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REVIEW ESSAY

Getting Under the Skin of "Diversity": Searching for the Color-Blind Society, by Larry Purdy. Minneapolis, MN: Robert Lawrence Press, 2008, 255 pp., $16.95 paperback.

River Views

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Larry Purdy is one very distraught attorney. As trial counsel for the plaintiffs Barbara Grutter and Jennifer Gratz in the two University of Michigan affirmative action cases, he had a close-up view of how several members of the U.S. Supreme Court, including the court majority in the Grutter decision,[1] willfully disregarded both the color-blind imperative of the Constitution's Equal Protection Clause and the plain meaning of Title VI of the 1964 Civil Rights Act prohibiting racial discrimination in government-funded educational institutions.

In *Getting Under the Skin of "Diversity": Searching for the Color-Blind Society*, Purdy refutes the reasoning behind the court majority's opinion in *Grutter* and offers an extended treatment of the mischief that ensues when the color-blind ideal is dispensed with in university and professional school admissions in the name of alleged social benefits such as "diversity." Much of the book takes aim at William Bowen and Derek Bok's *The Shape of the River: Long-Term Consequences of Considering Race in University Admissions* (Princeton University Press, 1998), the academic establishment's unofficial defense of racial preference policies. This study played a central role in convincing Sandra Day O'Connor, the key swing vote in the Court's 5–4 *Grutter* majority, to uphold the concealed quota system at the University of Michigan Law School, which kept Barbara Grutter out of its entering class.

One of the more effective techniques Purdy uses to undermine the case for affirmative action in higher education is to quote statements made earlier by Bok and O'Connor that seem to contradict—or at least to sit in uneasy tension with—their later support for racial preferences. Both writers had

[1] *Grutter v. Bollinger*, 539 U.S. 206 (2003).

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previously drawn attention to some of the serious harm that can ensue when racial preferences are employed, even for allegedly benign purposes. Here, for instance, is just a sample of the statements Purdy cites from Bok's writings:

> The available data should caution admissions officers against a policy of awarding excessive preference to minority applicants in an overzealous effort to achieve impressive percentages of black and Hispanic students. Some institutions may indulge in this practice, either from noble sentiments or to satisfy the demands of vocal minority groups. Regardless of motive, there is little justification for admitting minority applicants with scores [on the LSAT] 150 to 200 points below the average for white students. Differences of this magnitude may eventually make a substantial difference in the ability of students to succeed in their profession while threatening to impose handicaps and psychological burdens that will impair academic performance. This point seems particularly telling in the case of professional schools that are already enrolling proportions of blacks or Hispanics greater than the percentage of these minorities in the national applicant pool. Now that so many institutions have adopted preferential policies, such practices threaten to diminish the number of remaining minority applicants to a point that will force less prestigious schools to run the risk of making even more drastic concessions in the admissions process if they wish to obtain a racially diverse class.[2]
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> By awarding a heavy preference to minority applicants [universities] may actually sap the incentive of these students, since they know that they do not need to receive the highest grades to gain admission to the best graduate and professional schools. (169)
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> It is a bitter lesson indeed to discover that...preferential admissions policies and affirmative action laws quickly provoke humiliating debates questioning the native intelligence and intellectual competence of one's race....The end of discrimination in law has brought educated blacks more directly in contact with...racial stereotypes that are highly personal....Worst of all, contemporary America has placed

[2]Larry Purdy, *Getting Under the Skin of "Diversity": Searching for the Color-Blind Society* (Minneapolis, MN: Robert Lawrence Press, 2008), 171. Subsequent references will be cited parenthetically in the text.

> educated blacks in a confusing shadow world where it is hard for them to know whether the setbacks they experience are due to their own shortcomings or to racial discrimination, and equally hard to tell whether, when they advance, they have truly excelled or only been moved ahead as a grudging concession to comply with some legal requirement. (179–80)

In these few paragraphs appear several of the themes stressed by leading critics of racial preferences including Thomas Sowell, Shelby Steele, John McWhorter, and Richard Sander. At various places in *Getting Under the Skin of "Diversity"* Purdy cites all these critical writers, but as co-author of the most influential defense of racial preferences in undergraduate admissions, Bok in one sense stands out among the rest. One clearly gets the impression that the former Harvard president supports racial preferences only with great uneasiness, and that he clearly realizes their many pitfalls. (In a section of *Beyond the Ivory Tower*, which Purdy does not quote, Bok strongly criticizes the use of race in the appointment of university faculty and indicates his opposition to giving very large racial preferences to student applicants lest those in the beneficiary group cluster academically near the bottom of a university or professional school class and thus reinforce negative stereotypes of the group's abilities).[3] There is perhaps no more effective rhetorical technique than to quote against an advocate's controversial claim, conflicting, offsetting, or qualifying claims that the advocate himself has made on other occasions, and Purdy uses this technique with great effectiveness against the co-author of *The Shape of the River*.

Purdy uses a similar technique in criticizing Sandra Day O'Connor's employment of the diversity-enhancement rationale—one she takes over from Lewis Powell's controlling decision in the *Bakke* case—to defend the preference program at the University of Michigan Law School. Here are some of the things O'Connor had to say in decisions before *Grutter*:

> At the heart of the Constitution's guarantee of equal protection lies the simple command that Government must treat citizens "as individuals, not as 'simply components of a racial, religious, sexual or national class.'" (*Metro Broadcasting, Inc. v. F.C.C.*)

[3] Derek Bok, *Beyond the Ivory Tower: Social Responsibilities of the Modern University* (Cambridge, MA: Harvard University Press, 1982), chap. 4, 91–115.

> The dangers of [racial] classifications are clear. They endorse race-based reasoning and the conception of a Nation divided into racial blocks....Such policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution. (*Metro Broadcasting, Inc. v. F.C.C.*)

> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. (*City of Richmond v. J.A. Croson*)

Who would imagine that a judge affirming such principles regarding the Fourteenth Amendment's Equal Protection Clause could bring herself to support a rule of law so open to manipulation and the abuses of racial preferencing as the race-as-a-plus-factor rule in university admissions? Who would imagine that such a judge would affirm the constitutionality of a *de facto* racial quota system that in effect guaranteed to underrepresented minority applicants at the University of Michigan a minimum of approximately one-eighth of the seats in the entering law school class?[4] It would be an understatement to say that Purdy is disappointed with O'Connor's *Grutter* decision. He sees it as a constitutional travesty and a betrayal of O'Connor's own highest principles—the motives for which Purdy can't quite fathom, though he believes they have something to do with the elitist insulation of O'Connor (and much of the rest of the Supreme Court) from the values and concerns of ordinary Americans like Barbara Grutter.

Getting Under the Skin of "Diversity" brims with quotations

[4]Attorneys for the University of Michigan Law School rejected the claim that the school employed anything like a racial quota system, but honest statistical analysis revealed otherwise. University advocates spoke of the law school's goal as that of achieving a "critical mass" of underrepresented minorities (primarily blacks, Hispanics, and Native Americans), but were vague about the meaning of this term. Yet it was clear from examining acceptances that the law school had an obvious numerical target (a.k.a. "quota") in mind of an entering class that was at least 10 to 12 percent "underrepresented minorities."

To achieve this goal huge racial preferences had to be given. But since the law school did not employ the more transparent numerical racial rating system employed at the undergraduate institution, the result of the two Michigan affirmative action cases was split. The undergraduate affirmative action program reviewed in *Gratz v. Bollinger* was declared in violation of the constitution's Equal Protection Clause, while the law school's equally race-conscious but less transparent system was constitutionally upheld by virtue of O'Connor's swing vote. (On the law school's claims about race and their statistical dubiousness, see Purdy's "Prelude: *Bakke* Revisited," *Texas Review of Law and Politics* 7 [Spring 2003]: 315–84.)

and citations of affirmative action critics (and supporters), though for a critique of its kind it suffers from a shortage of supporting survey research and statistical data. An exception is a revealing survey Purdy reports of the retrospective assessments of Michigan Law School's alumni. A representative sample of law school graduates from 1970 to 1996 were asked to rate on a sliding scale from "no importance" to "a great deal of importance" the value to their classroom experience of seven items: faculty abilities as teachers, faculty abilities as scholars, being called upon in class, intellectual abilities of classmates, ideological diversity of classmates, gender diversity of classmates, ethnic diversity of classmates. Although all these items were given at least a middle-range score, "ethnic diversity of classmates," and "being called upon in class" tied for *last* in the retrospective alumni ratings. "Faculty abilities as teachers" was rated first, while "intellectual abilities of classmates" ranked a close second.

Although Purdy doesn't say so, the degree of importance that law students place on black/white and black/Hispanic diversity in their classroom experience may be substantially overstated by the "ethnic diversity" question in this survey. Given that respondents value so highly the "intellectual abilities" of their classmates, whites previously unfamiliar with Asians or Jews would be likely to think of their new exposure to numerous bright Jewish and Asian classmates as a positive kind of ethnic diversity, while the diversity produced by exposure to black and Hispanic law students, many of whom would be among the very lowest academic performers in their classrooms, would be viewed more negatively.[5] A question that combined the two types of diversity is likely to elicit more positive responses than a question that asked more specifically about black and Hispanic diversity. Yet it is the latter kind of diversity that forms the basis of support for those defending racial preference policies, since Asians and Jews typically receive no racial preferences.

What comes across very strongly in *Getting Under the Skin of Diversity* is that Purdy is one very disappointed advocate. And the reason for his

[5]In his excellent study, *Choosing Elites: Selecting the Best and Brightest at Top Universities and Elsewhere* (New York: Basic Books, 1985), economist Robert Klitgaard found that first-year grades for black students at ten elite law schools averaged at the *eighth* percentile of all grades (i.e., the bottom decile). "The bottom of the class at these law schools," Klitgaard writes, "was largely made up of black students" (162). Klitgaard's study is now twenty-five years old, but the enormous gap in grades he documents does not seem to have dramatically changed. (On black performance in law schools more recently, see Richard H. Sander, "A Systematic Analysis of Affirmative Action in American Law Schools," *Stanford Law Review* 57 (November 2004): 367ff.

disappointment is closely tied to Purdy's belief that America's highest principles—including the principle of "equality before the law," Justice Harlan's majestic affirmation that "our Constitution is color-blind," and the promise of the American Dream—have been slighted by the U.S. Supreme Court in the name of "diversity." Developed by guilty whites of the privileged classes, this "diversity" involves a very peculiar social engineering principle that in practice has a very restrictive meaning that comes close to "We must have a certain percentage of blacks and Hispanics in our entering classes."

Purdy is most of all angry because of what has been done to people like Barbara Grutter, whose situation he movingly describes in a speech appended to the end of the book:

> As a result of this decision, the door to Michigan's law school has been closed and locked in Barbara Grutter's face. Barbara, who as a young girl was raised in a culture where higher education for young women was not highly valued, would have brought a truly unique form of diversity to the Law School. I suspect it is the sort of diversity which is entirely missing in most law school classrooms today. At the time Barb applied, she was already a wife, and the mother of two home-schooled sons. The road which she traveled to obtain higher education took her first, not to Harvard or Stanford, but to a local community college in Grand Rapids, Michigan, and then on to a state university where she eventually graduated with high honors. Indeed, Barbara's personal quest for higher education is the very exemplar of what America's promise *should* be all about.
>
> Yet now, Barbara and thousands of other men and women innocent of any claims of discrimination on their part, have been told by our highest Court that no matter what their personal hardships, no matter what obstacles they may have overcome, no matter what cultural barriers they have had to fight through, the protections afforded to each citizen by the Fourteenth Amendment and the simple language of the Civil Rights Act of 1964 do not extend to them—solely because of their skin color. Their right to equal treatment under our Constitution has been declared expendable in order to further a concept called "diversity." (244)

Although there are a number of small criticisms that one can make of *Getting Under the Skin of "Diversity"*—for instance, its lack of an index and frequent repetitiveness— I want to make several substantial criticisms dealing with Purdy's treatment of "alternatives" to race-based admissions. In constitutional law many judges, including Sandra Day O'Connor, adhere to the view that racial categories, even those purportedly used for "benign" purposes, must be held to the highest "strict scrutiny" standard of constitutional review. Under this standard, actions by the state, including state-supported educational institutions, must justify the use of a racial categorization on the grounds both that (a) it furthers a truly "compelling" state interest, and (b) there are no non-racial means of achieving the same purpose. Whether the existence of a state-supported elite law school is a *compelling* state interest is one the Supreme Court justices quarreled over in the Michigan case (many states seem to get by without supporting *any* state law school, no less an elite state law school). But if one accepts that a state-supported law school or state-supported elite university (like the University of Michigan at Ann Arbor or the University of California at Berkeley) further compelling state interests, and in addition, that having more underrepresented racial and ethnic minorities in such institutions is similarly compelling, the constitutional question becomes whether or not it is possible to achieve such a goal in a manner that does not require racial classification and racial preferences.

Purdy believes that there are good means of achieving greater representation of underrepresented groups like blacks and Hispanics on college and professional school campuses without recourse to racial categorizing or racial preferencing. He gives as examples the "percentage plans" in Texas and California, whereby a certain percentage of the top graduates of each public high school in the state (10 percent in Texas, 4 percent in California) are assured places in the state universities regardless of how well the students fare on standardized tests in comparison with other students in the state or with test-takers nationally. The top-ranked students from even the lowest-achieving all-black or all-Hispanic high schools are thus assured a place in state universities rather than having to attend a less prestigious community college or lower-ranked four-year institution.

But no matter how clever administrators may be in thinking up ways to get more underrepresented minority students on elite university

campuses without specifically identifying them by race, the fact remains that if lower-scoring groups come to be represented in proportions approaching their representation in the general population—the unstated goal of many administrators—there will be a huge gap in terms of academic preparedness and capacity for advanced work between the targeted groups and others. Percentage plans such as those in Texas and California may actually increase this racial performance gap, since they require universities to accept a certain percentage of students from even the most dysfunctional public high schools in which the valedictorian may barely have achieved a fiftieth percentile score on the SAT or other national exams.

Given the huge and persistent academic achievement gap between racial and ethnic groups in America—Ashkenazic Jews usually at the top; Japanese, Chinese, Koreans, and certain other Asian groups rapidly challenging them for the top spot; most Euro-American groups situated somewhat below the top groups; Latino groups usually found *much* below the top groups; and African Americans lower still—any system of apportioning seats in elite universities and professional schools that seeks population proportionality will fly in the face of academic merit and achievement whether it uses specific racial criteria or some suitable, ostensibly non-racial proxy. When students of vastly different intellectual aptitudes and attainments are put together on the same university campus, and when these differences statistically correlate with race and ethnicity, most of the mischief we have come to understand as part and parcel of "race-sensitive admissions" inevitably ensues—e.g., stigma reinforcement, stereotype threat, feelings of group inferiority and superiority, self-segregated campus activities, heightened racial sensitivities, racial resentments, etc.

Purdy seems much too optimistic in his apparent belief that black and Hispanic representation in colleges and professional schools can be achieved to the degree that academic administrators want without creating huge achievement and performance gaps among those brought together on the same college campus. A quick look at SAT scores over the past several decades tells a sobering tale. While there was encouraging progress during the 1970s and 1980s in terms of black performance relative to whites, this came to a halt by the early 1990s, and the situation has never improved.

For example, the following are the average combined math and verbal scores on the SAT for whites, Asians, and blacks for the years, respectively, 1987, 1997, and 2007: whites: 1038,

1052, 1061; Asians: 1020, 1056, 1092; blacks: 839, 857, 862. One sees a small upward trend over the twenty-year period for all groups, though Asians have made substantially more progress than blacks and whites, who have boosted their scores by just 23 points, while Asians raised theirs by 72. Hispanics have fared only moderately better than blacks, at least if one considers the largest Hispanic groups, including Mexican Americans and Puerto Ricans, rather than some of the higher achieving but much smaller groups like the Cubans. In the years 1987, 1997, and 2007, Mexican-American SAT-takers averaged, respectively, scores of 912, 909, and 921—far below the white and Asian average and only moderately better than the black average.[6]

Statistics of this kind actually understate the gap between the lower-scoring black and Hispanic groups and the higher-scoring whites and Asians, because a higher proportion of high school students in the lower-scoring groups drop out before their junior and senior years, when the SAT is normally taken. Were these students to stay in school in the same proportion as whites and Asians and take the SAT at the same rate, the average of their group would no doubt significantly decline. And the gaps shown on the SAT are by no means peculiar to that test.

Whenever we get reliable ethno-racial breakdowns of test score results—whether of the National Assessment of Educational Progress (NAEP), the Law School Admissions Test (LSAT), the Medical College Admissions Test (MCAT), etc.—we generally see the same ethno-racial pattern as with the SAT. And many dozens of studies going back more than forty years have demonstrated conclusively that standardized tests do not as a rule underestimate how well black and Hispanic students will fare in the classroom—in fact, these studies usually predict that such students will achieve better grades than they actually do.

Whether there is a problem here and what is to be done about it is a topic for another day. But if we want to enshrine the color-blind ideal that Larry Purdy (and the present reviewer) so earnestly support, we must acknowledge that in a free society racial and ethnic groups will almost never perform in any competitive arena—be it academics, sports, finance, entertainment, small business, etc.—in terms of population-proportional outcomes. Groups differ too much in talents, traditions, energies, and focus—not to mention dysfunctional pathologies and

[6] See National Center for Education Statistics, *Digest of Education Statistics*, table 134, http://nces.ed.gov/programs/digest/d07/tables.

other impediments to achievement—to expect otherwise.

What we need today is a new meaning of "diversity" that comes to represent our tolerance for, and mosaic appreciation of, the fact that whenever careers are open to those with talent, energy, and the backing of their families and identity groups, diverse outcomes will ensue. That so many Jews hold prestigious chairs in medical schools and law schools; that so many engineering professors are Asian American and a walk through the MIT and Caltech campuses seems to some like an excursion through Bombay or Hong Kong; that the NBA looks like an African-American family reunion and the NHL like a conclave of Canadians and Russians; that the Greeks own so many of the restaurants, the Sikhs so many of the gas stations, the Gujaratis so many of the motels and Seven-Elevens, the Italians so many of the pizza parlors and barber shops—these facts in a truly diversity-affirming society should be the basis of celebration, a celebration that we are a free society and do not permit our public wells to be contaminated by the social poison of ethnic jealousy, spite, and envy, or the hypocrisy of privileged whites who to assuage their guilty consciences give away the jobs and educational opportunities of people like Barbara Grutter and others less privileged than themselves.

Purdy is clearly correct that the U.S. Supreme Court has a major role to play in preserving the color-blind ideal, and that in the *Grutter* case, by a narrow 5–4 decision, it let the nation down. *Getting Under the Skin of "Diversity"* reflects the disappointment of someone energetically and philosophically engaged in the struggle to preserve our nation's highest ideals and to stand up for the Barbara Grutters of America, whose pleas fall on silent ears among so many of our nation's elite.[7] One can only hope that with the replacement of Sandra Day O'Connor by a justice perhaps more sympathetic to the dissent's reasoning in *Plessy*, a 5–4 majority may be obtained to enshrine the color-blind ideal in our nation's basic law. If that day should come Larry Purdy and the rest of us will be able to proclaim—with pride and conviction—that "our Constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[8]

[7] Purdy's law firm took on the Grutter case *pro bono*.

[8] *Plessy v. Ferguson*, 163 U.S. 537 (1896), Justice Harlan dissenting.