

A Diversity of Ideas

Religion and Politics Are Better Criteria For Admissions Than Ethnicity

By Mitchell Kelter

Justice Lewis Powell, who passed away last month, will probably be best remembered for his deciding vote in *Bakke v. Regents of the University of California*, the 1978 landmark affirmative action case. His opinion contrasted the illegitimate goal of ethnic diversity for its own sake with the legitimate goal of a "genuine diversity" of "experiences, outlooks and ideas." A broad array of ideas is especially important in law schools, where most classes involve debates on controversial issues of public policy.

As courts have grown skeptical of universities' asserted need to offer racial preferences to remedy specific past discrimination, the "diversity" rationale has assumed new prominence. After the UC regents and the electorate voted in Proposition 209 to bar the use of racial preferences, UC Berkeley's Boalt Hall School of Law school devised a new method to foster diversity. It favors applicants "whose 'voice' might contribute to classroom discussions." The question is how Boalt can determine from applications which students will provide such distinctive voices.

As Powell's opinion noted, trial attorneys who must evaluate prospective jurors' attitudes with minimal information face a similar challenge. Because of this parallel, a recent California Court of Appeal opinion concerning jury selection, *People v. Martin*, 64 Cal.App.4th 378 (1998), may assist law school admissions boards. *Martin* held that although an involuntary characteristic like race or sex cannot be used to infer a person's outlook, the use of a voluntary characteristic, such as religious or political affiliation, may be proper.

The first part of *Martin* reiterated Supreme Court precedent: An attorney may not use a juror's race or sex as a proxy for his or her attitudes or beliefs. In the aggregate, women view rape or domestic violence evidence more sternly than do men; blacks consider police testimony more skeptically than do whites. But to assume any individual juror thinks a certain way

because of race or sex indulges an impermissible stereotype. Whether to hire or fire, drawing inferences about an individual on the basis of group membership is the essence of prejudice.

The second half of *Martin* broke new ground in allowing a prosecutor to dismiss a juror because of religious affiliation. The prosecutor argued the denomination's norms discouraged adherents from judging other people, which could (and often did) interfere with their duties as jurors.

The distinction between impermissible race- and sex-based inferences and permissible religious-based inferences, although troubling, makes sense. The former are based on generalizations that more people in the group think one way rather than another. By contrast, most people who identify with a religion do so because they personally embrace all or most of its tenets. Religion, unlike race, offers a window into the beliefs of the individual.

Martin suggests that religious-based inferences are more lawful

(and accurate) than race-based ones, especially as Proposition 209 does not mention religion. Students who have studied their community's writings can offer "distinctive voices" in classroom discussions of assisted suicide, abortion, pornography, drug use and, of course, the First Amendment's religion clauses. As UCLA Law School Professor Eugene Volokh has observed, growing up Sikh or Buddhist, or even a traditional Jew or Catholic, can shape one's outlooks and ideas more than ethnicity.

Religious-based preferences could invite fraud, but so could the favoring of any factor relevant to producing a distinctive voice. Powell's opinion expressly recognized the benefits of interaction between students of different races and religions.

But even religious affiliation is an imperfect proxy for a person's ideas. The *Martin* court explained it is surely proper for an attorney to consider a juror's political affiliation, which may provide the most direct evidence of the person's opinions. Accordingly, schools can most efficiently maximize ideological diversi-

ty by considering applicants' political affiliations. Diversity must be measured in context; few groups are so "underrepresented" at Berkeley as Republicans, and their increased presence would surely enliven classroom debates.

Reasonable minds remain divided over whether the "robust exchange of ideas" is such a compelling interest that it justifies the lowering of academic standards. If it is, it is more fair and more effective to consider evidence of how a person thinks rather than how that person looks in deciding which students will enhance a school's diversity of outlooks and ideas.

But if a diversity program seeks to maximize a diversity of ethnicities rather than ideas, it is not based on the legacy of Justice Powell, who held such a plan "would hinder rather than further attainment of genuine diversity."

- WHITE
- BLACK
- YELLOW
- RED
- BROWN
- OTHER

MAGNRE

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