RETHINKING FAIRNESS, DIVERSITY, AND APPROPRIATE TEST USE IN LAW SCHOOL ADMISSION MODELS: OBSERVATIONS OF AN ITINERANT DEAN

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DURING a somewhat peripatetic career, I have been blessed with the opportunity to visit and serve a number of American law schools. As itinerant travelers are wont to do, I have learned a few lessons along the way. The lesson that informs this brief essay is, in many ways, obvious. It is that law school deans and faculty, human beings that we are, tend not to act until a crisis pays a personal call.

For most law schools, admissions has yet to become our crisis. We are generally aware that some schools, particularly the public schools in California, Texas, and Washington, are struggling to maintain racial and ethnic diversity without the traditional, direct means of doing so. Too often, I fear, those of us in the rest of the country see their struggles as only remotely related to what we are doing in admissions. It is not yet our crisis; or, so we think. Law schools across the country, both those that are precluded from engaging in affirmative action and those that continue the important struggle to preserve it, must learn to do a better, more thoughtful and thorough job of admissions. To do so will take leadership from deans, a greater commitment of faculty resources, and a closer working relationship among deans, faculty, and admissions professionals.

There are, in my view, at least three reasons why most law school deans and professors have not had to pay a great deal of attention to admissions. First, there has arisen in recent decades a class of admissions professionals who know their jobs and perform them extraordinarily well. As lawyers, we are trained to be somewhat deferential to people with more expertise in a particular field than we have, and we have thus been able to turn our attentions away from admissions, comforted by the fact that the professionals are in charge and there is no crisis in our shop.

Second, we have been blessed with an abundant and talented applicant pool for many years. Although most of the 1990s saw a loss of law school applicants—a loss that seemed potentially catastrophic at times—that loss seems to have abated, at least for now. Even during the worst years of the recent downturn in applicant volume, for the vast majority of law schools, there were many more applicants than seats. Today, only a few law schools seriously struggle to fill their first-year seats. The continued surplus demand for our services has afforded most of us the additional comfort that our seats will be filled with competent, even bright, students; that application-fee and tuition dollars will continue to be adequate; and that the admissions process needs no special attention or drastic revision.

The third source of comfort has been the Law School Admission Test (LSAT). Most of us understand that the test is a very good one, that it is convenient and reliable, and that it is the single best predictor of success in law school that is available when admission decisions must be made. An aura and a reality of science

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surround the LSAT, allowing us again to give comforting deference to expertise that exceeds our own.

All of this comfort has allowed law schools to turn their primary attentions to other matters and, as comfort often does, has made many of us inattentive, if not lazy. I need, here, to be clear that I am not talking about the tireless, careful work of our admissions professionals or even those faculty members who pore over applicant files for our admissions committees. Rather, I am concerned about the kind of numbers-driven approach to admissions in which many law schools seem to engage, without the benefit of periodic assessment of how that process shapes institutional character, what alternatives might exist, and what benefits those alternatives might hold.

I. WHAT WE DO NOW

Although each law school admissions process has its own unique characteristics, there is one overarching method that predominates. This process is a system of admissions triage. Applicants are grouped into three categories usually based on a combination of undergraduate grades and LSAT scores. Those with the highest numbers are admitted (usually "presumptively" or "automatically"), those with the lowest numbers are presumptively denied admission, and those in the middle receive what is often called "full-file review," perhaps a euphemism for a competition for the remaining law school seats. Most law schools do review their presumptive-admit files for disqualifying factors, such as prior misconduct. Many also review their presumptive-deny files for extraordinary circumstances, such as a very interesting experience or unusual academic interest that might boost an applicant into the middle category. It is these middle files that receive the most attention and consume the greatest amount of institutional resources.

Within this admissions model, there are two important points at which law schools exercise judgment. First, law schools must determine the numerical values that define the three applicant pools. This decision has at least two important consequences: it determines the potential size of each of the three pools and can, if not properly monitored, disadvantage minority applicants.

A very high presumptive-admit cutoff, and a very low presumptive-deny cutoff, will place more of a school's applicants into the middle category, where the more exacting full-file review typically takes place. Narrowing the distance between the upper and lower decision points reduces the size of the middle category, thereby requiring a law school to read fewer "full" files, but also limiting its exercise of file-review judgment to a smaller group of applicants. These decisions have obvious relevance to the question of how much human resource a school must devote to applicant-file review.

More important, the setting of presumptive-decision boundaries can have an impact on the disposition of minority applicants' files. Given the vexing persistence of gaps in undergraduate grades and LSAT scores across racial and ethnic groups, high numerical boundaries for the presumptive-admit and middle categories can exclude some minority applicants who would be successful law students and lawyers. This impact can be ameliorated, of course, during the full-file review process, but only for those minority applicants who make it to that review.

The second point at which law schools exercise judgment in the triage model is in determining whom to admit among those receiving a full-file review. For many law schools, these are the people who actually will show up for orientation—those applicants whose chances for admission were not automatic and who may not have more attractive alternatives once all decisions are made. Folks whom one law school admits "presumptively" are probably competitive elsewhere, and many applicants choose to attend the law school to which their chances of admission were least certain. So, in a sense, these are the files to which a law school should devote the most attention, at least in the current model.

My fear, however, is that a focus on the numbers infects the full-file process review as well. That is, even within the group of files receiving a more exacting review, there remains a strong preference for applicants with higher numbers, even when the differences between those numbers may be quite small—so small that they certainly should not be the basis for selecting one applicant over another. The importance of numbers even at this stage can still be explained by their convenience and reliability, but there is an easy and increasingly common explanation for this focus: law school rankings, particularly those of *U.S. News and World Report*. Law schools believe that the LSAT scores of their students play an overwhelming role in determining their rank, and cower in fear of even minute slippage in the annual numbers-fest. We in legal education too easily grant that magazine power over our decisions. Moreover, I suspect that many deans cite the rankings as an excuse for the numbers fetish in which we, and our faculty, would indulge even without the rankings.

II. WHAT'S TO BE DONE?

First and foremost, we must find a way to reduce our reliance on numerical predictors when making admission decisions. I am certainly not calling for the abandonment of predictors. Rather, I would like to see them take their proper place in the process—as useful, important information that describes one or two of the many qualities each applicant possesses and that law schools should seek.

When we define our students primarily by their numbers, the numbers also define us. The first step in a reevaluation of our admissions processes, and a movement away from over-reliance on the numbers, must be a careful examination of our institutional character. We must, at each law school, ask ourselves who we are and who we wish to become. We need to understand our special institutional mission. We all like to think that our law schools are more than their *U.S. News* rankings, but we are not always good at defining ourselves, at pointing out the differences that exist among us, and at seeking applicants and students who share our values and goals. Students contribute an enormous amount to the life and character of a law school. Our selection of them must be informed by our sense of purpose. Unless our mission statement reads, "We seek to be a unidimensional law school whose students have the highest achievable LSAT scores," the numbers cannot help us as much as we might like.

Once a law school has established its aspirations, it must revise its admissions practices to ensure that it is attracting and admitting applicants who will advance them. Recruitment materials and messages should reflect this mission, allowing

applicants to distinguish among the many law schools competing for their applications and to select those schools that best match their personal goals. Perhaps more importantly, the admissions committee must decide what specific qualities and experiences will most contribute to the school's goals, and seek ways to find evidence of those qualities and experiences in admissions files. Recruitment and admission materials must be revised to ensure both that applicants understand what qualities a law school seeks and that they have a meaningful opportunity to demonstrate those qualities within a paper or electronic file. It may sound unusually obvious, but if a law school values the perspectives of those who have met and overcome personal or societal challenges, for example, it must encourage applicants to describe those experiences and provide the space, both psychological and physical, for those descriptions.

I believe that a law school's thorough soul-searching will result in a lengthy list of qualities that are desirable in students, and that no single student can possibly embody them all. Such a process should inevitably lead to the conclusion that a law school values a wide range of qualities among its students and that diversity among those qualities makes for the most interesting and broadening learning environment for students and faculty. My point here is not to sound another plea for diversity, although that plea cannot be made too frequently. Rather, I am suggesting that more law schools should begin to look at their admissions processes as ways to enroll a class, not merely a collection of individuals who have survived the competition with other applicants.

In this approach, a decision to admit an individual applicant might be based more on qualities that he or she could bring to a class—qualities that few other applicants might bring—than on traditional, numbers-based measures of merit. There is an example common to law school admissions that helps make this point. Seasoned admissions committee members and admissions professionals often say that, at some point in the admission cycle, they just cannot bring themselves to admit the 51st political-science major with a strong undergraduate grade-point average and good LSAT score. But they are troubled by a sense that the applicant has somehow earned a place in the entering class. By shifting the focus away from traditional conceptions of individual statistical merit, and toward a process of constructing a class, admissions decision-makers can begin to reduce their reliance on the numbers while enriching the learning environment for all. Such an approach might also begin to erode the sense of entitlement to a seat in law school among those who believe their grades and test scores are all that should, or do, matter. This sense of entitlement clearly lurks beneath today's anti-affirmative-action litigation; its erosion might help to forestall future suits and change the national dialogue about affirmative action.

To law schools undertaking or considering a reexamination of their admissions policies, I heartily recommend a recent publication of the Law School Admission Council: *New Models to Assure Diversity, Fairness, and Appropriate Test Use in Law School Admissions*."[1] This booklet makes the case for considering alternatives

1. LAW SCHOOL ADMISSION COUNCIL, NEW MODELS TO ASSURE DIVERSITY, FAIRNESS, AND APPROPRIATE TEST USE IN LAW SCHOOL ADMISSIONS (rev. Mar. 2000). Copies should be available in law school admission offices. To request a copy from LSAC, write to: LSAC; Box 40; Newtown,

to our predominant approach to admissions, and describes several alternative ways in which the process might work. I have no illusions that this booklet contains the one method that will meet all of our needs, or that any of the models it describes will necessarily work better for any individual schools than current practices. Rather, I hope that the booklet will help law schools think creatively about what they are doing and understand that alternatives do exist.

I know that it is difficult to undertake change without a strong motivation for doing so, and without some indication that change will result in a tangible benefit. I hope this essay has highlighted ways in which change is necessary. We are planning, through the Law School Admission Council, to help law schools experiment with alternatives to our current practices in an effort to determine whether those alternatives hold any promise. I hope, over the next year or two, that LSAC will be able to enlist five or six law schools to conduct two simultaneous admissions processes. One track would utilize each school's usual process, through which actual admission decisions would be made. The second track would be an alternative (or shadow process) that incorporates some of the ideas described in more detail in the *New Models* booklet. This second track would involve, presumably, a more labor-intensive review of candidate files, based on a more thorough search for non-numerical admissions factors. Results from the two tracks could be compared and evaluated to determine whether the alternative approach would yield an entering class that more closely fits the law school's goals and missions.

III. CONCLUSION

At the beginning of this essay, I mentioned the tendency among the legally trained to give deference to those with special expertise. This essay is an appeal to that other defining trait of lawyers and, especially, law professors—the belief that there is no field that we cannot master ourselves. We must master the issues and methods of admissions, using experimentation, creativity, and thoughtfulness. There is a better way, and we must work together to find it. I hope all law schools will rethink their admissions processes. A more thorough, and thoughtful approach to admissions can provide real benefits to students, faculty, and the life of the law school.

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