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THE USE OF TRANSFER POLICIES FOR ACHIEVING DIVERSITY IN LAW SCHOOLS

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I. INTRODUCTION

Law schools across the country have taken affirmative steps to achieve diversity¹ in their student bodies in recent years.² Most efforts have focused on enrolling diversity students in the first year of law school. Enrolling students who *transfer* from other law schools, however, has been largely overlooked as a source of diversity students. Latino law students have also been the victims of this systemic neglect.

This Article recommends that law schools formulate and implement diversity student recruitment programs to complement their efforts with respect to diversity in the first year class.³ Part II explains the normative foundations of diversity as an objective of law school admissions policies and Part III describes the current status of student transfer policies as they relate to the inclu-

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1. The concept of "diversity" is explained in Part II below.

2. Many people have written about the status of diversity admissions to law schools. The literature contains a number of different spins on the topic. See, e.g., Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 MINN. L. REV. 1233 (1988) (disturbing account of opposition to diversity programs); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Anthony J. Scanlon, *The History and Culture of Affirmative Action*, 1988 B.Y.U. L. REV. 343 (1988) (reviewing status of current programs); David H. Vernon & Bruce I. Zimmer, *The Size and Quality of the Law School Applicant Pool: 1982-1986 and Beyond*, 1987 DUKE L.J. 204 (illustrative data); Paul T. Wangerin, *Perspectives on Legal Education, Law School Academic Support Programs*, 40 HASTINGS L.J. 771 (1989) (education theory used to evaluate law school academic support programs); Stephanie M. Wildman, *Integration in the 1980's: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625 (1990).

3. The Article is primarily concerned with the transfer of students from other schools for the beginning of their second year of law school. Transfers can also occur at the beginning of the third year, of course. Typically, however, schools do not award degrees based solely on attendance at their schools for only one year. Since transfer students usually seek a degree from the transferee school rather than from the transferor school, it is highly unlikely that there will be very many diversity student transfers for the third year of law school.

sion of diversity students in law schools.⁴ Part IV sets out the potential benefits and costs of such programs and Part V identifies some of the administrative concerns that should be considered in formulating and implementing such programs.

II. DIVERSITY AS A NORM IN THE LAW SCHOOL SETTING

Diversity in the law school setting has two fundamental normative dimensions. The first dimension is enrichment. The life experiences and resulting values of those who work in the law play a significant role in the interpretive task of bringing law into being. Through students, lawyers, professors, judges and legislators, law simultaneously describes the society in which it operates and prescribes standards of conduct for those it governs. If law should be representative of the society in which it operates, then it is most legitimate when a broad spectrum of social values is represented among students of the law. Similarly, if the law's dictates are most likely to be followed when those who must do so have a stake in its creation, then law is also most effective when it is fairly representative of the experiences and values of the entire society in which it operates. Inclusion of students and professors of diverse backgrounds thus enriches the law school, the legal profession, and society in general by helping achieve that legitimacy and effectiveness.

The second dimension of diversity consists of progress toward social justice. Some individuals cannot take advantage of a legal education because of insufficient resources or because they have not had a fair opportunity to develop their analytical skills sufficiently to obtain the grade point average or law school admission test scores necessary for admission to law school. Sometimes this lack of preparation is the result of physical challenge or economic disadvantage. Sometimes economically disadvantaged status is itself partly the result of historical discrimination based on race, culture, gender or other immutable and suspect traits. There is surely some "enrichment" diversity to be gained from including students with such backgrounds in law schools: the ability to overcome such obstacles certainly evidences a perspective necessary to the completeness of the law. Any special

4. This Article does not address the legal basis for affirmative action programs. For a recent examination of the requirements for affirmative action programs in the educational setting, see *Podberesky v. Kirwan*, 764 F. Supp. 364 (D. Md. 1991), *rev'd*, 956 F.2d 52 (4th Cir. 1992) (programs must be narrowly tailored to remedy present effects of discrimination); for recent scholarly commentary, see Michael A. Olivas, *Legal Norms in Law School Admissions: An Essay On Parallel Universes*, 42 J. LEGAL EDUC. 103 (1992); Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323 (1990); Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Non-white Underclass*, 78 GEO. L.J. 1929 (1990).

consideration given to such students is thus partly an adaptation by the law school to benefit itself, the law, and the legal profession. The quintessential concern for social justice in law school diversity programs, however, is the desire to distribute social benefits fairly. A law school education is a benefit generated at least in part with resources contributed by the broader community in the form of tax exemptions, financial aid and public regulation. It is unjust to prevent people from taking advantage of that benefit because of factors beyond their control. Therefore, law schools need to take such factors into account in order to achieve social justice in diversity.

III. CURRENT STATUS OF LAW SCHOOL TRANSFER POLICIES AS THEY RELATE TO DIVERSITY STUDENTS

Existing law school policies with respect to in-transfer of students from other schools vary in the extent to which they consider the diversity of students from transferee schools. These variations track very closely the differences among law schools and the diversity of student bodies in the first year of law school. Thus, some schools take a passive position, focussing their transfer decisions on predictors such as the first year law school grades, class standing, undergraduate grade point average (GPA) and Law School Admission Test (LSAT) scores. Personal statements and letters of recommendation are also considered. Transferee schools also consider the relative standing of the prospective transferor school. Schools in this passive position consider diversity status a supplemental characteristic of the prospective transfer student, not a central attribute to which positive weight should be accorded.

Other schools assume a more active posture by considering the diverse background of a prospective transfer student as a positive factor. A very limited and unscientific survey,⁵ however,

5. I sent a questionnaire to thirteen California schools in the Spring of 1991. The survey is limited and unscientific. The cover letter read as follows:

A couple of years ago I was a member of the AALS [Association of American Law Schools] committee that put on a conference on increasing the numbers of diversity students in law schools. One of the aspects of recruitment that we did not focus on at that time was the *transfer* gateway into law schools.

I would like your help in compiling some preliminary information on the procedures and criteria for transfer used by law schools. This information would help me decide whether a broader survey might be worthwhile. (Of course, I would work with the LSDAS [Law School Data Admission Services] and similar organizations on such a broader survey.)

Please send me the following *as soon as possible*:

1. An application for transfer to your school;
2. A description of the procedures and criteria for admission as a transfer student; and

indicates that even among such schools, very few have an affirmative, systematic process for using transfer policies to include members from diverse backgrounds in their schools.

There are few transfer slots in any given year, and sometimes there are none. In light of the chronic underrepresentation of diversity students at law schools, especially after first year attrition takes its toll, however, any source of additional diversity students is worth serious consideration. Moreover, in light of the relatively small numbers of diversity students in law schools, even a small increase in the absolute numbers of diversity students is likely to have a major impact on the relative level of diversity in the schools.

If factors such as undergraduate GPA, first year law school grades, and LSAT scores remain the exclusive bases upon which transfer decisions are made, then schools are not likely to greatly increase the numbers of diversity students through in-transfers under existing programs. Where the diversity of student bodies is a genuine concern and an affirmative consideration, it must be pursued systematically, as any other law school priority. This requires a reexamination of transfer policies in order to maximize their usefulness as additional sources for diversity students.

IV. THE BENEFITS AND COSTS OF DIVERSITY-CONSCIOUS LAW SCHOOL TRANSFER POLICIES

The primary effect of changes in transfer policies in order to achieve greater numbers of diversity transfer students is likely to be positive. A transferee school would benefit by being able to enroll a proven commodity. Law schools must make their first year class admission decisions based on predictions about how well students will do in their law school careers. In contrast, transferee schools would have the benefit of first year grades as indicators of the abilities of diversity transfer applicants. Thus, schools would be assuming less "risk" on transfer applicants than they do with respect to first year admittees. Factors such as the relative performance of transfer applicants in their first year, the rigor of the transferor school and the recommendations of professors at the transferor school can all be used to supplement this information, as long as those additional factors are not allowed to override consideration of diversity status and demonstrated performance in the first year.

3. Any other information you think might further explain your transfer policies as they relate to diversity students.

All 13 schools eventually responded. Only two indicated that the diversity of prospective students' backgrounds was a factor in the admission of transfer students.

The value of transfer to the diversity students is that they need not give up hope of graduating from a "better" school if they do not get admitted to such a school for their first year of law study. Moreover they would have an additional incentive to perform well in their first year regardless of where they begin their law studies if they have a real opportunity to transfer to their school of choice after their first year.

Transferor schools may perceive a down side which is arguably more apparent than real. Such schools may fear that aggressive transfer policies by other schools may result in the loss of their top diversity students. Although this may be a possible result of aggressive transfer policies by other schools, those effects can be minimized through increased first year diversity student recruitment and enrollment by all schools. In the same way that schools over-recruit for the first year class in order to assure that their overall student population remains stable, schools can over-recruit for diversity students in the first year class to assure that a critical number of such students will remain for subsequent years, in spite of any additional attrition due to transfers. An ancillary benefit of such strategies will be that additional numbers of diversity students will be enrolled at all schools.

Another, perhaps more troublesome, side effect for transferor schools may be the perception that diversity students will want to "move up the ladder" by moving to another school. It is to be expected that each school may perceive itself as being of sufficiently high caliber that students should not want to leave. That consideration, however, is a function of the academic marketplace to which all schools are now subject. Students, faculty, and the general public already have a perception of the hierarchy among schools.⁶ Nondiversity students have always taken advantage of moving to what they perceive to be better schools and law schools have historically admitted such students as transfers based on conventional criteria. The rules of the marketplace of schools should not be suspended or somehow rendered less valid for diversity students or for the objective of achieving law school diversity.

It can be argued that the transfer strategies suggested herein are a zero-sum game, merely a redistribution of diversity stu-

6. When I first wrote this Article, I thought that schools would be less paranoid about (a) whether there is a hierarchy among schools, and (b) their relative position in whatever hierarchies may be generally acknowledged to exist. After discussing the Article with colleagues at various schools and reviewing reactions to initial drafts of this Article, I am convinced that concerns about hierarchy are quite prevalent. To the extent that diversity student transfer policies acknowledge—even if only implicitly—that *students* are aware of the relative standing of schools in the pecking order and act accordingly, such transfer policies may be perceived as threatening.

dents from lesser schools to elite schools, without a net gain. Yet if we acknowledge the hierarchy among schools, that students are aware of the existence of such hierarchy, the relative standing of schools in that hierarchy, that students are rational maximizers who will seek the *best* schools for their degrees, then it makes sense for transferor schools to take this into account in their enrollment policies at the outset. Thus, if the transfer policies suggested in this Article are adopted, then all schools, with the possible exception of the handful of universally acknowledged top schools, will view themselves as possible *transferor* schools and will allow for out-transfers by recruiting and enrolling more diversity students to begin with. The handful of top schools can probably rest on their laurels, since they will surely be able to recruit and retain significant numbers of diversity students in the first year, *because* they are perceived as being top schools.

V. THE WAYS OF CHANGE—TOWARD A MODEL PROGRAM

A diversity student transfer program can be modelled on existing first year diversity student programs. As in such programs, recruitment, admission and financial aid must be taken into account.

A. *Recruitment*

Recruitment of diversity transfer students can be an adjunct of existing recruitment and admission strategies. Materials advertising a school for purposes of enrollment to the first year could include description of the school's diversity transfer program. Such information might thus be included in the school catalogue, flyers or application packets.

A feature unique to the recruitment component of transfer programs might be that applicants *not accepted* for admission to the first year class could be informed that the school will nevertheless be anxious to reconsider their applications as transfer students at a later date if they remain interested in attending the school. Naturally, some students might be embittered by a rejection and be unreceptive to the invitation to apply for a possible second rejection. Others, however, might view the gesture in a more positive light and become motivated to excel in the school which they ultimately attend for their first year of school study.⁷

7. Of course, this group of students must not be led to believe that the invitation to apply for transfer is an assurance of admission. Accordingly, such invitations must be artfully formulated and conveyed.

B. *Admission*

Unlike students entering in their first year, transfer diversity students will already have a track record at another law school. If law schools only consider the top two or three students from any law school in the transfer applicant pool, without giving additional weight to diversity status, then the increase in the numbers of diversity transfer students may not be as significant. Although consideration should be given to predictors such as first year grades and class standing, undergraduate GPA and LSAT scores, additional attention must be given to seeking out diversity students during the transfer student admission process.

In addition, transfer students are ordinarily accorded advanced standing in the transferee schools, and that practice should not differ with respect to diversity students.

Existing law review selection procedures usually provide for consideration of membership during the summer after the first year. Transfer decisions are usually made about the same time after second semester first year grades are compiled. Diversity transfer students might be provided with the opportunity to compete for participation on the transferee law school's law review as an additional inducement to transfer and in order to avoid the possible prejudice to such students if they would otherwise have been eligible for the transferor school's law review.

C. *Financial Aid*

One of the greatest obstacles for diversity law students is money. Financial aid should be a significant component of diversity student transfer programs. While law schools should not engage in the unseemly habit of college or professional sports teams of luring people with money, the financial need of diversity transfer students should not be overlooked as a substantial obstacle to student transfer and, by extension, to law school diversity.⁸

VI. CONCLUSION

We should explore every opportunity to increase diversity in our law schools, including transfer policies which have been overlooked as potential avenues for increasing the diversity of law school student bodies. The recommendations made here point

8. My brief survey of California schools showed a more or less consistent policy of denying law school financial aid to transfer students, at least for their first semester at the transferee school.

the way toward exploiting this rich source of diversity students. Accordingly, Latino law students can expect to benefit from the implementation of such efforts.