Michigan Journal of Race and Law

Volume 9 | Issue 2

2004

Fair and Facially Neutral Higher Educational Admissions Through Disparate Impact Analysis

Michael G. Perez
University of Michigan Law School

FAIR AND FACIALLY NEUTRAL HIGHER EDUCATIONAL ADMISSIONS THROUGH DISPARATE IMPACT ANALYSIS

Michael G. Perez★

INTRODUCTION

Enforcing a prohibition on disparate impact in higher education admissions would force schools to discard or reform admissions criteria that have an *unfair* and *unnecessary* discriminatory effect on minority applicants.[1] Disparate impact claims would force liable schools, and encourage schools not yet subject to suit, to implement admissions policies that render diverse student bodies to the greatest extent possible, while still allowing schools to admit the most qualified students.

★ B.A. 2000, University of Virginia; J.D. Candidate 2004, University of Michigan Law School. I would like to thank the staff of the *Michigan Journal of Race & Law*, especially Jessie Gabriel and Rebecca Giltner, for their invaluable work in making this Note publishable.

1. This Note will focus on disparate impact in admissions based on race, but an admissions system could have a disparate impact on any protected category of persons. The term "minority" will refer to all persons who racially identify as something other than White.

A prohibition on disparate impact makes presumptively invalid any policy that has a discriminatory effect on a protected category of persons, such as a racial group, regardless of the policy's intent.[2] In order to survive a legal challenge, the defendant must prove that the policy is a necessity, meaning that it is the least discriminatory means of meeting its institutional needs.[3] In the seminal disparate impact case, *Griggs v. Duke Power Co.*,[4] an employer issued a blanket requirement that all employees have a high school diploma.[5] The policy eliminated a far greater number of Black applicants than White applicants.[6] According to the Court, Title VII of the Civil Rights Act of 1964, which prohibits disparate impact caused by employment criteria, required the employer to show that a high school education was a necessary qualification for an employee to do the job for which he was being hired.[7] The Court acknowledged that a high school diploma was a reasonable criterion, but found that it was largely unrelated to the specific skills and abilities needed to perform the job.[8] Because the criterion was both discriminatory in its effect and unnecessary, it was unfair to Black applicants and violated Title VII.[9]

If applied to higher education admissions processes, disparate impact analysis would reveal equivalent flaws in higher education admissions policies and criteria. Schools would be forced to alter policies that unnecessarily reject minority applicants more readily than White applicants. For instance, if a law school were to reject a block of applicants because they failed to achieve a minimum score on the Law School Admission Test (LSAT), and that minimum score had the effect of eliminating a disproportionate number of minority applicants, the policy would be presumptively invalid.[10] A school would then have to show two things: first, that the chosen cut-off point was consistent with the school's need to admit the most qualified applicants, and second, that the cut-off was the most effective means of doing so.[11] Criteria like privileges for legacies, extracurricular experience, and Advanced Placement credits, that advantage applicants from wealthier school districts and wealthier families, and disproportionately disqualify minority applicants, could also be chal-

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2. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k) (2003); Griggs v. Duke Power Co., 401 U.S. 424, 429–36 (1971).

3. 42 U.S.C. § 2000e-2(k); *Griggs*, 401 U.S. at 431.

4. 401 U.S. 424 (1971).

5. *Id.* at 427.

6. *Id.* at 426.

7. *Id.* at 431.

8. *Id.* at 433.

9. *Id.* at 432–33.

10. *See* Preston C. Green, III, *Can Title VI Prevent Law Schools From Adopting Admissions Practices That Discriminate Against African Americans?*, 24 S.U. L. REV. 237, 254–55 (1997).

11. *See id.* at 256–57.

lenged. If schools could not show that the existing criteria were necessary and the only available building blocks of a successful admissions process, then the criteria would have to be reworked in a manner that had an equitable result.

As it stands, admissions policies are not widely examined for unfair discriminatory effect.[12] Instead, schools employ affirmative action to correct what are possibly unnecessary disparities. The effect is to implicitly legitimize what might be racially inequitable and imprecise criteria. Schools are in some sense applying a band-aid instead of curing the ailment. Minority applicants appear to be under-qualified, when the true culprit may be that the existing criteria are imperfect measures of the qualifications for admission. Prohibiting disparate impact would force a correction of this potential imperfection, making the admissions process fundamentally racially unbiased.

Disparate impact analysis would for this reason be a viable compromise between advocates of diversity and advocates of race neutral admissions. By forcing renovation of the race neutral aspects of admissions systems such that those systems would become more equal in their effect, disparate impact analysis would foster diversity within a "colorblind" meritocracy. Indeed, given that the constitutionality of race conscious admissions is terminal,[13] and states are increasingly prohibiting such

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12. Disparate impact analysis can be applied to admissions under regulations promulgated under Title VI by the Department of Education. 34 C.F.R. § 106.21 (2004); 34 C.F.R. § 100, app. B; *see also* Alexander v. Sandoval, 532 U.S. 275, 288–91 (2001). Only one complaint has been brought under these regulations, however. After the removal of affirmative action policies in California's public universities, several civil rights groups filed a complaint with the Department of Education against University of California law schools, alleging a disparate impact caused by the use of the LSAT, in violation of Title VI. *See* 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, 1065 (2001).

13. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2346–47 (2003). According to the Court:

> We are mindful, however, that '[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.' Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.

Id. (internal citations omitted).

policies on their own,[14] it may eventually be necessary for diversity advocates to develop an alternative to affirmative action.

Current federal law allows for the application of disparate impact analysis to higher education but only in the form of an administrative action, initiated under the Department of Education regulations implementing Title VI.[15] No private cause of action for disparate impact exists under Title VI,[16] and there is no consensus among federal courts as to whether an individual can sue under Section 1983 to enforce Title VI disparate impact regulations.[17] Congress could, of course, amend Title VI or pass a new statute specifically addressing disparate impact in higher education to create such a right.

However, the details of how disparate impact scrutiny would function in higher education, and why it should be applied, are essentially unexplored.[18] Courts have applied disparate impact analysis to educational institutions, but only to desegregate public school districts,[19] and to test the validity of standardized tests used for tracking or as graduation requirements.[20] The only instance in which a court has dealt with disparate

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14. *See* William C. Kidder & Jay Rosner, *How the SAT Creates "Built-In Headwinds": An Education and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 193 nn.32–36 (2002) (discussing new facially neutral admissions policies, based on high school grades, implemented by the California, Florida, and Texas state systems).

15. *See* 34 C.F.R. § 106.21 (2004); 34 C.F.R. § 100, app. B; *see also* Alexander v. Sandoval, 532 U.S. 275, 288–91 (2001). Title VI prohibits discrimination by any entity receiving federal funding. 42 U.S.C. § 2000d-1.

16. *Sandoval*, 532 U.S. at 280–86.

17. *See, e.g.*, Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321 (2001); *see also* Derek Black, *Picking Up The Pieces After* Alexander v. Sandoval*: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356 (2002); Kidder & Rosner, *supra* note 14, at 176–77.

18. A few authors have made arguments for and against applying disparate impact to admissions processes. *See* Green, *supra* note 10; William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167 (2000); James S. Wrona, *Eradicating Sex Discrimination in Education: Extending Disparate Impact Analysis to Title IX Litigation*, 21 PEPP. L. REV. 1 (1993). A recent article by Kidder and Rosner provides data for and outlines the factual arguments necessary to make a claim of disparate impact, specifically against the use of the SAT. *See* Kidder & Rosner, *supra* note 14. The most comprehensive discussion of disparate impact in the educational sphere pertains to high-stakes testing in secondary school and argues against using disparate impact analysis. *See* Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111 (2002).

19. *See, e.g.*, In the Matter of Maywood School District #89, Docket No. 125, *available at* 1985 WL 306717 (Dep't Educ. June 12, 1985) (applying Department of Education disparate impact regulations promulgated under Title VI).

20. *See, e.g.*, Jay P. Heubert, *Nondiscriminatory Use of High-Stakes Tests: Combining Professional Test-Use Standards with Federal Civil-Rights Enforcement*, 133 ED. L. REP. 17 (1999). Tracking is a term used to signify the practice of organizing elementary and secondary

impact in higher education is through the lens of athletics, when Black student athletes challenged the academic requirements of the National Collegiate Athletic Association.[21]

Using Title VII disparate impact jurisprudence as a point of departure, this Note argues that higher education admissions policies should be subjected to disparate impact scrutiny, and proposes a feasible and effective judicial standard specifically conceived for this context. Part I proposes both remedial and instrumental justifications for applying disparate impact scrutiny to admissions policies. This Part argues that disparate impact analysis should be applied to higher education as a remedy for the disadvantage minority applicants face as a result of historic and ongoing intentional discrimination and that schools are culpable for unnecessarily utilizing admissions criteria that have this discriminatory effect. The result of applying disparate impact analysis will be admissions policies that produce diverse student bodies while remaining facially neutral with regard to race. Part II proposes that a necessity standard, unique to the higher education context, be fashioned such that admissions policies are made as equitable as possible while not undermining a school's ability to achieve its legitimate admissions goals. The proper necessity standard would grant schools latitude to define their institutional goals, but at the same time require that their admissions criteria be the least discriminatory methods of achieving these goals. Finally, Part III shows that a court can feasibly and effectively apply disparate impact analysis to admissions processes despite their complexity and variety.

I. REMEDIAL AND INSTRUMENTAL JUSTIFICATIONS FOR APPLYING DISPARATE IMPACT ANALYSIS TO ADMISSIONS

While intentional racial discrimination is probably no longer prevalent in admissions, race is not yet irrelevant to competing for admission. Historical discrimination in public education, housing, and employment, and ongoing intentional and institutional discrimination in those areas, disadvantage minorities competing for admission. To the extent that an admissions process has a disparate impact because of this disadvantage, minority applicants are still disqualified unfairly because of their race. It is, furthermore, socially optimal to force schools to remedy this unfair discriminatory effect. If admissions criteria cause a disparate impact unnecessarily—meaning that a school's admissions goals and operational needs can be met by more equitable criteria—the school should be viewed as having implemented an admissions system that is defective under disparate impact scrutiny.

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school students into ability groups upon which the subject matter and difficulty of their classes will be based.

21. *See* Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548 (3rd Cir. 2002).

In the process of eliminating unfair discriminatory effect, disparate impact analysis would force schools to use facially neutral criteria that are truly representative of applicants' merit. No longer will criteria imprecisely measure merit such that some students are disqualified because of their racial experience instead of their individual potential as a student. Thus, admissions processes that withstand disparate impact analysis will admit diverse student bodies and value diversity, while remaining facially neutral. Diversity is a compelling interest in higher education,[22] but race conscious admissions is a controversial method of achieving diversity in the student body.[23] Disparate impact analysis is thus a viable compromise between these positions.

A. *Remedying Unfair Discrimination*

This Section argues that a discriminatory effect is unfair when it occurs as a result of historical intentional discrimination.[24] Schools should be

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22. Grutter v. Bollinger, 123 S. Ct. 2325, 2339 (2003).

23. *See, e.g.*, SHELBY STEELE, A DREAM DEFERRED 20 (1998); Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115 (1996); Allen R. Kamp, *The Missing Jurisprudence of Merit*, 11 B.U. PUB. INT. L.J. 141 (2002) (citing HUGH DAVID GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972 (1990)); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 962 (1996).

24. Two paradigms of unjust discrimination predominate in American anti-discrimination jurisprudence: prohibitions on discriminatory treatment and those on discriminatory effect. Discriminatory treatment refers to policies or acts performed on the basis of impermissible traits such as race or gender. *See, e.g.*, 42 U.S.C. § 2000e (prohibiting discrimination by an employer "because" of an individual's race); Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (interpreting Title VI of the Civil Rights Act); Washington v. Davis, 426 U.S. 229, 239–40 (1976) (interpreting the Equal Protection Clause of the Fourteenth Amendment). Prohibitions on discriminatory treatment contemplate both policies that are facially discriminatory and those that are facially neutral but fashioned or implemented with the intent to discriminate. *See Washington*, 426 U.S. at 239–41; *see also* Yick Wo v. Hopkins, 118 U.S. 356 (1886). Schools explicitly segregated on the basis of race are therefore unlawful. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954). It is likewise unlawful for a state actor to confer business licenses to some applicants and not others on the basis of their race. *See Yick Wo*, 118 U.S. at 373–74.

A finding of discriminatory effect, however, does not require purposeful discrimination. Regardless of a policy's face or underlying impetus, if it disproportionately impacts a protected category of persons, without a showing of necessity, the policy is invalid under Title VII. *See* 42 U.S.C. 2000e-2(k) (2003); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 429–36 (1971); Kermit Welch, *The Changing Disparate Impact Theory of Employment Discrimination*, 34 HOW. L.J. 331 (1991) (discussing disparate impact theory and the development of the doctrine). For example, a zoning ordinance against multi-family housing that inordinately deprives minorities of housing opportunities fails under disparate impact analysis. Huntington v. NAACP, 488 U.S. 15 (1988) (interpreting the Fair Housing Act, 42 U.S.C. § 3601). Of the two, discriminatory treatment, because of the presence of intent, often registers as more reprehensible and its prohibition therefore more justified than the prohibition on discriminatory effect. Mere effect is often seen as accidental, and it is there-

liable for a discriminatory effect, even where they have no discriminatory intent, when their admissions systems produce the effect unnecessarily. Because the institutions are in the best position to adjust their practices in order to eliminate discriminatory effect in admissions,[25] disparate impact analysis would properly impose upon schools a duty to create the least discriminatory admissions system possible.

1. Discriminatory Effect Is Unfair When It Is a Product of Intentional Discrimination

While intentional discrimination may not be a persistent problem in higher education admissions, race remains a factor in the process. The most commonly used admissions criteria, without affirmative action, admit minorities less readily than Whites.[26] This disparate impact caused by admissions policies is unfair, even where it is not intentional, when the persistent effects of past intentional discrimination cause the disparate impact on minorities because of their race.[27] Facially neutral admissions criteria can thereby be unfair to minorities.[28]

The Supreme Court has recognized that unintentional discriminatory effect can be a consequence of past intentional discrimination and stated that "deficiencies in the education and background of minority citizens, resulting from forces beyond their control [should] not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."[29] The Court applied this principle in *Griggs v. Duke Power Co.*[30] In *Griggs*, the Duke Power Company required that workers achieve a minimum score on two standardized tests to be promoted beyond entry-level positions.[31] The tests formed a practically impenetrable barrier to Black employees seeking promotion.[32] Duke

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fore more difficult to attribute fault for causing a discriminatory effect. The policymaker is not necessarily a "racist," and the policy is colorblind on its face.

25. *See* H.R. REP. NO. 102-40(II), at 7 (1991).

26. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2346–47 (2003).

27. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 144–45 (1976).

28. The Supreme Court has expressed a "deep belief that legal burdens should bear some relationship to individual responsibility or wrongdoing, and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360–61 (1978) (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)) (internal quotations omitted).

29. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973) (citing Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971)).

30. 401 U.S. 424, 430 (1971).

31. *Id.* at 428.

32. *Id.* at 430.

Power Company argued that the disparate impact was a result of the lesser qualification of Black employees, based on their test scores.[33] The *Griggs* court, however, concluded that, in light of the impact that inferior educational opportunities had on the ability of Black applicants to perform well on the tests, the discriminatory effect of the tests was "directly traceable to race."[34] The rationale in *Griggs* was that equal opportunity does not exist apart from historical forces.[35]

Similarly, common admissions criteria effectively disqualify minorities disproportionately because of their (and their predecessors') racial experiences, rather than their individual potential.[36] Performance on college admissions tests has been correlated to wealth and family educational achievement.[37] Historical discrimination has produced a wealth disparity and limited educational opportunities for previous generations of minorities. De facto segregation, the legacy of de jure segregation, subjects minorities to inferior primary and secondary educational opportunities on average.[38] Furthermore, as a result of past intentional discrimination, minority applicants are rarely legacies at the schools to which they apply.[39] If an admissions criterion has a disproportionate effect that is a result of the social history of a minority group, that criteria is unfair to members of that group, regardless of whether the disproportionate impact is intentional.[40]

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33. *Id.* at 431.

34. *Id.* at 430.

35. *See id.* ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

36. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

37. Meredith Phillips et al., *Family Background, Parenting Practices, and the Black-White Test Score Gap, in* THE BLACK WHITE TEST SCORE GAP 118 (Christopher Jencks & Meredith Phillips eds., 1998). Minorities perform at a lower level on the SAT than majority students in the same income class. Sturm & Guinier, *supra* note 23, at 988–89. That, however, does not refute the point that minorities are disproportionately poor compared to Whites. The fact that higher wealth correlates with higher test scores thus has a disparate impact on minority test-takers because minorities are disproportionately poor. *Id.*

38. *See generally* CLAUDE S. FISCHER ET AL., INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH (1996); JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1992); Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education, in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 53 (Gary Orfield & Susan E. Eaton eds., 1996).

39. *See generally Naked Hypocrisy: The Nationwide System of Affirmative Action for Whites*, 18 J. BLACKS HIGHER EDUC. 40 (Winter 1997/1998) [hereinafter *Naked Hypocrisy*].

40. *Cf. supra* note 34 and accompanying text. Admittedly, this rationale for disparate impact analysis requires acceptance of a broad empirical assumption—that most or all members of a particular minority group have received uniformly substandard opportunities. If that is not the case, those members of a minority group who have been relatively less inhibited by discrimination might appear to be receiving a windfall when selection criteria are altered to the advantage of the entire minority group. Disparate impact analysis self-corrects in this regard, however. The advantages enjoyed by less inhibited minority

2. Schools Are Culpable for the Discriminatory Effect of Admissions When Their Admissions Process Unnecessarily Causes That Effect

Disparate impact scrutiny essentially holds schools liable for failing to implement admissions processes of a requisite quality, as defined by the educational necessity standard. A selection criterion must serve the purposes of the admissions system, such as discerning qualified applicants, and be the least discriminatory way of serving that purpose.[41] Schools must not only institute policies with the good intention of achieving necessary objectives, but those policies must also *actually* serve those purposes.[42] The *Griggs* Court stated this principal in the context of employment: "good intent or absence of discriminatory intent does not redeem employment procedures [that are unrelated to measuring job capability]."[43] Addressing the facts of the case, the Court stated:

> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force. The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used.[44]

To understand what makes admissions criteria similarly defective, one must conceptually disconnect the qualifications for admission from the criteria used to measure those qualifications.[45] Schools may seek to

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applicants—such as good schooling, opportunity for extra-curricular experience, well-educated parents—are similar in kind to those of the majority group; and these advantages are nullified as much as is possible by criteria that survive disparate impact analysis. To the extent that, under criteria altered by disparate impact analysis, slightly disadvantaged members of a minority group succeed more than very disadvantaged members of the same group, they do so because of their non-race-based qualifications.

41. See Part III for a more specific definition of educational necessity.

42. *See Griggs*, 401 U.S. at 431–32.

43. *Id.* at 432.

44. *Id.* at 431–32.

45. There are different methods by which a test can be validated for measuring a certain skill. A test is "content validated" if the content of the examination closely matches the content of the job (for example, a typing test for a typist position). A test is "construct validated" if a professional job analysis shows that the job requires a series of traits that the

admit students with certain abstract qualities such as natural aptitude, good work ethic, creativity, analytical skills, and writing ability. They employ criteria like standardized tests, grade point average ("GPA"), and personal essays to assess whether an applicant possesses the requisite qualities for admission. These criteria may not perfectly reflect possession of those skills. Disparate impact analysis asks whether, in light of the discriminatory effect these criteria cause, they are the most precise and inclusive gauge of the qualities they purport to measure.[46]

A simple diagram may help illustrate. The first figure below illustrates when an "Existing Admissions Criterion" effectively captures some applicants with the "Desired Skill," but at the same time ignores many other applicants who also have this skill. The different shades represent different races—the darker represents the victims of historical and ongoing intentional discrimination. Assume that there are equal numbers of applicants in each group.[47] The "Alternative Admissions Criterion" is more precise and inclusive. The discriminatory effect caused by the admissions criterion is therefore unnecessary, and the school failed to fulfill its legal duty.[48]

In each case, the existing admissions criterion has a discriminatory effect on a particular race. Because there is an alternative criterion that measures the same skill but without the discriminatory effect, the existing criterion is not a necessity and therefore fails under disparate impact scrutiny. The school has put forth into the admissions market a faulty criterion in the sense that it either under-recognizes qualified applicants or unnecessarily discriminates against a particular racial group, and there is a less discriminatory alternative that could be utilized.[49]

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test is known to measure. A test is "criterion validated" if there is a substantial correlation between measured performance on the predictor and performance on the job. *See* Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1171 (1990) (citing Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.5(B), 1607.16(D)–(F) (1990)).

46. This principle manifests itself in the requirement that the selection criterion are both consistent with necessity and the least discriminatory alternative. *See* 42 U.S.C. § 2000e-2(k) (2003); *see also Griggs*, 401 U.S. at 431.

47. These diagrams show a discriminatory effect in terms of the numbers of applicants disqualified by the criterion. In actuality, a disparate impact is present whenever a racial group is disproportionately disqualified in relation to the number of applicants of that race in the applicant pool, even if the total number disqualified is lower. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 598 (1979) ("In a disparate impact hiring case such as this, the plaintiff must show that the challenged practice excludes members of a protected group in numbers disproportionate to their incidence in the pool of potential employees.").

48. In requiring the school to utilize the alternative criterion, the law appears to simply enlarge the applicant pool. In such a case, schools should then use a second refining criterion instead of shrinking the applicant pool with the existing discriminatory criterion.

49. There is still the practical question of how large the discriminatory effect must be or how much better a less discriminatory alternative must be in order to hold a school liable. The disparate impact could at some point be considered negligible. Under Title II,

FIGURE 1

Applicants with the Desired Skill | Existing Admissions Criterion | Alternative Admissions Criterion

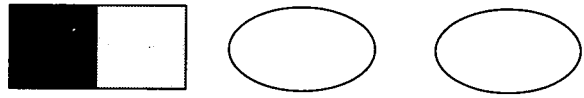
Now the criterion is used to assess the applicants:

Applicants with the skill are nevertheless excluded by the existing criterion and one race is disproportionately affected.

When the alternative is used all applicants with the skill are measured.

The next figure illustrates a less egregious violation, but a violation nonetheless. The "Alternative Admissions Criterion" is no more precise but is less discriminatory in its effect. The imprecision of the criterion is spread evenly across racial lines and is thus the just option:

FIGURE 2



Applicants with the Desired Skill | Existing Admissions Criterion | Alternative Admissions Criterion

Again, the criterion is applied to the applicants:

Applicants with the skill are excluded by the existing criterion and one race is disproportionately affected.

Applicants with the skill are excluded by the alternative criterion but each race is equally affected.

EEOC regulations state that a disparate impact of sufficient size exists if an employment criterion selects minority candidates for employment positions at a rate that is less than eighty percent of the selection rate for non-minorities. *See* 29 C.F.R. § 1607.4(D) (2004). The rule to be applied to admissions could be higher or lower depending on the balance between the importance of equality to the lawmaker and how well schools can bear the burden of meeting the standard.

Disparate impact analysis as applied to higher education admissions places the burden of improving the admissions systems on the party who can most efficiently bear the burden: the school.[50] An educational institution has exclusive control over admissions and is therefore in the best position to conduct research and development and then implement a new system.[51] Schools control a scarce and coveted resource for socioeconomic opportunity. If lawmakers wish to ensure the resource is distributed fairly, schools are the optimal party to bear the burden to do so. It is, moreover, in a school's best interest to analyze its admissions criteria for unnecessary disparate impact. By definition, if a certain group defined by unique socioeconomic and cultural characteristics is *unnecessarily* disqualified by the current admissions system, the school is eliminating an entire pool of qualified applicants.

Jennifer Braceras argues that disparate impact should not be extended from employers to educational institutions because, unlike employers, schools already act in the public interest. They need not, therefore, be regulated as closely as employers.[52] Title VII's prohibition on disparate impact in employment is justified, she argues, because the relationship between businesses and the public interest is to a certain extent adversarial—that is, profit margin is sometimes in opposition to the public interest. Because profit margin is not the primary institutional goal of a school, Braceras argues, disparate impact analysis is an unnecessary regulation.[53]

Braceras's argument fails to recognize that a prohibition on disparate impact is not premised on antagonism between the institution and the public interest. Instead, disparate impact analysis is meant to weed out neutral, but effectually discriminatory, practices.[54] Even a school with the best of intentions may for reasons of tradition, administrative ease, or profit motive utilize unnecessarily discriminatory admissions criteria. Also, an adversarial relationship may exist between different segments of an educational community for control of school policy, even if the institution as a whole is meant to act in cooperation with the public interest. Braceras also fails to recognize that applying disparate impact to higher education may be, in fact, more justified than in the employment sphere precisely because schools act in the public interest. Achieving equal opportunity seems more a part of the role of educational institutions than businesses. Because educational institutions are committed to the public interest to a greater

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50. *See* H.R. REP. No. 102-40(II), at 7 (1991); *see also* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944).

51. *See* sources cited *supra* note 50.

52. *See* Braceras, *supra* note 18, at 1199.

53. *See id.*

54. *See* 42 U.S.C. § 2000e-2(k) (2003); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 429–36 (1971).

degree than are businesses, they should have a greater obligation to take on the burden of alleviating unfair discrimination.

B. *The Policy Benefits of Disparate Impact: Diversity and a Colorblind Merit System*

Prohibiting disparate impact analysis in higher education admissions has an important policy benefit: admissions to higher education would be made more equitable while still adhering to a principle of colorblind merit. Moreover, the "qualified" applicant pool would include a more diverse cross-section of races as a result of the elimination of imprecise criteria that unnecessarily eliminate qualified minority applicants.

Immutable characteristics like race are considered qualitatively distinct from the concept of merit.[55] These aspects of an applicant's identity are, according to the Supreme Court, different from other aspects of an individual's personal experience and therefore irrelevant to considerations of merit.[56] The traditional criteria, therefore, compose the higher educational "merit system,"[57] and affirmative action is an exception to the rule.[58] If current higher education admissions criteria are considered the true yardsticks of "merit" in higher education admissions,[59] the need for affirmative action to correct the disparate impact on minorities implies that minority students otherwise do not deserve admission under the neutral criteria.[60] Race consciousness in admissions implicitly legitimizes the preexisting criteria as paradigms of merit[61] and masks their discriminatory effect by creating an equitable bottom line.[62]

By eliminating any unnecessary effects that intentional discrimination might have on admissions, disparate impact analysis ensures that the proper race neutral qualifications, such as analytical ability or creativity, dictate admissions decisions.[63] As the Court stated in *Griggs*, disparate impact analysis

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55. *See* Johnson v. Transp. Agency, 480 U.S. 616, 675 (1987) (Scalia, J., dissenting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361 (1978) (Brennan, J., concurring in part and dissenting in part); Sturm & Guinier, *supra* note 23, at 962.

56. *See Johnson*, 480 U.S. at 675 (Scalia, J., dissenting); *Bakke*, 438 U.S. at 361 (Brennan, J., concurring in part and dissenting in part); Sturm & Guinier, *supra* note 23, at 962.

57. *See* Sturm & Guinier, *supra* note 23, at 960–63.

58. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2338–39 (2003) (holding that the law school's affirmative action program, while violating equal protection, was justified by the school's compelling interest in diversity).

59. *See* Sturm & Guinier, *supra* note 23, at 960–63.

60. *Id.*

61. *Id.* at 956.

62. *See* Connecticut v. Teal, 457 U.S. 440, 451 (1982).

63. Notably, merit is not a consistent principle in admissions systems as they currently exist. Legacies are admitted at higher rates than other applicants, but with lower test scores, grades, and fewer extra-curricular activities. *Naked Hypocrisy*, *supra* note 39, at 41–42. Preferences are even sometimes granted to children of politicians, donors, alumni, and

does not ensure "that the less qualified be preferred over the better qualified simply because of minority origins.... Far from disparaging job qualifications as such, Congress [in passing Title VII] ... made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant."[64] The reworked admissions process may still have a disparate impact, but only on unqualified applicants. In this sense, adherence to disparate impact theory actually increases competition among applicants by ensuring that qualifications for admission are measured precisely. Where some qualified applicants were previously eliminated erroneously, a reworked admissions system would pit White applicants against minority applicants with which they previously did not compete. Disparate impact analysis thus actually could strengthen meritocracy.

The newly formed merit system would, furthermore, implicitly value diversity. In order to eliminate the disparate impact, the new facially neutral process would have to acknowledge various incarnations of merit in order not to have the discriminatory effect that current criteria do. A school would be forced to acknowledge, for instance, that the Scholastic Aptitude Test (SAT) only measures one kind of ability and that other skills, such as writing ability or work ethic, should be weighed more heavily. The reworked merit system, while not nominally delineating groups, would also encompass the broader spectrum of relevant talents, accomplishments, perspectives, and potential exhibited in a diverse society.

The Court has made it clear that benign race conscious policies are noxious to the principle of equal protection, which calls for a colorblind government.[65] Unintended negative consequences of race conscious admis-

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celebrities. *See* Ralph Frammolino et al., *UCLA Eased Entry Rules for the Rich, Well-Connected*, L.A. TIMES, Mar. 21, 1996, at A1. When considering *Bakke*, the Supreme Court was never told that the Dean of U.C. Davis personally admitted approximately six applicants each year that the office of admissions had rejected or waitlisted. DREYFUS & LAWRENCE, *supra* note 67. The Supreme Court was forced to take a fresh look at university admissions in the recent University of Michigan cases and acknowledged the fallacy of merit in admissions:

> The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to "merit." For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called "legacy" preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a "true" meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities.

Grutter v. Bollinger, 123 S. Ct. 2325, 2359–60 (2003) (Ginsburg, J., concurring).

64. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

65. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed")

sions policies, such as stigma and racial animosity, are similarly offensive to equal protection.[66] States, furthermore, are increasingly eliminating the use of affirmative action because such policies contravene an otherwise legitimate merit system.[67] Instead of evaluating applicants on the basis of intelligence, skills, and accomplishments, it is argued that affirmative action bases admission on what ought to be meaningless physical characteristics, such as race and sex.[68]

Advocates of affirmative action defend its use by arguing, among other things, that it remedies the effects of societal discrimination and creates diversity.[69] The Court recognizes that, despite the harm caused by race conscious state action, diversity is an interest so important to institutions of higher education that it justifies race conscious admissions for the time being.[70] Others argue that minority racial status should be considered a part of students' merit for admission because of the value their identities bring to the school.[71]

Disparate impact analysis applied to an admissions process could serve as a suitable compromise between these two positions. It would do some of affirmative action's diversity work while maintaining an ostensibly colorblind merit system. In other words, the process would be facially neutral *and* neutral in effect, and still measure an applicant's qualifications. As a matter of public policy it may be attractive to have diversity as an explicit value in higher education through affirmative action. While affirmative action is still constitutionally permissible[72] there is no reason it cannot be employed along with disparate impact analysis.

(internal citations and quotations omitted); Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race"); *see also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.").

66. *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (stating that racial classifications used for something other than remedying identified past discrimination "may in fact promote notions of racial inferiority and lead to a politics of racial hostility").

67. JOEL DREYFUS & CHARLES LAWRENCE III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 23–24 (1979); Kidder & Rosner, *supra* note 14.

68. *See* sources cited *supra* note 67.

69. *See Grutter*, 123 S. Ct. at 2338; *see generally* Devon Carbado, *What Exactly Is Racial Diversity?*, 91 CAL. L. REV. 1149 (2003); Brief of Amici Curiae on Behalf of Committee of Concerned Black Graduates of ABA Accredited Law Schools, Grutter v. Bollinger, 123 S. Ct. 2325 (2003), *reprinted in* 9 MICH. J. RACE & LAW 5, 16–21 (2003).

70. *See Grutter*, 123 S. Ct. at 2339 (holding that the law school had a compelling interest in creating a diverse student body).

71. *See* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1247–48 (2002).

72. *See Grutter*, 123 S. Ct. at 2346–47.

Disparate impact analysis would rework facially neutral criteria to be more equitable and meritocratic. Affirmative action could then be employed to sift through qualified applicants to render a student body even richer with perspective, ability, and life experience.

While it may be difficult to conceive of the college admissions process as any different than it is now, we should not assume that the traditional factors are perfect measures of a student's qualifications.[73] Moreover, as discussed in Part III, disparate impact analysis might not require drastic alterations to the admissions process in order to eliminate unnecessary discriminatory effect.

II. EDUCATIONAL NECESSITY

With the justifications above in mind, the next step would be to fashion a legal standard that is affective of those purposes and can be feasibly applied by the courts. The crux of disparate impact analysis is the necessity standard ("educational necessity" in the context of admissions as opposed to "business necessity" under Title VII). When a plaintiff challenges an admission criterion for its discriminatory effect, a school will respond that the criterion is necessary to achieve some purpose of the admissions process. If the necessity standard is too narrow, it will be prohibitively difficult for a school to achieve its educational purposes and operational needs. If the conception of necessity is too broad, however, schools might escape any meaningful change. Therefore, the educational necessity standard ought to be fashioned thoughtfully with regard to two different issues. First, it should be informed by the nature of the educational institution. Assuming that part of a school's purpose is to select qualified students, whatever that may entail for a particular school, this aspect of the necessity standard will ensure that "merit" remains a fundamental principle in the admissions process when disparate impact analysis is applied. Second, the procedural strictures of the educational necessity standard must be designed to effectively eliminate unnecessary disparate impact. Ultimately, a school should be given latitude to define its own needs, but the criteria it utilizes must be the best available means of serving those needs.

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73. For example, grades are a reasonably accurate predictor of future success in school, but do not predict professional success very well. *See* Sturm & Guinier, *supra* note 23, at 963. Test scores are similarly imperfect. While they purportedly do and ideally would predict future success, it is widely disputed whether they accurately represent the variety of skills that make for a successful student. *See, e.g.*, Allen R. Kamp, *The Missing Jurisprudence of Merit*, 11 B.U. PUB. INT. L.J. 141, 142; Sturm & Guinier, *supra* note 23, at 970. As for professional achievement, test scores have even less predictive value than grades. *See* Sturm & Guinier, *supra* note 23, at 970. None of these factors, however, can perfectly discern an applicant's motivation, perseverance, teamwork skills, and emotional constitution. *See id.*

A. *Educational Necessity Defined*

Educational necessity is a largely unexplored legal concept. In the few instances in which disparate impact analysis has been applied to educational institutions, most courts and commentators have conceived of educational necessity as analogous to business necessity.[74]

In order for selection criteria to be consistent with business necessity they must be "job-related."[75] Job-relatedness requires that selection criteria bear "a significant relationship to successful performance of the job."[76] Businesses are primarily enterprises for profit. Thus, requiring businesses to have job-related criteria effectively encompasses a business's goals with regard to hiring—selecting employees who will perform the duties of the job well.

The facet of educational necessity that is analogous to business necessity is, thus, the need to evaluate applicants for their ability to perform the duties of a student, or "studies-relatedness." This model has been adopted in the Title IX regulations that prohibit disparate impact on the basis of gender,[77] in the ABA Standards regarding law school admissions,[78] in the small body of case law interpreting the Title VI disparate impact regulations,[79] and in the academic commentary on educational necessity.[80]

The business model is a good analogy for educational necessity in some respects.[81] When a student excels it can be seen as indicative of a

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74. Bd. of Educ. v. Harris, 444 U.S. 130, 151 (1979); *see also* Salahuddin *ex rel.* Sharif v. New York State Educ. Dep't, 709 F. Supp. 345, 362 (S.D.N.Y. 1989).

75. *See* 42 U.S.C. § 2000e-2(k) (2003); Griggs v. Duke Power Co., 401 U.S. 424, 433–36 (1971).

76. *See* H.R. REP. No. 102-40(II), at 10 (1991).

77. 34 C.F.R. § 106.21(b)(2) (2004).

78. AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 503 (1998) ("A law school shall require all applicants to take a test for the purpose of assessing the applicants' capability to satisfactorily completing its educational program.").

79. *See* Elston v. Bd. of Educ., 997 F.2d 1394, 1412 (11th Cir. 1993) (applying disparate impact analysis to public school districting scheme); NAACP v. Georgia, 775 F.2d 1403, 1418 (11th Cir. 1985) (applying disparate impact analysis to public school tracking practices); Groves v. Dep't of Educ., 776 F. Supp. 1518, 1529–32 (M.D. Ala. 1991) (applying disparate impact analysis to the use of the ACT Assessment for admission to teacher training program); Salahuddin *ex rel.* Sharif v. New York State Educ. Dep't, 709 F. Supp. 345, 362 (S.D.N.Y. 1989) (applying disparate impact analysis to a scholarship program based entirely on SAT scores).

80. *See* Kidder & Rosner, *supra* note 14, at 189–90; Wrona, *supra* note 18, at 14–16.

81. In a recent article, Jennifer Braceras argues that educational necessity in any form lacks feasibility. She contends that business necessity, as embodied by productivity and profit margins, is justiciable because those factors are quantifiable, unlike a student's motivation and ability to learn. *See* Braceras, *supra* note 18, at 1191. Braceras conflates outputs with inputs, however. The proper comparison is between productivity, an employee's output, and grade point average, class rank, research and writing, a student's output, which can be quantified similarly to productivity and profit margins in the

successful educational program, just as successful employees make the business successful.[82] Students who can meet the demands of their studies are necessary to an effectively functioning educational program. A capable student can enhance the experience of fellow students.[83] Excellent students and successful alumni help a school's bottom line by bolstering its reputation among future applicants.[84] A successful student is also more likely to be able to make donations in the future.

A school's necessities are, however, not adequately encompassed by the selection of qualified students, and therefore may not adequately be served by simply adhering to studies-related criteria, as businesses are served with job-related criteria. A school's institutional needs extend beyond selecting qualified students because students are customers rather than employees and because schools serve broad, lofty purposes for society generally. Educational necessity should therefore encompass more than studies-relatedness. Additional considerations of an educational institution's institutional operational needs and mission should be a part of the educational necessity standard.

An admissions process serves the operational necessity of a school in a few different ways. A school's admissions process will presumably admit a number of students that is consistent with the minimum income needs of the institution. Because students' families are also potential donors, most schools also admit applicants whose relatives are alumni (legacies).[85] The admissions process itself can be designed to be efficient and inexpen-

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employment sphere. The inputs, an applicant's qualifications, moreover, can be equally nebulous and subjective in both education and employment depending upon the context.

82. *See* Braceras, *supra* note 18, at 1191. The job-relatedness, or studies-relatedness, of admissions criteria is, however, a more variable and complex inquiry than in employee hiring. Students are customers, not employees. They receive a service as well as take part in providing one. A student's success in the context of education is, therefore, to a degree, defined and attained on her own terms and serves her own goals and desires. The consequence of this relationship is that an educational admissions process must focus, more so than a business's hiring process, on measuring potential for success in a manner that is responsive to the applicant pool's interests, not exclusively its own survival. The educational necessity of admissions criteria cannot, therefore, be defined entirely in terms of "job" related validity. Applicants fill an educational institution's needs by succeeding, but their success cannot be entirely defined by the institution prior to admittance. An admissions process must therefore be flexible enough to consider, on the one hand, an applicant's individual goals and, on the other hand, an applicant's ability to satisfy traditional measures of success like grades.

83. *See, e.g.*, Statement by the Dean of the University of Michigan Law School's to Prospective Students, University of Michigan Law School Official Website, *at* http://www.law.umich.edu/prospectivestudents/welcome/dean.htm (last visited Mar. 20, 2004).

84. *Id.*

85. In the 1960s, Columbia University eliminated legacy preferences. The resultant drop in donations was so marked that it returned to using them shortly thereafter. *See* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 537 (2002) (citing information he acquired during his tenure as Dean of Columbia College).

sive in order to aid budgetary needs as well. Finally, the admissions system promotes institutional survival by satisfying the political constraints put on a school by trustees and perhaps the state government.

Beyond an educational institution's operational necessity, the law must recognize a school's mission necessity, or the social goals that transcend institutional survival. The broad, nebulous, and variable societal roles schools serve complicate educational necessity in a manner not applicable to businesses. Schools are means for the advancement of knowledge,[86] socioeconomic doors for students, breeding grounds for leaders, and venues for socialization.[87] A school is, much more than an employer, a social institution rather than an individualistic endeavor.[88] In adherence to these ideals, an admissions process might consider an applicant's leadership skills, motivation, and professional goals.[89] Educational institutions might need to consider more than a student's potential for success in the classroom (the analogue to job-relatedness), and also consider how a student will contribute to the learning environment or society after graduating. The various "mission-related" purposes of education will be manifested differently depending on the educational program—undergraduate, elite undergraduate, professional school, or small graduate programs. The mission necessities of the institution, though, will certainly bear on how it selects students, and the law ought to value these social goods.[90]

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86. *See, e.g.*, ROBERT KLITGAARD, CHOOSING ELITES, 116–31 (1985).

87. *See, e.g.*, WILLIAM G. BOWEN & DEREK CURTIS BOC, THE SHAPE OF THE RIVER, 118–54 (1998); AMY GUTMANN, DEMOCRATIC EDUCATION (1987); Wrona, *supra* note 18, at 1–2. Wrona argues:

> Education is crucial in an industrialized and highly technical society. This is true not only for individuals who hope to use their education to gain employment, but also for any nation that hopes to keep pace in an extremely competitive global market. Colleges and universities play a vital role in students' personal growth as well as their preparation for future careers.

Wrona, *supra* note 18, at 1–2.

88. The independence of employers from social responsibility is reflected to a degree in Title VII jurisprudence, which attempted to avoid overburdening the employer or undermining the employer's ability to remain efficient and reap profits. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652 (1989).

89. *See, e.g.*, CHARLES T. CLOTFELTER, BUYING THE BEST: COST ESCALATION IN ELITE HIGHER EDUCATION (1996); ELIZABETH A. DUFFY & IDANA GOLDBERG, CRAFTING A CLASS: COLLEGE ADMISSIONS AND FINANCIAL AID 1955–1994 (1998).

90. To a certain extent, operational necessities like selecting qualified students serve the mission necessities of the school in the end. If educational necessity, therefore, only included operational considerations mission necessity would not get neglected entirely. This is, perhaps, one reason why business necessity is not defined in terms of mission. It is assumed that operational necessity—selecting on the basis of job-related qualities—directly and conclusively correlates with a business's mission of reaping greater profits. The social ends of higher education, however, do not so closely correlate with operational needs and therefore must be considered explicitly as a part of educational necessity.

B. *The Standard: How to Apply Educational Necessity*

Disparate impact analysis applied to admissions processes should utilize a bifurcated educational necessity standard in which the purposes served by admissions must be merely legitimate, but the criteria chosen to serve those purposes must do so precisely. The first prong defers to a school's wisdom as to its own needs and essential purposes. Courts lack specialized knowledge in educational theory and policy, and should therefore refrain from intruding upon educational institutions' discretion in those regards.[91] In order to eliminate unfair discriminatory effect, however, the standard should require that a school's chosen criteria are precise instruments to serve the institution's stated goals, and the least discriminatory method of achieving those goals. This a court can effectively assess with expert data and testimony.[92]

Broadly speaking, there are four procedural standards from which disparate impact law might choose for its necessity justification. The law could require that criteria either: strictly correlate to an absolute necessity, loosely correlate to an absolute necessity, strictly correlate to any legitimate purpose, or loosely correlate to any legitimate purpose.[93] These four standards exhibit varying degrees of deference to the institution.

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91. *See, e.g.*, Grutter v. Bollinger, 123 S. Ct. 2325, 2339 (2003) ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("When judges are asked to review ... a genuinely academic decision ... they should show great respect for the faculty's professional judgment ... [and] ... may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973) ("[T]his case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."); *cf.* Sandlin v. Johnson, 643 F.2d 1027, 1029 (4th Cir. 1981) ("Decisions by educational authorities which turn on evaluation of the academic performance of a student ... are peculiarly within the expertise of educators and are particularly inappropriate for review in a judicial context.").

92. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1007 (1988) ("[A] variety of methods are available for establishing the link between these selection processes and job performance.... Courts have recognized [ ] the results of studies ... the presentation of expert testimony ... and prior successful experience.").

93. Disparate impact was first applied under Title VII with a standard akin to the strict version of necessity—the selection criterion had to be essential to job performance. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431, 436 (1971); *see also* NAACP v. Georgia, 665 F.2d 1403, 1418 (11th Cir. 1985). Under this version of necessity, while requiring a high school diploma would have increased the overall level of education of the workforce, this was not a necessity for a proficiently skilled workforce. *See Griggs*, 401 U.S. at 433. Later, the Eleventh Circuit articulated a similar standard and required that the selection policy be "legitimate, important, and integral to the defendant's institutional mission." Elston v. Bd. of Ed., 997 F.2d 1394, 1413 (11th Cir. 1993). The *Griggs* standard was later

It is my contention that the goals of an admissions process should need only be "legitimate." If the purpose of the policy is within the scope of the institution's purpose, the law should not go further to require courts to assess how necessary, or conversely how dispensable, the policy is. An educational institution needs discretion in order to be responsive to its clientele and fulfill its social role. Courts generally give a good degree of deference to educational institutions to determine their own legitimate goals.[94] One could argue that doing so renders "legitimacy" meaningless, as the term seems to imply sanction by an outside entity. The expertise and experience of educators is self-legitimating, however. The complexity of the economic, social, and ideological issues calls for those with specialized knowledge and experience to make educational policy decisions.[95]

Under a legitimacy standard courts would still retain the power to prevent schools from stepping beyond the bounds of their area of expertise. The Eastern District of Pennsylvania took this approach to "legitimacy" in *Cureton v. National Collegiate Athletic Ass'n.*[96] Instead of legitimacy encompassing anything vaguely related to the nature of the institution, the court limited legitimacy to those interests within the core purposes of the institution.[97] The court stated that "[t]he proper scope of [the NCAA's] authority must be circumscribed to requirements

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softened by the Supreme Court in *Wards Cove* to only require that a selection practice be "manifestly related to the legitimate ends" of a business. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (later overruled by the 1991 Civil Rights Act). Legitimacy is a far cry from necessity. The most inconsequential of goals could be a legitimate undertaking. Indeed, legitimate has been defined to be neither "essential" nor "indispensable." *Id.*; *Elston*, 997 F.2d at 1412 (citing NAACP v. Georgia, 775 F.2d at 1417–18). The only limitation is that the selection criterion cannot be "spurious." *Wards Cove*, 490 U.S. at 659.

The *Wards Cove* test has been interpreted to have called for a strict correlation to a legitimate end, calling not only for the purpose to be legitimate but also for a criterion to be "manifestly related" to the purpose it serves. *See* cases cited *supra* note 79. This standard, like legitimacy, is not without bite in theory. To be manifestly related is more than a mere rational relationship. It is a "nexus" of sorts. Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 706, 707 (E.D. Pa. 1999) ("Merely being abstractly rational, as opposed to arbitrary, will not suffice."); *see* NAACP v. Harrison, 940 F.2d 792, 802 (3d Cir. 1991).

94. *See* cases cited *supra* note 91.

95. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973). The *Rodriguez* case was a school quality suit involving questions of districting, taxation, and budget allocations. It is distinguishable from a disparate impact suit against an admissions process in that it involved policy concerns that extended well beyond the litigated issue. While reorganization of an admissions process might involve some budgetary changes for a school, it does not implicate anything as broad or as far outside the scope of traditional adjudicative power as a city government's budget or tax scheme. Thus, deference may not be as necessary for an admissions process. A school is, however, more inextricable from public policy than a business, as discussed above, and deference is extended to educators even for decisions that are small in scope, such as dismissal of a student. *See id.*

96. 37 F. Supp. 2d 702 (E.D. Pa. 1999).

97. *Id.* at 702–04.

pertaining only to student athletes."[98] The NCAA had no legitimate interest in promoting overall graduation rates of the student body.[99]

An additional proviso of the legitimacy standard should be to only allow ex ante justifications to legitimize criteria. To do otherwise would be to turn disparate impact analysis into rational basis scrutiny and make victory for a plaintiff nearly impossible.[100] In *GI Forum v. Texas Education Agency*,[101] for instance, the court was able to ignore the stated justification for a standardized graduation test and instead stated its justifications ad hoc.[102] Upon implementation, the articulated goal of the test was to "hold schools, students and teachers accountable for education and to ensure that all Texas students receive the same, adequate learning opportunities."[103] The various purposes of the test should have been tested for their relationship to this educational goal. Instead, the court justified the test circularly. When the test needed to be justified for its validity in measuring skills acquisition, the court said that the legitimate goal of the institution was skills inculcation.[104] When the chosen cut-off score needed justification, the court said the legitimate goal was setting a minimum graduation score.[105] When it was challenged on the basis of using it as a graduation requirement, the state's legitimate interest was "setting standards as a basis for awarding of diplomas."[106] The court used ex post justifications to legitimize the criterion circularly. In *Cureton*, the court rejected this approach and limited the acceptable justifications for the criterion to those articulated when it was implemented.[107] Thus, closing the gap between graduation rates of White and Black athletes was not a legitimate goal because it was not the purpose behind the adoption of the test score minimums.[108]

Allowing ex post rationalizations would make necessity an empty standard. Merely requiring ex ante justifications, however, is a formal pro-

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98. *Id.*

99. *Id.* at 702. A school would likewise not have a legitimate interest in discriminating or, conversely, creating an all White student body, as that is an impermissible goal under the Equal Protection Clause and Title VI. Grutter v. Bollinger, 123 S. Ct. 2325, 2338 (2003).

100. Professor Richard Fallon argues that "judicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp." Richard H. Fallon, Jr., *The Supreme Court, 1996 Term, Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997).

101. 87 F. Supp. 2d 667 (W.D. Tex. 2000).

102. *Id.* at 679–81.

103. *Id.*

104. *Id.* at 679–80.

105. *Id.* at 680–81.

106. *Id.* at 681.

107. Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 704 (E.D. Pa. 1999).

108. *Id.*

viso easily undermined by a potpourri of ex ante justifications or one all-encompassing justification. The legitimacy standard is therefore only effective when it is limited to ex ante justifications that fall within the legitimate purposes of the institution. For instance, a law school should not be able to avoid legal attack by stating beforehand that its admissions process is designed to "better humanity." As stated, the goal is too broad and vague to reasonably be considered a part of the school's area of expertise and is therefore not a legitimate purposes. The law school's overarching goal would be better stated as producing excellent lawyers.

The important difference between legitimacy and a strict necessity standard is that under the former, the court is limited to discerning the legitimate scope of the institution's purpose and should not, as with the latter, weigh the various purposes of an institution and decide which are most important and which are dispensable. The standard is, admittedly, one that is still pliable for a court that is determined to find the institution's articulated justification for the criteria illegitimate. The policy of deference underlying the "legitimacy" standard, however, should rein in such a court or at least make the decision correctable on appeal.

An educational institution's discretion in formulating the best admissions policy for the times would be undermined by a strict necessity standard. Relying on plodding legal precedent to define what is necessary in admissions would hamstring schools both as businesses and as agents of opportunity and progress. Drawing the line, furthermore, as to which goals are important enough to meet the standard would be difficult to get right the first time. Disparate impact analysis for educational admissions policies should therefore defer to the institution to set its own goals within the parameters of legitimacy, as defined above.

After ascertaining the legitimate purposes of an admissions criterion, the next step is requiring employers to show that the criteria strictly serve those purposes. There should, for instance, be a strict correlation between a good score on the standardized test required for admission and success in the program. If a school employs an index score that combines test scores and GPA, that index should predict success closely. In this aspect of the inquiry, courts need not defer to the institution. It is a substantive inquiry that requires a degree of expertise, but it does not involve the court in macro policy making. Instead, the court is finding facts as to how well a school is adhering to the school's own policy goals.

Determining just how closely correlated they need be is the hard part. A standard akin to strict scrutiny's narrow tailoring would be effective. Narrow tailoring would require that the policy be considerably more empirically precise than imprecise and would ultimately ensure that the utilized criterion be a necessity.[109] While narrow tailoring can be a

109. Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 14–15 (2000).

malleable standard, it is so to a far lesser degree than the other possibilities: requiring a "manifest relationship,"[110] "substantial relationship,"[111] or a "significant relationship."[112]

The "manifest relationship" standard neither provides guidance to schools and courts nor ensures that the intent of the law will be reflected in judgments. In *NAACP v. Georgia*, for instance, the challenged practice was tracking "achievement grouping" of students, and the institutional necessity was articulated as "classroom education."[113] Because "achievement grouping" or tracking was an "active pedagogical practice" it had a manifest relationship to its purpose.[114] Instead of demanding that the practice be a well-honed tool for serving the school's purposes as a narrow tailoring requirement would, the court justified the disparate impact of tracking by pointing out that many schools use it.

Requiring either a "substantial" or "significant" relationship is equally vague and potentially ineffective. Neither indicate whether a criterion must be more precise than imprecise, meaning that it captures more people with the desired attribute than it rejects. They only imply that there is some degree of correlation between the criterion and its purpose that happens to sway the court in a given case. Any and all criteria could pass scrutiny as long as they had some empirical relationship to their purpose.[115]

The only consistent principle the Supreme Court has used to animate the "substantially related" requirement is that laws that operate on the basis of stereotypes or myths are not substantially related.[116] That rule does very little in the disparate impact context because none of the admissions criteria are likely to be entirely imprecise measures of a skill, based only on stereotypes and myths about racial groups. Furthermore, the standard essentially only ensures that the criteria are not irrational tools for admission. In order to make disparate impact analysis in admis-

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110. *See* cases cited *supra* note 79.

111. *See, e.g.*, Lunding v. N.Y. Appeals Tribunal, 522 U.S. 287, 298 (1998) (holding that state action that abridges privileges and immunities must be substantially related to an important governmental objective); Heckler v. Matthews, 465 U.S. 728, 744 (1984) (holding that gender discrimination can only be justified if it has a substantial relationship to an important governmental objective).

112. *See* H.R. REP. No. 102-40(II), at 10 (1991).

113. NAACP v. Georgia, 665 F.2d 1403, 1418 (11th Cir. 1985).

114. *Id.*

115. Requiring a stricter correlation between the criterion and necessity is not without its difficulties, however. It would be difficult to apply a consistent standard without somehow quantifying the level of precision at which a selection criterion must serve the purposes of an educational institution. Mere rationality is a clearer line, but such a standard would provide no further incentive to use nondiscriminatory policies as is already provided by considerations of administrative efficiency and institutional mission. Narrow tailoring gives disparate impact analysis bite in curing discriminatory effects.

116. *See, e.g.*, Nevada Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1979 (2003).

sions effective, the necessity standard must ensure that selection criteria are precise tools for the selection of students.

Requiring that the criteria are narrowly tailored to the purpose also incorporates the least discriminatory alternative requirement of Title VII disparate impact analysis. Narrow tailoring requires proof that there is not a less discriminatory alternative.[117] Under Title VII, once the defendant justifies the criterion by necessity, the plaintiff can show that there are less discriminatory alternatives. The burden of persuasion remains, however, on the defendant to show that the existing criterion is indeed the least discriminatory alternative for achieving the stated purpose.[118] This allocation of burdens provides an incentive for institutions to innovate in order to meet their needs equitably, instead of resting the onus of research and development on plaintiffs.[119] The plaintiff is poorly equipped to offer feasible alternatives and the institution is well equipped to innovate prior to litigation and then to justify its policy in court.[120] Disparate impact for admissions policies should therefore require narrow tailoring of the criterion to the educational purpose and thereby place that burden on the institution.

Allocating the burden in this way will have numerous policy benefits. Because schools will have a greater incentive to engage in preventive innovation, the amount of litigation will be lower. Placing the burden on the plaintiff, on the other hand, would lead to subsequent suits where plaintiffs continue attempting to find less discriminatory alternatives.[121] Demanding strict correlation and placing the burden of proving that correlation on the institution also conveys a normative message that discriminatory effect is unacceptable if it does not occur with good reason.

An application of strict necessity is open to the critique that it will be difficult for an institution to justify a disparate impact and that, as a result, it will resort to covert quotas in order to avoid litigation.[122] This concern is, however, less relevant to educational institutions than employers. Considering how legally perilous educational quotas are,[123] it is unlikely that a college or university will risk implementing a quota just to save resources. The burden of disparate impact litigation, furthermore, has

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117. *See, e.g.*, C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 392 (1994); Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 100–01 (1994); Hughes v. Oklahoma, 441 U.S. 322, 337–38 (1979).

118. *See* H.R. REP. No. 102-40(II), at 7 (1991).

119. *Id.*

120. *Id.*

121. *See* Note, *The Civil Rights Act of 1991 and Less Discriminatory Alternatives in Disparate Impact Litigation*, 106 HARV. L. REV. 1621, 1627 (1993).

122. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652 (1989).

123. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2342 (2003) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)).

a built-in sunset clause. By using a strict but effective necessity standard, disparate impact on minorities in admissions and overall socioeconomic inequality will be mollified. The basis for a disparate impact suit will, thus, be eliminated. Moreover, there will likely be a ripple effect from one successful suit, as schools are shown by example how to comply with the law.[124]

A broad definition of educational necessity implemented with precision is therefore a feasible and effective necessity standard for applying disparate impact analysis to admissions policies. This standard defers to the expertise of the school when the complexity of the issues demands, but retains its ability to eliminate unnecessary discrimination.

C. *Other Proposals*

Other conceptions of necessity have been proposed that attempt to capture and answer similar concerns, but they are not suitable for admissions processes. First, some commentators have suggested that Title VII disparate impact law should differentiate between entry-level positions and those requiring more skill.[125] One would apply a strict necessity to the former, and require only legitimacy for the latter.[126] Less competitive undergraduate admissions are perhaps the analogue to entry-level hiring, and graduate school the analogue to managerial hiring. While this proposal honors concerns about expertise by deferring to the institution when it seems appropriate, it provides no normative justification for why positions requiring more nuance in selection should be any less subject to disparate impact laws. The proposal further leaves a large and very fuzzy middle ground between entry-level positions and executives. Deference to the institution in defining necessity followed by a narrow tailoring requirement offers more consistency and therefore provides a clearer standard around which institutions can design their policies.

Two different balancing inquiries have been proposed as well. One suggests balancing the minority applicant's loss of employment opportunity with the employer's benefit from using the policy.[127] For a school a

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124. Just as law schools and undergraduate institutions were given a general model for implementing affirmative action in admissions by the Supreme Court in *Grutter* and *Gratz*, a successful disparate impact suit will yield an injunction and a judicial opinion upon which schools can model their admissions systems. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2338–47 (2003); Gratz v. Bollinger, 123 S. Ct. 2411, 2437–40 (2003).

125. Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1522 (1996).

126. *Id.*

127. Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 416 (1996); Gary A. Moore & Michael K. Braswell, *"Quotas" and the Codification of the Disparate Impact Theory: What Did Griggs Really Say and Not Say?*, 55 ALB. L. REV. 459, 492 (1991); *see also* Robinson v. Lorillard Corp., 444 F.2d 791, 798

minority applicant's loss of access to higher education would be balanced with the school's gain. How to quantify the loss of opportunity in order to accurately compare it to an institution's gain is not clear, however. Even if one could find a way to make the comparison, though, such a utilitarian analysis would reduce disparate impact law's concern for equality to simple cost-benefit analysis and thereby forsake any sense of rights. If high costs could justify allowing discrimination, the costs of discrimination would continue to fall on its victims.[128]

Another balancing approach suggests weighing the necessity of the goal against how well the criterion correlates to that goal: the more important the goal, the less correlation would be required.[129] This approach is counterproductive, however. If the goal is extremely important, and the criterion is allowed to achieve that goal in a loose fashion, the goal is not necessarily being achieved. The disparate impact would be justified despite the fact that the criterion serves the institution's purposes poorly. Like other balancing tests, this proposal also lacks feasibility. There is no consistent or quantifiable method for courts to assess the importance of the goal and then determine how precisely the criterion serves it. Lastly and more fundamentally, this approach forces courts into a realm in which they have little or no expertise—where they must assess the importance of an institutional goal instead of deferring to the institution's expertise.[130]

III. DISPARATE IMPACT ANALYSIS APPLIED

This Part first applies the proposed standard to a series of hypothetical cases. Then, it discusses some potential problems in adjudicating disparate impact claims, and proposes concrete changes to a specific admissions process.

A. *Applying Disparate Impact to Various Hypothetical Admissions Systems*

Schools have many different admissions criteria and ways of evaluating those criteria. For examples, the criteria could be objective or subjective. The process could involve only one criterion or be a

(4th Cir. 1971) (holding that a business purpose must be sufficiently compelling to override any racial impact).

128. *See* Note, *supra* 121, at 1630.

129. *See, e.g.*, Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981) (permitting a lesser showing of manifest relationship between practice and goal because the goal of safety was of great importance); Spurlock v. United Airlines, 475 F.2d 216 (10th Cir. 1973) (holding that the employer's burden of demonstrating the job-relatedness of a criterion varies with the skills required for the job and the interest in hiring qualified people); Grover, *supra* note 127.

130. *See supra* note 91.

multi-component evaluation. A multi-component evaluation could involve any combination of criteria, and the decision could be either a holistic assessment of all the criteria or each criterion could form a barrier or cut-off in a process of elimination. If the decision is holistic, such a decision could be subjective or objective. However, the variety of admissions standards is not a barrier to application of a disparate impact test.

A school might utilize a single criterion admissions process based on an objective evaluation, such as a standardized test score. If the test were not race neutral in its effect, disparate impact analysis would force the school to consider alternatives that could accurately assess qualifications, but do so without the disparate impact. A different standardized test might work, one that measures qualifications in a way that does not favor one culture over another. The school might also switch to a different criteria, like grades or class rank, or consider a multi-component process.

A multi-component admissions process presents a more difficult judicial inquiry. A multi-component admissions decision might entail a holistic decision, involve cut-offs, or both. When a holistic decision is at issue, disparate impact analysis would play out differently depending on whether the decision is based on objective weighting of each criterion combined into a total score, or a subjective decision based on the candidate as a person. A multitude of factors could influence decisions on any particular candidate—standardized test scores, grades, extracurricular activities, personal experiences beyond school, and background. One particular factor would not always carry the same weight from one candidate to another. Great numbers might win the day for one applicant, extracurricular accomplishment for another, and resonant personal experiences for another.

For a process that objectively weighs different criteria but combines them to make a holistic decision, the court could still consider each criterion as an individual barrier.[131] Although mitigated by the other criteria, each factor would have an independent effect on the admission decision that could, independently, cause a disparate impact.[132] The weighting of each factor could also contribute to a discriminatory effect, in which case, the weighting system itself would be challenged for its discriminatory effect. This difference in analysis would depend on which aspect of the policy the plaintiff could prove caused the disparate impact—the weighting system or a substantive criterion. The potential solutions to either, however, would be the same. The school could limit the scope of some factors and weight others more heavily in order to be

131. *See* Eric Lasker, *The Appearance of Justice and the Bottom Line Defense*, 99 YALE L.J. 865, 870 (1990).

132. *Id.* at 871.

more equitable, and still discern meritorious students. Further, some factors could also be discarded if unnecessary.

Some components of multi-component systems might exist as independent cut-offs. An applicant would have to meet a certain standard with regard to one criterion in order to make the cut and be considered in terms of another criterion. In such a case, each cut-off is an independent barrier to admission if it has a discriminatory effect. Each cut-off could then be scrutinized independently for disparate impact and necessity.

Further, subjective criteria, such as an essay or an interview, might also be integrated with objective factors in a multi-component process. The same solutions that are available for objective criteria are also available for subjective criteria. If they are given a numerical weight in the process, it could be lowered. Some criteria could be rejected altogether or others could be added.

B. *Problems with Adjudicating Disparate Impact Analysis*

Courts and commentators have raised concerns about both the feasibility of adjudicating such disparate impact claims and fairness to the defendant institutions in allowing the claims to be made. These concerns are for the most part, and sometimes entirely, unwarranted.

The Supreme Court has held that in a Title VII disparate impact case, when a plaintiff challenges a multi-component selection decision, the plaintiff must identify "the specific employment practice that is challenged."[133] The Court has warned that out of fairness, "[e]specially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."[134] It is possible to satisfy this concern while challenging a multi-faceted admissions process. When challenging a holistic process a plaintiff could argue that a particular factor or factors are unnecessary in light of other factors in the process that serve the same or similar purpose. The plaintiff could also specifically attack the method of weighting the factors in relation to each other. In either case, the plaintiff identifies a specific practice that causes the disparate impact.

Two prominent concerns arise when considering subjective criteria under disparate impact law. First, the assertion has been made that subjective decisions, because they are inherently colored by individual judgment, cannot be facially neutral. Therefore, the argument continues, subjective decisions fall categorically outside the boundaries of disparate impact analysis, which addresses facially neutral criteria that have a disparate

133. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988).

134. *Id.*

impact.[135] For this reason, some argue that subjective criteria can only be scrutinized for intent to discriminate.[136] This argument, however, confuses facial neutrality with objectivity. Facially neutral in the context of antidiscrimination law means ostensibly unrelated to race or other protected categories of persons. For example, writing samples or interviews are facially neutral in relation to as race and can have a discriminatory effect on minority applicants.[137]

The Supreme Court has also considered whether it is unfair to allow challenges to subjective criteria based on disparate impact because it is difficult to defend against such challenges.[138] The contention is that nuanced considerations of motivation and compatibility are never absolutely necessary, except in very exclusive application processes like graduate school programs, and impossible to defend because they cannot be scientifically validated.[139] If, however, subjective criteria were insulated from disparate impact scrutiny because of the burden on selectors, selectors could insulate every selection process from judicial scrutiny with some sort of subjective criteria.[140] Subjective criteria must therefore be included within the purview of disparate impact analysis.[141]

Disparate impact analysis can thus be applied to a wide variety of admissions criteria, as well as entire processes. While some processes may push the boundaries of disparate impact jurisprudence due to their complexity and subjectivity, most fears about proof and causation are unwarranted. Not all criteria are ultimately faulty, however. A school must be able to run an effective admissions process and a defense of necessity will protect criteria that are essential to that purpose.

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135. *See* Alfred W. Blumrosen, *The Legacy of* Griggs*: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 34–35 (1987).

136. Some lower courts similarly misunderstood challenges to subjective decisions and allowed a demonstration that there was a legitimate reason for the decision to rebut a disparate impact claim. *See id.* A showing that other members of the plaintiff's group were selected, or that members of her group were involved in the selection decision, have also been accepted as defenses. *Id.* These defenses are, however, irrelevant to a disparate impact claim because they only show that the decision was void of discriminatory intent.

137. In this sense, there is no real distinction between subjective and objective decisions for the purposes of disparate impact analysis. *See* Anthony Sanchez, *Defining the Proper Bounds of Disparate Impact Analysis: Beyond an Objective/Subjective Employment Criteria Dichotomy*, 49 U. PITT. L. REV. 657, 677 (1988). Disparate impact is meant to be applied to a situation in which a plaintiff claims that her qualifications are unnecessarily ignored or denigrated by the selection criteria. *Id.* Subjective and objective decisions can deprive an applicant of equal opportunity in an identical fashion.

138. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989 (1988) ("[Respondents] also argue that subjective selection practices would be so impossibly difficult to defend under disparate impact analysis that employers would be forced to adopt numerical quotas in order to avoid liability.")

139. *See id.* at 991–92.

140. *Id.* at 989.

141. *Id.*

C. *The Possibilities for Change: A Brief Case Study*

Since 1995, the University of Michigan's undergraduate school of Literature, Science, and the Arts (LSA) has amended its admissions system several times. These changes, taken individually, provide examples of ways in which a school can alter its admissions system that are affective of disparate impact analysis's purpose and ways that are not.

During 1995 and 1996, LSA admissions officers evaluated applications according to GPA combined with "SCUGA" factors: the quality of an applicant's high school (S), the strength of an applicant's high school curriculum (C), an applicant's unusual circumstances (U), an applicant's geographical residence (G), and an applicant's alumni relationships (A).[142] These scores were combined to produce an applicant's "GPA 2" score.[143] Admissions officials then admitted students on the basis of "Guidelines" tables, which listed GPA 2 ranges on the vertical axis, and American College Test (ACT) or SAT scores on the horizontal axis.[144] Each table was divided into cells that included one or more courses of action to be taken: admit, reject, delay for additional information, or postpone for reconsideration.[145] Applicants in the same cell were subject to different admissions outcomes based upon their racial or ethnic status.[146]

Under this system, standardized test scores would seem to play a nearly determinative role in a candidate's admission. Prior scholarly achievement and personal qualities are reduced to one variable, GPA 2, of equal value to a candidate's test scores.[147] If a racial minority typically scored lower on these standardized tests, a class of plaintiffs could sue under a theory of disparate impact.[148] They could argue that admission should not be an equal function of the GPA 2 score and standardized test score because test scores reflect disparities in wealth, test preparation, and socioeconomic perspective that disfavor minority test-takers.[149]

In 1997, LSA made changes to reflect these disparities but did so in a manner designed to simply admit minority students, rather than refine the system to be an accurate measure of qualifications independent of

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142. Gratz v. Bollinger, 123 S. Ct. 2411, 2419 (2003).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Even if race conscious preferences such as the one utilized here create an equitable bottom line, plaintiffs can still sue under a theory of disparate impact because they are denied the opportunity to compete equally with other candidates, based on the accepted criteria. *See* Connecticut v. Teal, 457 U.S. 440, 451 (1982).

149. Kidder & Rosner, *supra* note 14, at 155–60.

socioeconomic disparities.[150] LSA changed the formula for calculating an applicant's GPA 2 to include additional point values under the "U" category in the SCUGA factors.[151] Specifically, applicants received points for underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was applying (for example, men who sought to pursue a career in nursing).[152] Instead of creating a more precise system, it simply offset the racial disadvantage created by the existing criteria with express consideration of minority racial status. The system, furthermore, retained its emphasis on standardized test scores. The 1997 admissions process would thus still be vulnerable to a disparate impact claim.

For the 1998 academic year, LSA discarded the Guidelines tables and the SCUGA point system for a "selection index," on which an applicant could score a maximum of 150 points.[153] Each application received points based on high school GPA, standardized test scores, quality of high school, strength of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership.[154] Applicants could receive up to twelve points for standardized test scores; up to ninety-eight points for high school grades, strength of curriculum, and strength of school; ten points for being a Michigan resident; four points for being a child of an alumnus; up to three points for the quality of the essay; and up to five points for personal achievement such as leadership or public service.[155] Under a "miscellaneous" category, an applicant was entitled to, among other things, twenty points based upon his or her membership in an underrepresented minority group and up to two points for residency in a underrepresented state. This index was divided into ranges calling for admissions dispositions as follows: 100–150 (admit); 95–99 (admit or postpone); 90–94 (postpone or admit); 75–89 (delay or postpone); 74 and below (delay or reject).[156]

This system considers applicants in great detail and according to objectively weighted criteria.[157] Most importantly, the 1998 system finally moderates the importance of standardized test scores, making it one factor among many. The connection between SAT scores and academic per-

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150. *Gratz*, 123 S. Ct. at 2419.

151. *Id.*

152. *Id.*

153. *Id.* at 2431 (O'Connor, J., concurring).

154. *Id.*

155. *Id.*

156. *Id.* at 2419–20; Joint Appendix at 182–97, Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (No. 02-516).

157. Joint Appendix at 182–97, Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (No. 02-516).

formance is dubious[158] and its disparate impact on minority applicants is apparent. By making grades of greater importance, the system evaluates applicants relative to their surroundings rather than exacerbating socio-economic disadvantage.[159]

Several states have abandoned use of the SAT completely and instead rely on GPA and class rank.[160] Initial results from Texas's use of this system show that high school grades appear to correlate with excellent academic performance better than SAT scores.[161] Thus, by downplaying the significance of test scores and making academic performance more important, LSA made their admissions system more fair and equitable without sacrificing academic excellence.[162]

The 1998 system is still susceptible to a challenge, however, based on the apparent importance of high school curriculum and strength of the school. These factors clearly disadvantage minorities from lackluster schools and poor school districts that do not have good academic reputations and do not offer prestigious curricula like Advanced Placement and International Baccalaureate classes. The question would be whether school reputation and strength of curriculum are truly indicative of student's academic ability. Might smart students from lesser schools just begin college with a smaller base of knowledge that is a negligible factor in their ability to proceed? Or do those admissions criteria accurately indicate the strength of a candidate for admission? A plaintiff might also argue that essays should be given more weight. Why not place more weight on this intimate look into a candidate's writing ability, clarity of expression, and personality?

In 1999, LSA established an Admissions Review Committee (ARC). The ARC flagged for review applications that demonstrated that the

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158. Kidder & Rosner, *supra* note 14, at 195–96.

159. According to Kidder and Rosner:

> For example, in the last few years it was about equally as difficult for White college-bound seniors to obtain either a 600+ Verbal or 600+ Math score on the SAT as it was for them to rank in the top 10% of their high school class. In contrast, it was considerably more difficult for Black and Chicano seniors to score over 600 on a section of the SAT than to rank in the top 10% of their high school class . . . [T]he disparate impact of requiring a 600+ on a section of the SAT is roughly twice as severe as the adverse impact of requiring graduation in the top 10% of the class.

Id. at 143.

160. *Id.* at 193 nn.32–36.

161. *Id.* at 202–03.

162. Justice Scalia recently suggested during the oral arguments in *Gratz* that if the University of Michigan wanted to admit more minority students it should just set lower standards. Oral Argument at 37–38, Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (No. 02-516). It was the University's fault, he implied, for wanting to be a simultaneously diverse and elite institution. *Id.* These data suggest that no such compromise need be made.

student: (1) is academically prepared to succeed at the university; (2) has achieved a minimum selection index score; and (3) possesses a quality or characteristic important to the university's composition of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, or underrepresented race, ethnicity, or geography. After reviewing "flagged" applications, the ARC determined whether to admit, defer, or deny each applicant.[163]

Once again, LSA made disadvantage a qualification rather than reforming the facially neutral criteria to not have a discriminatory effect on disadvantaged applicants. The essence of the reform may be positive, though. One can imagine a system where, after assessing an applicant's academic qualifications in a manner that does not reflect socio-economic disparities, the school would evaluate applicants in the remaining pool broadly and holistically in light of their personal qualities. This would appear ideal for purposes of eliminating disparate impact and not infeasible or overly burdensome, as the University takes the time and effort to read essays and consider individual experiences already.

CONCLUSION

Disparate impact analysis is justified in the context of higher education because race is not yet irrelevant to competition for admission. Minority applicants who are still suffering from the effects of purposeful discrimination are at a competitive disadvantage to those who benefited from de jure segregation. Disparities in income, residential segregation, and persistent racism still disproportionately hinder the progress of individuals in the racial minority and cause a disparate impact in admissions processes.[164] Equal opportunity in education, in this light, does not begin and end with the start and stop of a proctor's watch, but involves consideration of historical discrimination and its influence on the results of otherwise neutral selection criteria.

The optimal solution to this problem is to hold schools responsible for making sure this impact only occurs when absolutely necessary to a school's legitimate purpose. If there are other criteria that can measure those factors necessary to the school's legitimate purpose, without disproportionate effect, schools should utilize them. Disparate impact scrutiny applied to admissions processes would accomplish this purpose.

The thought of anything but the current criteria being the cornerstone of admissions and merit is unnerving, undoubtedly. Standardized tests and grades are sacred monuments in the American sense of individual merit, and admission into college, or graduate or professional schools is the reward of excellence. Yet, disparate impact analysis neither calls for a

163. *Gratz*, 123 S. Ct. at 2419–20.

164. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973).

radical departure from traditional criteria nor from one's sense of merit in higher education. The traditional system may only need to be changed and perhaps broadened to encompass new yardsticks for merit and simultaneously admit a representative student body. Disparate impact analysis provides, furthermore, a boundary at which changes must end. That is, an admissions process could not so drastically be forced to change as to thwart the achievement of educational necessities.

Disparate impact analysis could be applied to admission processes through administrative action under Title VI.[165] Addressing the problem entirely through administrative action could have several policy advantages. From a plaintiff's perspective, administrative action might be attractive because the agency would put its legal and investigatory resources toward winning the claim.[166] From a policy perspective, the relationship between an agency and the school might have a more cooperative tone than between parties in a private suit. Part of the agency's role would be to achieve the purpose of the regulations and their enabling statutes, and not merely to redress an injury or punish wrongdoing. An agency can, furthermore, address the problem with a specific expertise.

Creating a private cause of action or suing under Section 1983 may for those same reasons, however, oblige more widespread and definitive change.[167] Administrative action could be weak and slow because of the cooperative relationship between agencies and the institutions they oversee. Political tides may also influence the Department of Education's zeal for social change, its available resources, and even the substantive policy goals of the agency.

Admissions policies as they now exist are not broken. They are, however, unchallenged by the law to be refined in order to provide equal opportunity. At the same time, innovation is happening, and some feasible alternatives are out there.[168] Social scientists have performed studies of admissions that have yielded encouraging results.[169] Several state university have stopped using standardized tests and rely only on high school grades.[170] Bowdoin College stopped using the SAT two decades ago and has retained the same prestige among liberal arts colleges.[171] To be sure, more research and development needs to be done before disparate impact suits in admissions can be widely successful and force major change. The

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165. *See* sources cited *supra* note 15.

166. Kidder & Rosner, *supra* note 14, at 205–06.

167. *Id.*

168. For a discussion of law school admissions and viable diversity fostering alternatives, see Michael A. Olivas, *Higher Education Admissions and the Search for One Important Thing*, 21 U. ARK. LITTLE ROCK L. REV. 993 (1999).

169. Kidder & Rosner, *supra* note 14, at 155–60.

170. *Id.* at 193 nn.32–36.

171. Andrea F. Silverstein, Note, *Standardized Tests: The Continuation of Gender Bias in Education*, 29 HOFSTRA L. REV. 669, 695–96 (2000).

law as is currently utilized, however, fails to give even sufficient incentive for schools to change. In order to make admissions more fair and equitable, disparate impact analysis should either be actively enforced through administrative action or made available to private plaintiffs.