readers of accidental, candid texts. Rather, like priests, administrators possess an important power—the power to admit or deny an applicant based, in part, on her personal statement. Guidebooks amplify this power by evoking the image of the bored and well-educated admissions officer who will not hesitate to reject an applicant deemed unworthy of admission. For example, an admissions officer from George Washington University Law School notes in a coaching manual, "After thirty-one years of doing this, there is a lot that bores me."[307] Susan Estrich, a law professor at the University of Southern California, published her own coaching manual. She advises:

> Write about you, not about law. .e . Whoever is reading your essay knows the stuff better than you. They also know your numbers, and all that. They know your resume. . . . Most young people haven't got a clue. Every day, I meet young people from incredibly interesting and powerful families who tell me that they've written essays about their views on international law. Asleep, I know more about international law than they do. And it's not even my area. So does whoever will read their applications.[308]

The coaching manuals quoted in these examples depict admissions officers as vastly more powerful, experienced, and intelligent than the applicants.

To earn admission, therefore, the applicant must prove her worthiness by observing certain rules. In order to receive absolution, religious penitents must give a "complete" confession.[309] Not any revelation can meet this standard. Tentler describes how the Church versified the most important qualities of a complete confession so that priests could easily remember them.[310] The verse read:

> Let the confession be simple, humble, pure, faithful,
> And frequent, unadorned, discreet, willing, ashamed,
> Whole, secret, tearful, prompt,

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306 *Id.*

307 *Id.* at 41.

308 ESTRICH, *supra* note 295, at 71.

309 TENTLER, *supra* note 240, at 106–07.

310 *Id.*

> Strong, and reproachful, and showing readiness to obey.[311]

Only confessions that met these standards resulted in absolution.[312]

In the academic context, coaching manuals have meticulously described and modeled the *complete* personal statement. First, a good personal statement is memorable but well-mannered. *Great Personal Statements for Law School*, the coaching book that encourages applicants to "data-mine" the darkest reserves of the self,[313] also advises applicants to picture a "tony cocktail party" at which the candidate is competing with others to make a lasting impression on the "hosts"—the admissions officers.[314] According to the book, "everything you say must communicate a compact multidimensional message that's distinctive enough for your hosts to remember long after other partygoers have made their pitch."[315] Personal statements are portrayed as a marketing genre consisting of sound bytes and pitches. An applicant must write her essay as if she were alone at a "tony cocktail party," facing the possibility that everyone might belong except for her. She should reveal something personal that is also ambitious, inoffensive, memorable, witty, and unique. Foucault could have been talking about this party when he described the religious confession as "the formidable injunction to tell what one is and what one does, what one recollects and what one has forgotten, what one is thinking and what one thinks he is not thinking."[316]

Complete personal statements should also be professional. *Law School Essays that Made a Difference*, the same coaching book that lists "Tell the truth" as tip number four, lists as tip number one, "Be professional."[317] The book explains, "In your personal statement, you want to present yourself as intelligent, professional, mature, and persuasive. These are the qualities law schools seek in applicants. Moreover, these are the qualities that make good lawyers."[318] Personal statements should be wearing their suits, not their sweatpants. Good grammar, respectful politics, and pleasant prose tell administrators that an applicant is professional enough to attend their school and to one day become a lawyer.

Personal statements are frequently considered a way to remove barriers to getting to know an applicant. This view, however, obscures the power relationship that elicits the statement in the first place. An essay is not the candidate's chance to break the rules. Instead, it should represent

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311 *Id.* at 107 (quoting *St. Thomas's Commentary on Book IV of the Sentences*).
312 *Id.*
313 BODINE, *supra* note 258, at 8.
314 *Id.* at 6.
315 *Id.* at 6–7.
316 FOUCAULT, *supra* note 242.
317 OWENS, *supra* note 236, at 13–14.
318 *Id.* at 13.

a well-disciplined, "intelligent, professional, mature, and persuasive" candidate.[319] Applicants write them to be remembered, respected, admired, and admitted. Sometimes, these desires are so poignant and conflicting that an applicant will plagiarize or outright fabricate an experience. Sometimes, these desires are primed to produce more artful fictions.

D. THE COLORBLIND CALIBRATION OF UNIQUE VOICES

Up to this point, this article has compared personal statements with religious confessions in order to demonstrate how personal statements produce rather than reveal truth, knowledge, and selfhood. The article will now turn to a particular type of knowledge produced by personal statements: racial knowledge. There is a strain of racial knowledge called *diversity* that both white and nonwhite applicants are building. Specifically, the colorblind diversity standard encourages students to be different but not too different. Because diversity classifies race as interchangeable with other extracurricular activities, applicants try to distinguish themselves without being permanently different. This racial knowledge further reinscribes the colored colorblindness endorsed by the Supreme Court and administered by schools.

Though students of all races and ethnicities participate in diversity production, white students and students of color approach it differently. Diversity translates sharp racial categories into a spectrum of difference. It begins from the presumption that white candidates lack it and black candidates have it in excess, but, because it is a standard, individual members can theoretically access the desirable, gray, colorblind middle. Applicants view themselves as members of certain groups who must downplay the potential extremism of group membership. Students of color often describe racial difference as a consciousness gap that they hope to bridge. As nonwhites try to reconcile themselves with the dominant culture, white applicants try to distinguish themselves from it.

Diversity has made its mark on three common elements of personal statements: an emphasis on self-reliance in overcoming obstacles; a representation of a core self that is coherent, centered, autonomous, and aracial; and the self-endorsement of diversity as a racial policy consistent with these values. White and non-white applicants frequently incorporate these elements into their essays, but each group does so in a way that moves them to the center of the diversity standard (colorblindness) and away from sharp racial categories (race consciousness).

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319 *Id.*

1. *Diverse Personal Statements Emphasize Self-reliance in Overcoming Racialized Obstacles*

Self-reliance is a powerful theme that can help a candidate re-invent herself from a racial category to a diverse individual. Kennedy defines self-reliance as "an insistence on defining and achieving objectives without help from others (i.e., without being dependent on them or asking sacrifices of them)."[320] In the diversity context, stories of hardship and self-reliance take on added meaning as war stories from the racial trenches. Candidates are careful, however, to emphasize their poverty (a colorblind category) rather than skin color (an immutable, race-conscious category). Students of color and white students both arrive at this colorblind conclusion, though they approach it from opposite poles.

Students who identify as black might begin their essays from a perspective of racialized disadvantage, but then shift focus to class disadvantage: a problem considered possible to overcome through self-reliance. The essay becomes a story in which the obstacle of poverty is peppered with details that carry racial significance. For example, a black student who described his coming of age in the South Side of Chicago tells a story of being "approached by several threatening gang members who demanded that [he] become initiated into their gang."[321] His refusal "resulted in several months of torment, including physical and emotional harassment by gang members."[322] The racial details, however, are not the focus of this self-reliance story. Instead, the applicant focuses on the aspects of his life that he could escape: poverty and a lack of education. He writes, "As a direct result of the attacks, I became determined to complete my education in civil liberties, enlist in the military, and utilize my life experience to contribute to society."[323] The candidate emerged from racially-coded attacks to take charge of his own life.

The life lessons learned from this racial experience strengthened individualist values and worldview. For him, the "perpetuation of the underclass" is the result of "life without *the chance* of achieving *economic success*."[324] The applicant acknowledges a colorblind that is the product of unequal opportunity, rather than unequal distribution of wealth or racial privilege. By framing his essay this way, he affirms the story that self-reliance can transcend economic hardship, while providing just enough racial coding of the obstacles to signal that he is black.

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320 Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713 (1976).

321 Jarvis Wyatt, *Jarvis Wyatt*, *in* PROFILES AND ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 260, 261.

322 *Id.*

323 *Id.* at 260–61.

324 *Id.* (emphasis added).

White students can also rely on racial code embedded in poverty stories. In this context, however, these signifiers distinguish white applicants from the pack. For example, one white applicant recounted how, when he was very young, his father "disappeared as his world came to revolve around drug addiction."[325] Concurrently, his mother "became a welfare mom who spent her time partying, sleeping around, and dealing drugs on the side."[326] When he was in first grade, his mother tried to overdose on sleeping pills, and he was forced to move in with his aunt.[327] After relating these obstacles, the applicant concludes that his self-reliance values make him *different* (rather than transcendent):

> With this kind of background, it may seem odd for me to believe so adamantly that the reins of life are in our own hands. It should be obvious to me that social and economic forces beyond an individual's control constrain both choices and opportunities. While this is an important point, it seems to me that circumstances can only confine those people who allow themselves to be trapped.[328]

This applicant also emerged from a racially-coded hardship (poverty) to take charge of his own life. After acknowledging "social and economic forces beyond an individual's control," the applicant arrives at the same conclusion as the black applicant above: he is different because he will not allow himself to be trapped.

These essays show how racially-identified applicants can use self-reliance narratives to represent themselves as diverse individuals. But each candidate emphasized different parts of the narrative. While the black applicant wrote about *overcoming* racialized poverty, the white applicant wrote about overcoming *racialized poverty*. The black candidate told the story to show that he is not too different, while the white candidate told the story to show he is not too ordinary.

2. *Diverse Personal Statements Present a Centered Self that Navigates Racial Stereotype and Individual Authenticity*

The autonomous, centered self is a second popular theme of student essays that has been influenced by diversity. Professor Gerald Frug de-

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325 Jamie Alan Aycock, *Jamie Alan Aycock's Personal Statement*, *in* OWENS, *supra* note 236, at 145.

326 *Id.*

327 *Id.* While applicants of all races and ethnicities certainly encounter obstacles such as drugs, welfare, and absent mothers, these hurdles are nonetheless highly racialized topics in American consciousness. They become even more significant in an applicant's file, where information is scarce.

328 *Id.*

scribes the centered self as "a sense of self determinate enough to serve as the touchstone for the pursuit of self-interest."[329] In the diversity context, applicants often discuss this theme as the pursuit and ultimately personal decision to reject group identity. Because of the colorblind parameters of diversity, applicants of all races and ethnicities can tell this story, though again, applicants approach it from different starting points. Students who identify as black often reject a naïve pursuit of *blackness* in favor of a more aracial self. Students who identify as white seek to distinguish themselves by highlighting their sensitivity to diversity issues. Together, blacks and whites approach a conscientious, colorblind norm: the student of color renounces hyper-conscious group associations, while the white student renounces hyper-ignorant group associations. For everyone, the story ends with a happy, centered, self-aware individual making her own decisions. In these essays, identity development is a linear and autonomous process.

Professor Richard T. Ford has written that a double bind in identity politics creates a yearning for a centered self.[330] According to Ford, "on the one hand, we want to assert our distinctive identity and have others recognize it as distinctive. On the other hand, we want to avoid those forms of recognition that we experience as demeaning or simply inaccurate."[331] It is the centered self that decides whether a racial performance is authentic or fraudulent; whether to embrace or resist a stereotype.[332]

Ford provides the example of a young, black, unwed mother who embraced her pregnancy as resisting white culture because the "autonomous rights-bearing individual [has] *chosen*, because the identity she articulates comes from within (whereas the stereotype of Jezebel and the disciplinary ideal of Mammy are imposed from without)."[333] Ford critiques this model because it ignores how "identity is produced through dialogue and recognition, not by internal and autonomous choices."[334]

While Ford's article focuses on problematizing the self that chooses to *embrace* a stereotype, this article examines essays that present centered individuals who can *resist* stereotype.[335] Applicants recoil from stereotypes for the same reason that Ford's black, unwed mother might adopt them: to demonstrate coherent and autonomous choices.[336] But

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329 GERALD E. FRUG, CITYMAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 66 (1999).

330 Richard T. Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*, *in* LEFT LEGALISM/LEFT CRITIQUE 38, 57 (Janet Halley & Wendy Brown eds., 2002).

331 *Id.*

332 *Id.* at 60.

333 *Id.*

334 *Id.*

335 *See* Ford, *supra* note 330, at 38.

336 *Id.* at 57–60.

regardless of whether one chooses to resist or embrace a stereotype, the model of the centered self rejects the possibility that identities are continually "produced through dialogue and recognition."[337]

One common way applicants who identify as black tell the choosing story is by describing a trip to Africa.[338] In these stories, applicants discover that Africa was not the home they had expected.[339] One student equated her trip to Zimbabwe with a search for a long-lost grandmother:

> [G]oing to Africa . . . meant that I could, for the first time, connect with a part of my history that I hadn't a chance to connect with in the past. For example, unlike other African Americans, I didn't have a grandmother who lived down the street and cooked fried chicken and green beans for Sunday family dinner. My grandmother was in Jamaica and I had only seen her a few times. Africa meant an opportunity to connect with that side of myself. When I exited the plane, I thought, secretly, that I would be greeted with a hug from my estranged family.[340]

The applicant initially embraced positive cultural stereotypes that African Americans eat fried chicken with their grandmothers every Sunday. She believed that people in Africa shared that cultural value, and she went to Africa with the expectation of finding a country full of extended family. The applicant then continues the story with almost self mockery of her secret hopes:

> Well, it was no surprise that I was not. I was treated like another tourist, which was disappointing. But what surprised me further was how I was treated. I felt like I was in *Gone with the Wind*, only in this version I am not the maid, I am the white woman being waited on by the black maid. The Zimbabweans did not feel close to me, as I wanted to feel towards them. I was looked at as an American. In their minds, being an American meant privilege . . . . I now realize I am American more than I am African, even more than I am Jamaican. I am proud to embrace my Americanism because America represents opportunity.[341]

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337 *Id.* at 60.

338 *See, e.g.*, Natasha N. Davis, *Natasha N. Davis*, *in* PROFILES AND ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 74, 75.

339 *See id.*

340 *Id.*

341 *Id.*

The applicant relates a story about deciding between embracing and resisting stereotypical African roots. Her experience prompted her to reject stereotypes about the kinship of black people around the world. Instead, she cast her lot with America because it affirms individualist ideas like opportunity. Strikingly, the disorientation of visiting Zimbabwe resulted in an easy choice, rather than a perpetual struggle with outsider status in Zimbabwe, Jamaica, and the United States. This choice was easy even though, as she embarked on the journey, she had previously struggled with feeling disconnected from her past.

Also interesting is the substance of what this applicant chose to embrace: the colorblind ideology of American opportunity.[342] She nearly echoes Peller's description of the colorblind ideals: "[T]o transcend stereotypes in favor of treating people as individuals, free from racial group identification."[343] The applicant found that the American legal system was the best example of this opportunity: "As I tried to fathom why America is so great, the one common denominator that I found was our laws. Our system of government espouses that EVERYONE has inalienable, undeniable human rights."[344] She chose to call America home because it affirmed individualist, colorblind values.

Another black student discussed a similar experience when she traveled to Senegal:

> I thought I would finally have a place to call home, but my idealized perception of the Motherland was continually fleeting. And although I was welcomed, I was nevertheless an American, with fancy clothes, the privilege of an American education, economic wealth, and opportunities. I was a minority and an outsider, just like I am in America.[345]

This applicant also did not adopt Ford's view that her self is continually reproduced through interaction and dialogue. Rather, she resolved her disorientation by reproducing a nested set of choices for her self to evaluate. She said the visit "allowed me to have the deep introspection that I needed to let the issue of my identity come to a resting-place, a place in which I was comfortable accepting. . . . To honor my ancestors I am African, to recognize my circumstances I am American. I am African-American."[346] This applicant's awareness of identity's double bind

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342 *Id.*

343 Peller, *supra* note 8, at 768.

344 Davis, *supra* note 338, at 75.

345 Aisha Green, *Aisha Green*, *in* PROFILES AND ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 96, 97.

346 *Id.*

strengthened, rather than undermined, her faith that a centered self can negotiate stereotype and authenticity.

White applicants also use stories about travel to highlight their centered selves. Unlike black applicants, though, white candidates often discuss how travel made them different from other Americans, rather than how it allowed them to fit more easily into American culture. For example, one student wrote about going to live with her dad in Germany.

> I may have lost my mother, my friends and my country, but I discovered something new—the world. It is too easy, sitting amid corporate coffee chains and grotesquely large super-stores, to assume that the world ends at the shores of the Atlantic and Pacific oceans, that life exists only north of the Rio Grande and south of Niagara Falls.[347]

While traveling, the applicant discovered a latent, mainstream group-think that had conditioned her to believe that Starbucks and Safeway were reality. After traveling, her centered self rejected that group-think and embraced a diverse world.[348]

American schooling is another common topic that showcases the centered self. In contrast to Africa, coded as black, school for many black applicants is coded as white. Black applicants frequently discuss how they rejected group-think and embraced school, just as they had to reject fantasies about Africa to embrace the United States. For white applicants, school, like the world, offers diversity.

One black applicant, Telia Anderson, whose essay was part of a successful transfer application, discussed her first days at Yale after growing up in a black neighborhood:

> When I spoke, I exposed my roots. It was so embarrassing when my first-year college roommate did not understand that I was responding affirmatively to her request to borrow my Walkman when I said, "Yeah, you can hold it." She was confused: "You want me to *hold* it?" . . . My roommate called these "Telia-isms." Meanwhile, my friends at home complained, "You sound like a white girl."[349]

The applicant then explains how she resolved her ambiguous identity. Sometimes, she did so by embracing the stereotype. For example,

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347 *American University 2007*, *in* OWENS, *supra* note 236, at 67.

348 *Id.*

349 Telia V. Anderson, *Telia V. Anderson's Personal Statement (Transfer)*, *in* PROFILES AND ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 30, 31.

she learned that she did in fact speak correctly, according to grammatical rules of Black Standard English: "Later taking a graduate linguistics seminar, I learned that a statement for which I had been mocked, 'I be going to the library,' was a grammatically correct sentence in Black Standard English."[350] Sometimes, she rejected stereotypes in favor of more traditional meritocratic, colorblind measures of success. She explains, "It was gratifying to finish the year with a 3.9 GPA and an invitation to join the Law Review. More importantly, I closed the gap between the dichotomy of my academic life and my African American community. I was not the 'white girl' who lived away, but the 'lawyer' who had returned home."[351] Success did not make her white, it made her a lawyer who could both work and go home whenever she wanted. Moreover, like the applicant who traveled to Zimbabwe, she embraced a centered self that could choose when to embrace or resist a stereotype. This self was found in the colorblind American legal system. Lawyering, for her, is not white or black. It is simply a synonym for herself; it mutes color barriers, permitting her to transition easily between home, work, and school.

Another black applicant discussed growing up in a poor Dallas neighborhood and attending a magnet school:

> Day after day I heard about how I was a "sellout" and how I was a disgrace to the Black race. After a while the "friends" that I had thought would support me through almost anything turned against me . . . . Even I started to believe that I was "losing my color" . . . . But if I was not Black, what was I?
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> . . .
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> [T]hose girls made me realize that I was not going to be a puppet for anyone, whether it was "my people" or outsiders. No matter what I do with my life I am going to do it because I want to do it, not because I think it is what anybody else thinks is right.[352]

Again, the applicant described a choice between identifying with a white school or with her black friends. She tried to navigate this by emphasizing the centered self that does the choosing. She embraced a deep down, individual self that is distinct from both *her people* and outsiders. Given her academic successes, it is clear that her choice was to

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350 *Id.*

351 *Id.*

352 Irene Joe, *Irene Joe's Diversity Statement: Diverse Experience*, *in* PROFILES AND ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 113, 113–14.

continue with school. But, in her story, her serious commitment was dependent upon stripping "school" of its white and black baggage. Even though she believed that she was black when the alternative is oblivion, she portrays the self that chooses as a colorblind individual following a colorblind path, erasing both her people and the outsiders.

Because diversity makes race interchangeable with other qualities, white students can tell the same story of choose one's own education over group identities that hold them back, such as sports. However, instead of embracing the colorblindness of school ("*i.e.*, it isn't white, it's school"), white applicants often highlight how education makes them different. For example, one student described his transition from what he calls "Mr. Football is my life" to a serious student:

> I guess it must have been hard to believe that I, Mr. "Football is my life," would be able to achieve even half of what he planned, so it is no wonder that, no sooner had I finalized my plans, when both my first year academic advisor and my father declared that I would be incapable of achieving my goals . . . but I was confident in my abilities . . . . Soon the *New York Times* editorial page and the *New Yorker* would take the place of the *Boston Globe* sports page and *Sports Illustrated* in my life . . . . While I do at times regret leaving my football career behind, there is no doubt that I am better for having done so.[353]

Like the black applicants described above, this applicant portrayed himself as a centered individual that can resist a stereotype when no one thought he could. Although his football identity marked him as simple-minded and lazy, both to himself and to others, he chose to become smart, motivated, and self-reliant. School also diversified him—his essay later describes how he took courses on subjects like Zorastrian philosophy, opening his mind to the larger world.[354]

In all of these essays, the applicants rely on an aracial, but diverse, centered self to reject a group-think stereotype and highlight their individual authenticity. Each applicant, however, embraced a colored colorblindness, portraying him or herself as different but not too different. Thus, whereas experiences such as travel and school temper the differences of black students, such experiences enrich the differences of white students.

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353 Michael Leahy, *Michael Leahy's Personal Statement*, *in* ERIC OWENS, LAW SCHOOL ESSAYS THAT MADE A DIFFERENCE 64–65 (3d ed. 2008).

354 *Id.*

3. *Diverse Personal Statements Advocate Sharing Unique Individuality Through Cross Cultural Contact*

A third theme of essays that diversity has influenced is that differences, though unique and unchangeable, should be shared. By sharing, an individual's horizons are expanded and new opportunities arise. Irrational prejudices are dispelled. After reading hundreds of personal statements, one is struck by the isolation that wraps itself around each essay, each confession. There is, ultimately, one "I" in a file. Diversity offers itself as the solution to loneliness of difference.

Moreover, because students are careful that their difference does not sound "too different," diversity appears to be a perfectly calibrated modest solution to a modest problem. The diversity solution of cross-racial contact looks a lot like colorblind integrationism. As Peller notes, colorblindness assumes that the ignorance produced by isolation can be erased by the knowledge attained in an integrated (diverse) school:

> This deep link between racism and ignorance on the one hand, and integration and knowledge on the other, helps explain the initial focus of integrationists on public education: Children who attended integrated schools would learn the truth about each others' unique individuality before they came to believe stereotypes rooted in ignorance. By attending the same schools, children would in turn have equal opportunity at the various roles in American social life.[355]

The faith that a diverse education can erase the alienating differences between racial groups, and the simultaneous obscuring of the factors that establish those differences (including the mechanism of the personal statement itself), is classic colorblind ideology reinscribed within race consciousness.

Applicants treat racial difference as no more and no less than skin deep, and they endorse diversity as the way to close the gap. Again, however, applicants of color and white applicants gravitate toward this norm from opposite sides of a diversity spectrum. Black applicants write about cross-racial contact as a way to overcome what appears to be the permanence of difference. In contrast, white students look to cross-racial contact as a way to overcome their ordinariness. Thus, two distinct types of racial performance complement and corroborate a colorblind ideal of overcoming stereotype through cross-racial contact.

Black applicants often discuss how an initially racially isolating event led to cross-racial contact and, ultimately, enlightened understand-

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355 Peller, *supra* note 8, at 770.

ing for everyone. For example, one candidate recounted reading aloud her essay on *The Scarlet Letter* to her high school class.

> [M]ost students agreed it helped them comprehend and appreciate new aspects of the novel. However, one boy snickered "unique" ideas were easier for me since I was a "unique" student. Ironically, his sarcastic remark sparked an epiphany . . . . I recognized that my background could enhance, even change, another person's understanding of an event, situation or belief.[356]

Another black applicant discussed her visit to an elementary school in Australia, where the children had never seen an African American. She explains that the experience "opened [her] eyes and made [her] realize that there are many things that Americans take for granted. We live in a diverse nation with many different people and although there is a dominant race, information is constantly exchanged to dissolve stereotypes and promote interracial harmony."[357] Another black applicant, Diana Walker, posed the question, "What is diversity?" and answered it this way:

> The presence of diversity in our lives is essential to ensure that all cultures and backgrounds of thought have a voice in society. Diversity expands the realm of thought from a narrow point of view towards public issues, to a wide range of interpretations and solutions. . . . The impact of diversity is more complex than just racial differences but also encompasses the unique life experiences of each individual.[358]

Although all of these statements contain a broad element of race consciousness—they believe they have something to contribute as a result of living outside the dominant culture—the racial experience is both reified and individualized. Race is, more than ever, a skin, an individual organ. It is the applicants' indisputable beginning but it is not where they end. For them, diversity allows them to keep their skin while pursuing a transcendent interracial harmony in which individuals are ultimately judged by the content of their character.

Diversity also allows white applicants to transcend their skin, to distinguish the content of their character. One white applicant wrote,

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356 Deshalia Dixon, *Deshalia Dixon's Personal Statement*, *in* PROFILES AND ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 83, 83.

357 Green, *supra* note 345, at 96.

358 Diana Walker, *Diana Walker's Personal Statement*, *in* PROFILES AND ESSAYS OF SUCCESSFUL AFRICAN AMERICAN LAW SCHOOL APPLICANTS, *supra* note 259, at 234, 234.

> My decision to apply to law schools followed a different route than most. After attending a wealthier high school that was racially and socially homogenous . . . I felt I was missing out on the "real world." It was difficult for me to shake the feeling that I wasn't truly experiencing the diversity of the nation and the peoples and cultures within it. I decided to move to Washington, DC, where I felt I could further my interest in different cultures.[359]

Reading this essay together with Ms. Walker's, described above, illustrates how diversity implements the colorblind aspirations of integrationism. Although both applicants have irreducible differences (skin color, background, etc.), these differences are individual and mutable, not group-based. They are, according to Ms. Walker, as individual as any other "life experience."[360] Both applicants expect cross-cultural contact to dispel any prejudice that attributes to skin color any additional meaning. For both, cross-cultural contact is a mechanism of self-improvement, a tool created for the individual and used by the individual in the hope of transcending unenlightened group politics.

In sum, personal statements tend to individualize racial difference as irreducible yet mutable. In these essays, race is no more and no less than skin deep. Because difference is carefully calibrated (different but not too different), and because a centered individual can make choices about stereotypes and authenticity, diversity sounds like an ideal remedy for racial isolation and ignorance. Taking the personal statement's racial announcement as their beginning, applicants view diversity as a way to learn about individual differences and then transcend them. Diversity encourages a colorful colorblindness.

CONCLUSION

In 1966, B. Alden Thresher wrote: "There is, indeed, serious question whether, above a certain 'floor' of ability, the college and the public would not be better served by random selection of candidates than by the kind of ignorant purposefulness many admissions committees delight to exercise."[361] Forty years later, the admissions process has moved full speed in the opposite direction. The role played by personal statements has expanded. Administrators have intensified their focus upon whether the student has competently communicated her *true* identity and whether that identity fits with an institution's mission.

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359 Anonymous, *The George Washington University Law School: Personal Statement*, *in* OWENS, *supra* note 236, at 78.

360 Walker, *supra* note 358, at 234.

361 THRESHER, *supra* note 135, at 75.

My review of personal statements suggests that the current approach has not fulfilled its promise. Applicant essays are far from a source of candid, authentic, empowered, unique individuals that comprise our society. The power relationship between applicant and admissions officer, and the literature about what constitutes a *good* essay, undercuts the possibility that personal statements can give schools access to objective racial knowledge from the ground. In practice, personal statements often read like highly standardized reaffirmations of the colorblind values that also underpin the text of the *Grutter* decision and the administrative reactions to the shadow it cast.

The administrator-student power relationship plays out in a network of other power relationships; I have examined one between the Court and administrators. The paradoxical effect of the interaction is a reinscription of colorblindness within race consciousness by every key actor in higher education admissions—the Court, the administrators, and the students. Together, these actors produce a type of racial knowledge called *diversity* that, on the surface, openly acknowledges group-based race consciousness but, when digging deeper, reaffirms individualist values of colorblindness.