

# Beyond the *U.S. News* Index: A Better Measure of Law School Diversity

*J. T. Manhire\**

I. INTRODUCTION.....	1
II. BENEFITS OF DIVERSITY .....	2
III. MEASURING LAW STUDENT DIVERSITY .....	4
A. IDENTITY DIVERSITY .....	5
B. EXPERIENTIAL DIVERSITY.....	6
C. TRAINING DIVERSITY.....	7
IV. COGNITIVE DIVERSITY INDEX METHODOLOGY .....	7
V. CONCLUSION .....	8
APPENDIX.....	10

## I. INTRODUCTION

The *U.S. News & World Report* publishes a diversity index along with its annual ranking of U.S. law schools.<sup>1</sup> Race and ethnicity are the only factors the magazine uses to measure law school diversity. But is this a meaningful measure of student difference? Are race and ethnicity all that count or are there other differences that contribute to a richer educational experience for students and better outcomes for law schools? In a 2011 *Iowa Law Review* article, Kevin Johnson argues that law school diversity is not limited to only race

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\* Director of Program Development, Texas A&M University School of Law. The author thanks the very helpful editorial staff at the *Iowa Law Review*. All analyses, conclusions, opinions, proposals, and mistakes belong to the author alone.

1. *Law School Diversity Index*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-school-diversity-rankings> (last visited Nov. 13, 2015).

and ethnicity.<sup>2</sup> He further argues that law school diversity, defined broadly, is critical to the success of legal education, both for the students and the institutions that serve them.<sup>3</sup>

Yet, the epistemological question remains: How do law schools know how diverse their student bodies are? If law student diversity is more than just racial and ethnic diversity, then the current *U.S. News* index is incomplete and fails to provide a meaningful law school diversity measure. This Essay proposes an improved diversity index that captures more of the differences that matter to the success of both law students and law schools. The Essay begins by very briefly recapping some of Dean Johnson's arguments for why law school diversity (in its broader conception) is critical, and why measuring it is so important. It then examines the types of differences shown to produce better outcomes in heterogeneous groups, and explains the methodology behind the proposed cognitive diversity index.

## II. BENEFITS OF DIVERSITY

Much research has been devoted to understanding the relationship between diversity and improved group outcomes.<sup>4</sup> In his 2007 book, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies*, Scott Page provides a compelling argument that diverse groups outperform homogeneous groups.<sup>5</sup> Dean Johnson makes a similarly compelling argument that diversity improves law student outcomes and the overall quality of the legal education experience.<sup>6</sup> For example, diversity provides students the exposure necessary to break down harmful group stereotypes and leads to more enlightening classroom discussions.<sup>7</sup> It more properly prepares law students for the globally diverse society in which they will work by exposing them to widely diverse viewpoints, cultures, ideas, and opinions.<sup>8</sup> As Dean Johnson writes, "[t]his has become the conventional wisdom that is warmly embraced by the vast majority of leaders in higher education today."<sup>9</sup>

There are many ways to define diversity. Narrow definitions tend only toward Equal Employment Opportunity-protected characteristics such as race,

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2. Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1566 (2011) ("[D]iversity among students . . . is not limited to racial diversity.").

3. *See id.*

4. *See* Lynn M. Shore et al., *Diversity in Organizations: Where Are We Now and Where Are We Going?*, 19 HUM. RESOURCE MGMT. REV. 117, 117 (2009) (surveying the literature).

5. *See generally* SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007).

6. *See* Johnson, *supra* note 2, at 1553 (summarizing the Supreme Court's conclusion in *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

7. *Id.* at 1552–53 (citing and quoting *Grutter*, 539 U.S. at 330).

8. *Id.* at 1553 (citing and quoting *Grutter*, 539 U.S. at 330).

9. *Id.*

gender, ethnicity, age, national origin, religion, and disability.<sup>10</sup> Yet, as Dean Johnson observes, a richer vision of diversity in today's world calls for diversity of *perspectives*.<sup>11</sup> In addition to traditional notions of diversity, this broader definition includes sexual/affectional orientation, values, personality characteristics, education, language, physical appearance, marital status, lifestyle, beliefs, and background characteristics such as geographic origin, work experience, and economic status.<sup>12</sup>

Dean Johnson points out that the Supreme Court of the United States comes to a similar conclusion. In *Regents of University of California v. Bakke*, the Court wrote that in order for diversity to further a compelling state interest it must "encompass[] a . . . broader array of qualifications and characteristics of which racial or ethnic origin is but a single . . . element."<sup>13</sup> Twenty-five years later, the Court in *Grutter v. Bollinger* upheld Michigan Law School's admissions policy as not being an unconstitutional quota system because the policy "g[ave] serious consideration to *all the ways* an applicant might contribute to a diverse educational environment."<sup>14</sup> In short, Dean Johnson's argument, endorsed by the Court and supported by scientific research, shows that diversity means simply *the multiple ways in which we are different*.

Although Dean Johnson concludes that "the relative excellence of law schools rests in part on the diversity of their . . . student bodies," he stops short of suggesting a method for properly measuring law student diversity given this broader conception of difference.<sup>15</sup> If Dean Johnson is correct and student diversity is critical to law school success, it is imperative to design a diversity index that accurately measures the meaningful ways in which students are different. Anything less would give false results. For example, even though a single-indicator measure like that used by *U.S. News* might show racial and ethnic diversity as strong for a law school, it is possible that other indicators of diversity (gender, age, geography, prior education, life experiences, etc.) are weak and would not show up in the index measure. Therefore, a significant

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10. See *About EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc> (last visited Oct. 4, 2015) ("The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.").

11. Johnson, *supra* note 2, at 1566. President Barack Obama has also called for a broader notion of diversity. His 2011 executive order on the topic calls for federal agencies to create strategic plans for improving diversity of perspectives. Exec. Order No. 13,583, 76 Fed. Reg. 52,847 (Aug. 18, 2011).

12. See OFFICE OF DIVERSITY & INCLUSION, U.S. OFFICE OF PERS. MGMT., GOVERNMENT-WIDE DIVERSITY AND INCLUSION STRATEGIC PLAN 5 (2011).

13. Johnson, *supra* note 2, at 1566 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (plurality opinion)).

14. *Id.* at 1567 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003)).

15. *Id.* at 1566.

challenge facing law schools is how to properly measure student diversity in its many guises.

Law schools are essentially businesses that care deeply about optimizing operational outcomes.<sup>16</sup> Like any business, a law school wants to assemble a high-functioning, high-performing group that will improve these outcomes.<sup>17</sup> As Dean Johnson points out, this includes its student body.<sup>18</sup> A traditional business approach is to hire the best and the brightest. The analog for law schools is to accept students with stellar undergraduate grades and high LSAT scores.<sup>19</sup>

Yet surprisingly—even counterintuitively—this conventional approach often fails in the business world. Research over the last two decades strongly suggests that individual ability is less important than group cognitive diversity.<sup>20</sup> Cognitive diversity means the different ways people perceive and define problems, use mental short cuts to generate solutions, and predict accurate results.<sup>21</sup> If implemented correctly, initiatives focusing on improving the cognitive diversity of students could potentially have a significant impact on law schools' performance outcomes.

### III. MEASURING LAW STUDENT DIVERSITY

Why is measuring diversity important? For one, measurement lets law schools know if they are meeting their strategic goals. Second, it confirms what law schools already know about their diversity efforts and reveals where diversity gaps might exist. Third, it tracks whether future improvements have been made as planned. Fourth, measurement allows administrators to make data-driven decisions about diversity-related policies instead of using gut feelings or biased perceptions. Lastly, it lets students, alumni, and benefactors know that a law school's diversity objectives are (or are not) being met.

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16. See John H. Garvey, *The Business of Running a Law School*, 33 U. TOL. L. REV. 37, 37 (2001) ("[A law school is] a nonprofit business that provides a service to about 800 customers each year, and we, like all businesses, have to balance our books.").

17. See Andrew Morriss, *Reasons to Be Cheerful: The Future of Legal Education*, LIBR. L. & LIBERTY (Apr. 1, 2015), <http://www.libertylawsite.org/liberty-forum/reasons-to-be-cheerful-the-future-of-legal-education> (arguing for better outcomes for law schools).

18. Johnson, *supra* note 2, at 1552.

19. Some studies show that law school admission decisions based only on undergraduate grades and LSAT scores threaten student diversity. See generally Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1 (1997).

20. See, e.g., Anita Williams Woolley et al., *Evidence for a Collective Intelligence Factor in the Performance of Human Groups*, 330 SCI. 686 (2010) (finding a strong correlation between the presence of women on otherwise all-male teams and an increased group intelligence measure).

21. Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROC. NAT'L ACAD. SCI. 16,385, 16,386 (2004) ("To put it succinctly, diversity trumps ability.").

Good indicators summarize and condense meaningful information.<sup>22</sup> The *U.S. News* index assumes race/ethnicity to be the sole indicator of diversity. This Essay disagrees and proposes an expansion of a law school diversity index by incorporating, at a minimum, indicators organized across three categories that cause cognitive diversity: identity, experience, and training.

#### A. IDENTITY DIVERSITY

Identity can shape an individual's cognition and, therefore, it can affect cognitive diversity.<sup>23</sup> Studies show that identity-diverse groups are more innovative and generate more solutions to problems.<sup>24</sup> Often, contextual factors such as industry, profession, and organizational culture affect identity diversity's impact on better outcomes.<sup>25</sup> Still, identity-diverse groups, if properly managed through inclusive environments, can overcome barriers and realize improved outcomes.<sup>26</sup> If identity diversity focuses more on the variety of perspectives and approaches to problems and less on physical and cultural differences, it can lead to improved outcomes.<sup>27</sup>

The cognitive diversity index presented here uses two indicators to represent measures of identity diversity: *ethnicity/race* and *gender*. The types for the ethnic/racial diversity indicator are (1) American Indian/Alaska Native; (2) Asian; (3) Black/African American; (4) Native Hawaiian/Pacific Islander; (5) Mixed Race; (6) Hispanic/Latino; and (7) White. Most law schools invite their students to self-identify ethnicity/race. While identification is best if it is voluntary, it would be appropriate for law schools to attempt to classify a student's race and/or ethnicity visually, but only if the student does not first self-identify.

The gender diversity indicator has two types: female and male. The U.S. government defines gender identity as "the individual's internal sense of being male or female."<sup>28</sup> For consistency, law schools should adopt this same definition and ask students to self-identify their gender accordingly. As with

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22. See Joan Nymand Larsen & Gail Fondahl, *Introduction: Human Development in the Arctic and Arctic Social Indicators*, in *ARCTIC SOCIAL INDICATORS* 11, 23 (Nordic Council of Ministers ed., 2010) ("[I]ndicators condense real-life complexity into a manageable amount of meaningful information. They are proxy measures, used to infer the condition and, over time, the trends in a system.").

23. PAGE, *supra* note 5, at 307.

24. See, e.g., Charlan Jeanne Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 *PSYCHOL. REV.* 23 (1986).

25. See generally Aparna Joshi & Hyuntak Roh, *The Role of Context in Work Team Diversity Research: A Meta-Analytic Review*, 52 *ACAD. MGMT. J.* 599 (2009).

26. PAGE, *supra* note 5, at 324–28.

27. David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, *HARV. BUS. REV.*, Sept.–Oct. 1996, at 79, 80.

28. *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. OFF. PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance> (last visited Oct. 14, 2015).

race and ethnicity, visual identification would only be appropriate if the student chooses to not self-identify. This means law schools should not try to “correct” a student’s self-identification with the gender “male” even if the student appears “female,” and vice-versa.

### B. EXPERIENTIAL DIVERSITY

Identity diversity influences how individuals think, but so do experience and training. The causes of diversity are themselves diverse. For this reason, the current *U.S. News* diversity index is not rich enough to capture the level of cognitive diversity of law students. People develop different cognitive tools to help them make sense of experiences. In turn, different experiences usually lead to different cognitive tools, and the cycle continues. As a geographical example, one probably will not find as many surfers in Topeka as in Malibu, and more folks in Fort Worth most likely know what to look for in quality cowboy boots than those in New Haven.

Cognitively, people perceive problems and their solutions differently in large part based on the categories and mental models they can create.<sup>29</sup> In this way, experience informs individuals as to “what works” in certain situations. A student who has the experience of acing a final after cramming for an exam might use the same approach for the next exam convinced that it was the cramming that led to the good result. Another student might have a different experience and be convinced that cramming is a surefire way to fail. Experience is what drives these mental models.

Because experience predisposes individuals to different modes of perceiving and solving problems, a group with diverse experiences can, given the correct inclusive environment, explore more solutions to problems. There are many potential indicators of experiential diversity, but the two most likely available to law schools for analysis are *age* and *geographic* diversity.

Law schools can track students’ ages in five-year increments. It would be appropriate for the youngest type to begin at “less than 20 years” and increase in five-year increments (e.g., “20–24, 25–29,” etc.) ending with the oldest type as “65 years or more.” Unlike the identity diversity types, students would not self-identify their age and schools would calculate the age value from the student’s birth date.

People’s origins are also important to the formation of perspectives. A law student’s geographic foundation should be defined as the region that the student most identifies as his or her origin. This need not be where the student was born. Like identity diversity, students can self-identify where they most associate being from. If a student does not self-identify, a law school can record the student as being from the address on the admissions application. The types for the geographic diversity indicator can follow the four U.S. regions most

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29. See PAGE, *supra* note 5, at 303–05.

commonly used in demographic data reporting, plus a fifth region labeled “international.”<sup>30</sup>

### C. TRAINING DIVERSITY

Different training can also be a cause of cognitive diversity. The obvious example is one’s level of formal education, but it also includes levels of work experience beyond an undergraduate degree.<sup>31</sup> Additionally, those who have formal studies in the S.T.E.M. fields (science, technology, engineering, and mathematics) might have different perspectives from those who studied in the liberal arts since each makes mental maps that could lead to different solutions.<sup>32</sup>

Employment diversity types are defined by the years of employment experience beyond an undergraduate degree. They include: (1) less than two years of employment beyond the undergraduate degree; (2) two or more years of employment; (3) advanced degree; and (4) military veteran. Types for the *educational* indicator can be classified as simply S.T.E.M. and non-S.T.E.M. majors.

## IV. COGNITIVE DIVERSITY INDEX METHODOLOGY

The cognitive diversity index presented here measures diversity as a function of the probability of difference. The *U.S. News* index calculates the probability that two students chosen at random are of the same race and ethnicity. The cognitive diversity index extends the indicators of diversity beyond race and ethnicity. It also offers an alternative to calculating the probability of difference for each indicator. Instead of finding the probability that any two students chosen at random are the same, summing those probabilities of sameness, and then subtracting the sum from 1 as the *U.S. News* index does, the cognitive diversity index finds the probability that any two

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30. See, e.g., SEYMOUR SUDMAN & NORMAN M. BRADBURN, *ASKING QUESTIONS: A PRACTICAL GUIDE TO QUESTIONNAIRE DESIGN* 205 (1982) (“The most widely used regional definitions follow those of the U.S. Bureau of the Census.”). For a complete list of these regions, see BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *GEOGRAPHIC AREAS REFERENCE MANUAL* 6-2 (1994).

31. Where students received their formal education is also a possible indicator of training diversity. For example, the American Bar Association made the following comment in 1980 on the fact that most law professors graduated from a handful of elite schools: “Were we biologists studying inbreeding, we might predict that successive generations of imbeciles would be produced by such a system.” Richard E. Redding, “Where Did You Go to Law School?” *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 594 (2003) (quoting LAW SCHOOLS AND PROFESSIONAL EDUCATION: REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION 82 (1980)). Faculty diversity is something Dean Johnson also discusses, but its formal measure is a topic for a separate essay. See Johnson, *supra* note 2, at 1556–66.

32. See generally KEITH J. HOLYOAK & PAUL THAGARD, *MENTAL LEAPS: ANALOGY IN CREATIVE THOUGHT* (3d prtg. 1999).

students chosen at random are *different* for a given type and then only requires the sum of these probabilities to find the diversity score for that indicator.<sup>33</sup>

Each indicator has a maximum value depending on its number of types ( $n$ ). This means the maximum probability of difference for each indicator can be different, and is determined by the formula  $(n - 1)/n$ . For example, the gender diversity indicator has only two types ( $n = 2$ ), producing a maximum probability of difference of 0.50. For geographic diversity, the number of types is five ( $n = 5$ ), producing a maximum value of 0.80.

This creates a problem. Since a perfect score for gender diversity is 0.50 and a perfect score for geographic diversity is 0.80, the central tendency (average) of just these two indicators would be only 0.65. But 0.65 does not seem like the measure of a law school with perfect diversity scores. What's more, the total diversity index score will skew in favor of schools that have higher scores in indicators with more types (higher  $n$  values).

A solution is to normalize the values of each indicator to have a maximum value of 1.00. We accomplish this by dividing the probability of difference for each indicator by the maximum probability of difference. This solution means that a perfect score for any indicator will always be 1.00.

Each law school's measure of cognitive diversity (its central tendency) is then the average of the normalized value of each indicator.<sup>34</sup> The result should reflect the central tendency of a law school's cognitive difference levels across the indicators for identity, experiential, and training diversity. It is a measure of the multiple ways law students are different, which meets our original definition of diversity. This final value between 0 and 1 becomes each law school's cognitive diversity index score and allows for easy comparison.

## V. CONCLUSION

Diversity is arguably a good in and of itself from an equal opportunity and social justice perspective.<sup>35</sup> Research suggests that diversity also affects the performance of law schools. As Dean Johnson has already shown, "a diverse student body provides a richer learning environment than a homogeneous one for students, who will then be better prepared to succeed and thrive in the incredibly diverse real world of lawyers and clients that is the modern United States, as well as the world."<sup>36</sup> The cognitive diversity index proposed here provides a useful tool for law schools to measure their levels of diversity across multiple indicators. It can be used to show where diversity gaps exist so that policies and practices can be modified accordingly. It also provides a universal standard to compare law school diversity. With a universal measure of

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33. For the mathematics used to calculate the probability of difference, see *infra* Appendix.

34. For the mathematics used to calculate the central tendency of the normalized probabilities of difference, see *infra* Appendix.

35. But see Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003) (arguing that focusing on diversity is a significant distraction to the cause for racial justice).

36. Johnson, *supra* note 2, at 1552.



diversity, researchers can more easily study the relationship between law school diversity and performance.

## APPENDIX

*A Generalized Formulation of the Cognitive Diversity Index*

Define the following:

1.  $P$  as a population, and  $|P|$  as the magnitude of  $P$ .
2.  $p_t$  as a subpopulation of  $P$  that is of type  $t$ , and  $|p_t|$  as the magnitude of  $p_t$ .
3.  $r_t$  as the ratio of magnitudes  $|p_t|:|P|$ . Because  $r_t$  approximates the probability of  $t$  occurring in  $P$ ,  $r_t$  is equivalent to the probability of a randomly drawn member of  $P$  being of type  $t$ , or  $r_t \equiv Pr(t)$ .
4.  $n$  as the number of types in indicator  $i$ .
5.  $N$  as the number of indicators used for measuring diversity in  $P$ .
6.  $\delta_x$  as the probability of difference for variable  $x$ .
7.  $\hat{\delta}_x$  as the normalized probability of difference for  $x$ .
8.  $\Delta$  as the central tendency of the normalized probabilities of difference for  $P$ .

The probability that two members drawn at random from population  $P$  are of different types  $t$  is calculated as:

$$\delta_t = Pr(t \cap \bar{t}) = Pr(t)Pr(\bar{t}) = r_t(1 - r_t) = r_t - r_t^2.$$

The total probability of difference for indicator  $i$  is:

$$\delta_i = \sum_{t \in i}^n \delta_t.$$

The maximum value of difference for each indicator is:

$$\max \delta_i = \frac{n-1}{n}.$$

The normalized probability of difference for indicator  $i$  is:

$$\hat{\delta}_i = \left( \frac{\delta_i}{\max \delta_i} \right) = \left( \frac{n}{n-1} \right) \sum_{t \in i}^n \delta_t.$$

The central tendency (arithmetic mean) of the normalized probabilities of difference for indicator  $i$  is:

$$\Delta = N^{-1} \sum_{i \in N}^n \hat{\delta}_i.$$

Because the expected value is equivalent to the arithmetic mean in probability theory, the central tendency of the normalized probabilities of difference can also be expressed as:

$$\Delta = E(\hat{\delta}_i),$$

where  $E$  is the expected value operator. *This is the final equation for the index measure of cognitive diversity in a population.*