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THE “CRITICAL MASS” AND LAW ENFORCEMENT

I. INTRODUCTION

Racism, or at least the appearance of racism, continues to fester in American society. For a variety of reasons many urban centers have become predominantly populated by low-income minority residents.¹ Meanwhile, the racial composition of urban police departments often does not reflect that of the minority communities they protect.²

A sense of resentment toward law enforcement officers persists in black communities throughout the country.³ This resentment occasionally has boiled over into violent and angry demonstrations after public incidents of officers' apparently racist practices.⁴ Such demonstrations reflect a dangerous disconnect between police forces and the communities they serve.

¹ One author explains the “spatial segregation” of blacks this way:

[B]lack migration from the South to the North surged after World Wars I and II. Northern industrial cities such as New York, Detroit, and Chicago were primary sites for black migration. As the black population grew, so did the tools and means for containing newly arrived blacks in burgeoning ghettos. Federal policies played a significant role in encouraging white flight to the suburbs and restricting African Americans to specific inner-city neighborhoods. Local political leaders, real estate agents, and developers, and community based neighborhood preservationists used various tactics to discourage blacks from moving to white neighborhoods.

Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUSTICE, 156, 161 (2001).

² For example, in Boston, Massachusetts whites dominate the upper ranks of the police force. Recently promoted Police Commissioner, Kathleen O'Toole stated, “One quarter of Boston Police officers are black, according to police statistics. But at all ranks above patrol officer, blacks are severely under-represented. Just 3 of the 50 lieutenants are black, for instance.” Jeremy Schwab, *New Police Chief Talks Policy with Minority Officers' Group*, BOSTON BAY-STATE BANNER, March 11, 2004.

³ For the last thirty years studies have shown that blacks are more critical of the police than whites. Keith D. Parker et al., *African Americans' Attitudes Towards the Local Police*, 25 J. BLACK STUD. 396, 405 (January 1995).

⁴ An example of a violent demonstration occurred in Los Angeles in 1992, following the not-guilty verdict of officers accused of assaulting a black man, Rodney King. James Rainey, *Vandals Smash Glass, Ransack Some Offices in Times Building*, L.A. TIMES, April 30, 1992, at 21.

In 2001, a white Cincinnati, Ohio, police officer shot a nineteen year-old black man, Timothy Thomas, following a brief chase.⁵ Wanted for a number of misdemeanor charges,⁶ Mr. Thomas was the fifteenth black male shot and killed by a Cincinnati police officer since 1995.⁷ Two days after Mr. Thomas's death, a riotous crowd gathered outside Cincinnati's police headquarters.⁸ Enraged community members hurled bottles, rocks and insults as officers in riot gear protected the station entrance.⁹ These protests rocked Cincinnati, causing the city government to impose a curfew between the hours of 8:00 p.m. and 6:00 a.m., in order to regain control of the city in the ensuing days.¹⁰ Councilwoman Alicia Reece, stated at a city hall meeting on the first day of the Cincinnati riots that "[e]very member of the council, from the mayor on down, needs to be here today. Leadership needs to deal with the diversity that exists in the city."¹¹

In New York City, similar circumstances developed. At about midnight on February 4, 1999, a Haitian immigrant named Amidou Diallo arrived at home.¹² Four plainclothes police officers confronted Mr. Diallo in the vestibule of his apartment and shot him 19 times.¹³ A few days later, Mr. Diallo's funeral became the epicenter of demonstrations critical of the local police department and the mayor.¹⁴

This Note is not intended as an indictment of urban law enforcement. Rather, this Note addresses the perception, correct or not, that urban communities often feel detached from the police force patrolling their neighborhoods. The two instances described above demonstrate the persistent resentment and distrust that exists in many urban communities between police and the community. Changing the racial composition of the police force may reduce tension between a community and its police. Whether the officers in the above instances were justified in drawing their weapons and firing is not the question this Note seeks to answer. Instead this Note confronts the underlying tension between the police and their community. To that end, this Note argues for the constitutionality of race-based hiring and transfer practices in urban police departments in light of the Equal Protection Clause of the Fourteenth Amendment.¹⁵

The United States Supreme Court's recent decision in *Grutter v. Bollinger*,¹⁶ which addresses the constitutionality of race-based affirmative action programs in

⁵ Susan Vela, *Officer Shoots, Kills Suspect*, CINCINNATI ENQUIRER, Apr. 8, 2001, at 1A.

⁶ *Id.*

⁷ *Id.*

⁸ Jane Prendergast and Robert Anglen, *Hundreds Protest Police Shooting*, CINCINNATI ENQUIRER, Apr. 10, 2001, at 1A.

⁹ *Id.*

¹⁰ Howard Wilkinson, *City Braces for Curfew: Bush Administration Gets Involved*, CINCINNATI ENQUIRER, Apr. 13, 2001, at A1.

¹¹ *Id.*

¹² Michael Cooper, *Officers in Bronx Fire 41 Shots, And an Unarmed Man is Killed*, N.Y. TIMES, February 5, 1999, at A1.

¹³ *Id.*

¹⁴ Susan Sachs, *Anger and Protest at Rite for African Killed by the Police*, N.Y. TIMES, February 13, 1999, at A1.

¹⁵ U.S. CONST. amend. XIV, § 1, cl. 4.

¹⁶ 539 U.S. 306 (2003).

higher education, provides a framework that police departments can model to combat rising racial tension. Specifically, police departments can change the racial makeup of their forces in order to reflect more closely their respective communities. Police departments have a compelling interest in maintaining public safety and, as such, can greatly improve public safety by employing a visibly diverse police force.

Section II of this Note takes up the first prong of the equal protection analysis, examining whether a compelling interest in diversity exists in the context of law enforcement. Part A analyzes Justice O'Connor's majority opinion in *Grutter*. In Part B, the discussion shifts to Justice Thomas's dissent, and inquires whether his opinion indicates that he would affirm a compelling interest in diversity to serve a police department's "operational need."

In Section III, this Note moves to the second prong of the equal protection analysis: narrow tailoring. The discussion focuses on the relationship between *Regents of University of California v. Bakke*¹⁷ and *Grutter*. This Note discusses the balancing of a police department's "operational need" against the potential for invidious discrimination prohibited by the Fourteenth Amendment in the form of a "blanket assignment."¹⁸ Finally in Section IV, this Note concludes that police departments may constitutionally, under limited circumstances, institute a policy of race-based transfers and hiring practices to counter racial tension in a community.

II. THE FIRST PRONG: THE COMPELLING INTEREST OF DIVERSITY IN THE CONTEXT OF LAW ENFORCEMENT

In *Grutter*, Justice Sandra Day O'Connor justifies affirmative action programs in the context of higher education and lays the groundwork for future arguments justifying affirmative action programs in other contexts.¹⁹ Most significantly, *Grutter* disposes of the notion that "remedying past discrimination is the only permissible justification for race-based government action."²⁰ Removing this limitation on race-based government action is the first step toward recognizing diversity as a compelling interest in contexts separate from higher education.

Grutter's five to four split decision reflects just how little latitude future litigants will have to argue that diversity is a compelling interest in any context other than higher education. *Grutter*'s holding was highly specific to higher education.²¹ Because it sets clear standards for equal protection claims, Justice Clarence Thomas's principled dissent in *Grutter* may be a more helpful guide to securing court approval of affirmative action programs in the context of law enforcement.

Part A of this section reviews Justice O'Connor's majority opinion. It summarizes how litigants can incorporate the majority's rationale to garner court

¹⁷ 438 U.S. 265 (1978).

¹⁸ *Baker v. St. Petersburg*, 400 F.2d 294, 300 (5th Cir. 1968).

¹⁹ 539 U.S. 306 (2003).

²⁰ *Id.* at 328.

²¹ "[S]ince *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education." *Id.*

approval of a racially administered hiring and transfer policy in the context of law enforcement. Part B of this section then reviews Justice Thomas's dissent, focusing on the importance of a police department's role in public safety, the most traditional of compelling interests.

A. *The Majority Opinion*

The majority in *Grutter* held that the University of Michigan Law School ("Law School") had a compelling interest in "obtaining 'the educational benefits that flow from a diverse student body.'"²² Similarly, it seems reasonable to argue that the benefits of diversity will flow to a wider variety of organizations. For example, Fortune 500 companies and high-ranking United States military personnel, among others, submitted briefs of amici curiae on behalf of the Law School in *Grutter*, testifying to the benefits of diversity in their respective fields.²³

Affirmative action programs promoting diversity within a police department have met different fates in different courts.²⁴ The *Grutter* decision validated diversity as a compelling interest only for law schools in making admissions decisions. The challenge for police departments is to relate the compelling interest of effective law enforcement to the benefits of diversity in higher education.

The University of Michigan Law School admitted a "critical mass" of minority students in order to receive the benefits that flow from a diverse student body. This "critical mass" of diverse students did not "amount to outright racial balancing," which would be illegal.²⁵ Rather, a "critical mass" of minority students is a "meaningful representation" that prevents minority students from feeling isolated and allows them to feel comfortable participating in the classroom.²⁶

Grutter identified a number of reasons why a "critical mass" of minority students within a student body is a compelling interest for an institution of higher learning,

²² *Id.* at 328 (quoting Respondent's Brief at i, *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003) (No. 02-241)).

²³ *Id.* at 330. Leading corporations argued that a diverse workforce is vital for companies to compete in a global marketplace. Likewise, military personnel argued that "a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks is essential to the military's ability to fulfill its principal mission to provide national security." *Id.*

²⁴ *Cf.* *Patrolmen's Benevolent Ass'n v. City of New York*, 310 F.3d 43 (2d Cir. 2002) (holding race-based transfers of black officers violated Equal Protection Clause); *Hayes v. City of Charlotte*, 802 F.Supp. 1361 (W.D.N.C. 1992) (holding race-based promotion of black officers violated Equal Protection Clause); *Minnick v. California Department of Corrections*, 157 Cal. Rptr. 260 (1979) (holding Department of Corrections affirmative action plan did not violate the Equal Protection Clause); *Wittmer v. Peters, III*, 87 F.3d. 916 (7th Cir. 1996) (holding preferential treatment based on race for promotions did not violate Equal Protection Clause); *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1980) (holding promotion of a black officer to major, who was qualified for the position, did not violate Equal Protection Clause).

²⁵ *Grutter*, 539 U.S. at 329-330.

²⁶ *Id.* at 318.

such as cross-racial understanding, erasing the myth of the "minority viewpoint"²⁷ and providing a visible route to leadership.²⁸ Class discussion reveals the individuality of each student and repudiates the myth of the minority viewpoint when a "critical mass" of minority students is present in a class.²⁹ Furthermore, a diverse student body "better prepares students for an increasingly diverse workforce and society."³⁰

The benefits flowing from diversity are relevant in a policing context as well. A racial disparity between a community and its police department, particularly in densely populated urban areas, acts as a barrier to effective law enforcement.³¹ A visibly homogeneous police force that does not reflect the racial make-up of the community it patrols may engender resentment among the residents of that community.³² The hostility "may arise from distrust of the white establishment, whose power and authority the police symbolize; racist attitudes and practices of white police officers; or past discrimination by the municipality in the provision of law enforcement services to black residents."³³ This negative perception may become more prevalent when a highly publicized incident of discrimination occurs.³⁴ Consequently, this negative perception can lead to a breakdown when relations between the police department and the greater community are strained.

The presence of a "critical mass" of minority police officers in a community may alleviate obstructive hostility between police and the community. Such a "critical mass" of minority officers may be necessary in order to "carry out [the force's] mission effectively, with a workforce that appears unbiased, is able to

²⁷ *Id.* at 319-320. (Dean Syverud, a former professor at Michigan University stated in his Expert Report that students "often assign to people of different races and ethnic backgrounds viewpoints that are uninformed by experience or by direct dialogue with a client or adversary. They are often very wrong. They don't know what they don't know, and it is my job to show them what they have to learn, every time, from every individual client or adversary." Expert Report of Kent D. Syverud, *Grutter v. Bollinger*, 137 F.Supp.2d 874 (E.D. Mich. 2001).

²⁸ 539 U.S. at 332.

²⁹ *Id.*

³⁰ *Id.* at 330 (quoting Brief for American Educational Research Association et al as *Amici Curae* 3, available at 2003 WL 393292).

³¹ Note, *Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L. REV. 413 (1979) [hereinafter *Race as an Employment Qualification*].

³² *Id.*

³³ *Id.*

³⁴ Resentment toward police among minorities may not actually rise following a highly publicized discriminatory incident perpetrated by police. Resentment may have existed prior to the inflammatory incident, but the incident may have provoked a public display of that resentment through riots or protests. One study asked Detroit residents about their feelings regarding police unfairness towards blacks before and after a highly publicized fatal beating of Malice Green, a black man, by Detroit police officers in 1992. The results of this study revealed an increase from 90% to 91% of black respondents who thought the police were unfair to blacks. The authors of the study opined that "public concern about police unfairness was already widespread before the Green beating...the lack of impact of the Green beating, may reflect, at least in part, a ceiling effect." Lee Sigelman et al, *Police Brutality and Public Perceptions of Racial Discrimination: A Tale of Two Beatings*, 50 POL. RES. Q., 777, 782 (1997).

communicate with the public and is respected by the community it serves.”³⁵ The existence of a diverse police department can reassure a community that the department will not act in a discriminatory manner.³⁶ This will, in turn, lead to even better policing, since community cooperation with police investigations leads to more solved crimes and a correlative reduction in criminal behavior.³⁷

Much as in higher education, a “critical mass” of minority police officers will help to erase stereotypes of particular ethnic groups in a community. A “critical mass” of police officers visibly patrolling a community undermines the characterization of the police as an occupying force.³⁸ The visible presence of a “critical mass” of minority police officers reduces racial tension and increases police effectiveness in a community.³⁹ A diverse police force, as a whole, is more likely to understand unfamiliar cultures that it may encounter in a community.⁴⁰

Moreover, the positive benefits realized in the military context are also applicable to law enforcement. The military leaders’ amici brief to the Court in *Grutter* extols the benefits of a diverse police force.⁴¹ They explained, “The current leadership views complete racial integration as a military necessity – that is, as a prerequisite to a cohesive, and therefore effective, fighting force. In short, success with the challenge of diversity is critical to national security.”⁴² Police forces and military units share similar challenges as both must achieve unit cohesion in order to fulfill their respective missions. The military must be able to effectively engage enemy combatants and a police force must be able to effectively engage criminals. Additionally, in the post-9/11 world, local law enforcement departments have coordinated efforts with military personnel in the battle against terrorism. The experience of the military in successfully cultivating improved race relations presents an important consideration for the implementation of effective law enforcement techniques.

B. Justice Thomas’s Dissent

Justice Thomas, with whom Justice Scalia joined, penned a principled dissent in *Grutter*.⁴³ Justice Thomas’s criticisms and discussion of diversity in higher

³⁵ *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988).

³⁶ *Race as an Employment Qualification*, *supra* note 29.

³⁷ One author writes that “a growing body of research suggests that police legitimacy prevents crime. . . . [and identifies] a strong correlation. . . between perceived legitimacy of police and willingness to obey the law.” LAWRENCE W. SHERMAN ET AL., U.S. DEP’T OF JUSTICE, PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING 8-26 (1997) (citation omitted).

³⁸ *Cf. Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm’n*, 482 F.2d 1333, 1341 (2d Cir. 1973).

³⁹ *Race as an Employment Qualification*, *supra* note 29.

⁴⁰ *Baker*, 400 F.2d at 301 n.11.

⁴¹ Brief of Amici Curiae Julius W. Becton, Jr. et al., at 13, *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁴² *Id.*

⁴³ See *Grutter*, 539 U.S. at 349 (Thomas, J., dissenting).

education as a "compelling interest," arguably place diversity in a law enforcement context on stronger footing than diversity in the context of higher education.

Thomas equated a "compelling interest" with a "pressing public necessity."⁴⁴ Thomas noted that prior to the *Grutter* decision only two circumstances existed where a "pressing public necessity" justified racial discrimination: (1) issues of national security and (2) the remedying of a state's past discrimination.⁴⁵ Thomas concluded that "only those measures the state must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity.'"⁴⁶

Justice Thomas's identification of "preventing violence" as a "pressing public necessity" indicates that racial diversity within a police department may be a compelling interest if the department can show that diversity helps it prevent violence. For example, deploying minority officers to a location with impending riots and a non-minority police force under verbal and imminent physical assault may be a "pressing public necessity" under Thomas's rationale. Therefore, while Thomas had reservations about expanding "compelling interests" to include diversity in higher education, he may find it more acceptable to include the interests of police departments in a diverse officer corps.

Justice Thomas also noted that "Michigan has no compelling interest in having a law school, much less an elite one."⁴⁷ Thomas stated "the only interests that can satisfy the Equal Protection Clause's demands are those found within the state's jurisdiction."⁴⁸ Thomas argued that since the Law School produced less than 6% of Michigan bar applicants in 2002, the Law School's interest in being an elite school did not really benefit the state of Michigan and, therefore, did not meet the demands of the Equal Protection Clause.⁴⁹ He further noted that both public and private institutions could provide a legal education to community members.⁵⁰

Conversely, the benefits of effective policing and public safety are localized within a community. Any benefits to neighboring communities are external benefits emanating to communities living in close proximity to a well patrolled and safe community. The community itself is the primary beneficiary of better policing. Moreover, while legal education is provided by private as well as public institutions, law enforcement is entirely a function of government.⁵¹ A community has a single public police department on which to depend. Accordingly, Justice

⁴⁴ *Id.* at 351 (Thomas, J., dissenting) (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

⁴⁵ *Id.*

⁴⁶ *Id.* at 353-354 (Thomas, J., dissenting) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.* 488 U.S. 46, 521 (1989); *Lee v. Washington*, 390 U.S. 333, 334 (1968)).

⁴⁷ *Id.* at 358.

⁴⁸ *Id.* at 358-359.

⁴⁹ *Id.*

⁵⁰ Private law schools in Michigan include Ave Maria School of Law, Thomas M. Cooley Law School and University of Detroit Mercy School of Law. Michigan State University College of Law is financially independent, receiving funding from neither Michigan State University nor the State of Michigan.

⁵¹ *Race as an Employment Qualification*, *supra* note 29.

Thomas's critique of the Law School as a "waystation for the rest of the country's lawyers"⁵² does not apply in a policing context because the benefits of diversity would flow directly to the community policed. While graduates of law schools with nationwide reputations typically migrate to other parts of the country to ply their trade, police officers work within a single community providing security. Therefore, while a community may not have an interest in an "elite" law school, it does have an interest in an effective police department.

Another relevant criticism by Thomas is that the "aesthetic"⁵³ goal of diversity does not even benefit admitted applicants to the Law School.⁵⁴ Thomas noted that no evidence presented in the suit established that these students are able to keep up with their fellow students, leading Thomas to conclude that these minority students are "overmatched" by their classmates.⁵⁵ This criticism may pose a problem in the police context as well. Minority officers transferred, on the basis of race, to New York's 70th Precinct, in the wake of Abner Louima's beating, were transferred to a dangerous area.⁵⁶

Who is "burdened or benefited," however, is irrelevant to the question whether or not a community has a "compelling interest" in the benefits diversity will have on law enforcement.⁵⁷ The interest in effective law enforcement lies in the community. Whether the particular policy is narrowly tailored on balance with the relevant "compelling interest" is a question for the second prong of the equal protection analysis.

Furthermore, the aesthetic goal of diversity, according to Justice Thomas, does not benefit the student body at large either.⁵⁸ Justice Scalia contended that the benefits described by the majority are "lessons of life rather than law."⁵⁹ Thomas argued that the use of discrimination "engender[s] attitudes of superiority or, alternatively, provokes resentment among those who believe that they have been wronged by the government's use of race."⁶⁰

Race-based police transfers are open to the same criticisms. The minority officers transferred in *Patrolmen's Benevolent Association v. City of New York* contended that tensions existed between the new officers and some of the other

⁵² *Grutter*, 539 U.S. at 360 (Thomas, J., dissenting).

⁵³ Justice Thomas explains his use of the term "aesthetic" by stating "the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them. I also use the term 'aesthetic' because I believe it underlines the ineffectiveness of racially discriminatory admissions in actually helping those that are truly underprivileged. It must be remembered that the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation." *Id.* at 354 n.3 (Thomas, J., dissenting) (citation omitted).

⁵⁴ *Id.* at 370 (Thomas, J., dissenting).

⁵⁵ *Id.* at 372 (Thomas, J., dissenting).

⁵⁶ *Patrolmen's Benevolent Ass'n*, 310 F.3d at 43 (officers were transferred to hostile areas in midst of racial strife).

⁵⁷ *Croson*, 488 U.S. at 494.

⁵⁸ *Grutter*, 539 U.S. at 356 n.4 (Thomas, J., dissenting).

⁵⁹ *Id.* at 347 (Scalia, J., dissenting).

⁶⁰ *Id.* at 373 (quoting *Adarand Constructors*, 515 U.S. at 241).

officers.⁶¹ This criticism belies the problem, however. It is exactly this suspicion of outsiders that exposure to individuals from different ethnic backgrounds would alleviate. A "critical mass" of minority officers would have a similar effect upon fellow officers as minority students would in a law school setting. Moreover, by visibly patrolling a community, the positive effects of diversity may be experienced within the community itself. The public role of police departments may expand the benefits of diversity beyond the walls of police headquarters and to the community itself, thereby improving public safety. Despite Thomas's assertions to the contrary in a law school context, Thomas did express a willingness to make allowances for public safety.⁶²

Thomas's criticisms of the majority opinion in *Grutter* attack the weaknesses of recognizing diversity in higher education as a compelling interest. On the other hand, Thomas's equation of a "compelling interest" with a "pressing public necessity," combined with his recognition of the obstruction of violence as a "pressing public necessity," supports diversity as a compelling interest for police departments. Additionally, the "aesthetic" effects of diversity will actually support the effectiveness of a community's police department. A review of Justice Thomas's criticisms in *Grutter* reflects that a police department's interest in diversity is actually a more compelling interest than a law school's interest in diversity in its classrooms.

III. THE SECOND PRONG: NARROWLY TAILORING RACE-CONSCIOUS HIRING AND TRANSFERS OF MINORITY OFFICERS

The second step in an equal protection analysis is determining whether an action is narrowly tailored to support a compelling state interest.⁶³ The Court in *Grutter* held that, "when race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied."⁶⁴ Dissimilarity between police departments and law schools exists in the affirmative action context; while minority law school applicants actively seek a seat in a school's entering class, minority officers in urban areas might not actively seek positions in precincts policing minority communities. Justice Thomas's skepticism aside, admission to an elite law school like the University of Michigan⁶⁵ opens great financial and professional possibilities to all of the school's applicants.⁶⁶ By contrast, the transfer or placement of a minority officer in an urban community that is heavily populated by minority residents may be one in an economically

⁶¹ 310 F.3d at 48.

⁶² *Grutter*, 539 U.S. at 353 (Thomas, J., dissenting).

⁶³ *Id.* at 327.

⁶⁴ *Id.*

⁶⁵ U.S. News and World Report ranked University of Michigan-Ann Arbor as the 7th best law school in the United States for the 2004 school year. *Best Graduate Schools 2004*, U.S. NEWS AND WORLD REPORT, Apr. 14, 2003, at 70.

⁶⁶ The median income for graduates entering the private sector was \$125,000 in 2003. *Id.*

depressed area with a high crime rate.⁶⁷ Officers are even less likely to desire a transfer to an area in the throes of racial strife due to perceived police brutality against minority community members.⁶⁸

A. Bakke's *Plus-Factor*

Grutter applied the standard used in *Bakke* that prohibits quotas but allows the use of a "plus factor" for admissions.⁶⁹ The Court defined a quota as "a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'"⁷⁰ The practice of using "plus factors," on the other hand, includes race as one of a number of factors when making admission decisions.⁷¹ The Court emphasized the importance of "individualized consideration" of each applicant in such a way that race is not the determining feature of the applicant.⁷²

The Court recognized race as a factor worthy of consideration because "such students are likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignores those experiences."⁷³ Importantly, the Court noted that the Law School did not limit the range of qualities and experiences which may be considered valuable considerations.⁷⁴ A sampling of factors included fluency in several languages, having overcome personal adversity or family hardship, having an exceptional record of community service, or success in other careers.⁷⁵

The analysis employed in *Grutter* is applicable to police departments seeking to achieve diversity in order to improve law enforcement. *Grutter*'s affirmation of Justice Powell's opinion in *Bakke* assures that any police usage of quotas will be unconstitutional under the Equal Protection Clause.⁷⁶ However, police departments may be able to consider race as a "plus-factor."⁷⁷

A potential hurdle for police departments seeking to establish a "critical mass" of minority officers is the process of determining how many officers comprise such a "critical mass." The plus-factor of race can not negate an individualized assessment of each officer when a police department determines whether to hire or where to place an officer. Therefore, much like the law school in *Grutter*, a police

⁶⁷ Although African-Americans make up only 12% of the population, they make up 38% of all those arrested for drug offenses. This disparity may be due to an over-zealous police force in minority neighborhoods. Bass, *supra* note 1, at 166.

⁶⁸ See *Patrolmen's Benevolent Ass'n*, 310 F.3d at 43.

⁶⁹ *Grutter*, 539 U.S. at 334 (citing *Bakke*, 438 U.S. at 315-316).

⁷⁰ *Grutter*, 539 U.S. at 335 (quoting *Crosun*, 488 U.S. at 493).

⁷¹ *Bakke*, 438 U.S. at 315.

⁷² *Grutter*, 123 S.Ct. at 337 (citing *Bakke*, 438 U.S. at 318 n. 52).

⁷³ *Id.* at 338.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Grutter* stated that, "to be narrowly tailored, a race-conscious admissions program cannot use a quota-system." *Id.* at 334.

⁷⁷ See *id.*

department will have to establish a plus-factor that will allow for an individualized assessment while still pursuing a "critical mass" of minority officers.

Grutter's emphasis on the use of other plus-factors serves notice to police departments to identify other potential factors which may influence employment decisions. For example, an officer fluent in a foreign language spoken by a large percentage of a community's residents may be very helpful in communicating with residents in an effort to investigate crimes. Also, an officer who has experienced family hardship may be more understanding of domestic problems confronting community members. Alternatively, an officer with extensive community service experience in a given locale may know that community well and gather information with particular efficiency. That same officer may be a familiar face in the community, thus serving to bridge the divide between the community and its police force. Police departments should consider these additional factors for each individual officer before making employment decisions.

B. *Striking the Balance between "Operational Need" and "The Colored Car"*

Courts have recognized the "operational need" of law enforcement agencies and have upheld hiring or assignment practices favoring minorities, even in the absence of past discrimination.⁷⁸ The "operational need" of a police department is its need to "carry out its mission effectively."⁷⁹ Courts try to prevent abuse of the "operational need" justification by requiring the government to demonstrate that it is "motivated by a truly powerful and worthy concern and that the racial measure adopted is a plainly apt response to that concern."⁸⁰ This standard leaves to the discretion of courts the determination as to what actually qualifies as an "operational need."

Courts are wary of situations like that in *Baker v. St. Petersburg*, where black officers were assigned to a particular patrol car, known as the "colored car."⁸¹ By maintaining different policies for temporary transfers and permanent hires, the requisite racial diversity to preclude or quell racially sparked crises can still be achieved without violating the second prong of the equal protection analysis. Key factors in a court's analysis of these policies may include whether there was an explicit request from a community for more minority officers and the availability of other equally effective options.

1. Temporary Transfers

In *Patrolmen's Benevolent Association*, the Second Circuit concluded that transfers of minority officers were not constitutional because the transfers were permanent and other effective means were available to defuse the community

⁷⁸ *Patrolmen's Benevolent Ass'n*, 310 F.3d at 52 (citing *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981); *Reynolds v. City of Chicago*, 296 F.3d 524, 530-31 (7th Cir. 2002); *Wittmer v. Peters*, 87 F.3d 916, 921 (7th cir. 1996); *Minnick v. Dep't of Corrections*, 95 Cal. App. 3d 506, 520-21 (1979)).

⁷⁹ *Patrolmen's Benevolent Ass'n*, at 52 (quoting *Barhold*, 863 F.2d at 238).

⁸⁰ *Id.* at 52-53 (quoting *Wittmer*, 87 F.3d at 918).

⁸¹ *Baker*, 400 F.2d at 300.

problem.⁸² *Patrolmen's Benevolent Association* is a benchmark for a narrowly-tailored policy using race as a factor when transferring police officers to hotbeds of racial discontent. While the court ultimately did not support the race-based transfers, it did opine that "[t]here may indeed be occasions where race-conscious transfer of police officers is a constitutionally permissible means of improving law enforcement, whether as a long-term strategy to create a diverse police force or as an immediate response to an emergency situation."⁸³ The tailoring of a transfer policy may differ substantially from a hiring policy used by police departments, while both may serve the compelling interest of effective law enforcement.

A race-conscious transfer policy must be more narrowly tailored than a race-conscious hiring policy due to the immediate danger and disruption to the transferred officers. A race-conscious hiring policy does not operate under the same "operational need" as a transfer policy in response to immediate dangers. A transfer policy must suit the needs of the particular challenge confronted. In *Patrolmen's Benevolent Association*, the New York City Police Department made an apparently good faith effort to defuse a potentially violent situation through the transfer of black police officers to the embroiled precinct. The policy as applied, however, was held unconstitutional.⁸⁴

The New York City Police Department argued that the community requested more minority officers.⁸⁵ Although the record did not include any explicit request,⁸⁶ the police commissioner testified that he understood there to be an implicit request from community leaders.⁸⁷ If a community leader requests more minority officers, then the appearance of animus toward a particular group is diminished. Without a specific request from community leaders, courts may be more likely to consider potential improvements, via transferred members of the force who speak a foreign language or are trained in community relations, to be equally effective in defusing a crisis, as was noted by the court in *Patrolmen's Benevolent Association*.⁸⁸ Temporary transfers may not resolve the problem in all cases even if more minority officers are explicitly requested. A police department may be justified in making temporary transfers pending the hiring of minority officers for employment in that precinct.

2. Permanent Hires

The foregoing discussion indicates that the "operational needs" of a department may allow a police department to make race-conscious hiring decisions. An affirmative-action hiring policy has the benefit of potentially bridging the racial divide between a community and its police force over a longer period of time.

⁸² *Patrolmen's Benevolent Ass'n*, 310 F.3d at 53 (noting that transferring Creole speaking Haitian American officers and officers trained in community relations to the precinct may have been an adequate response).

⁸³ *Id.* at 54 (citation omitted).

⁸⁴ *Id.*

⁸⁵ *Id.* at 48

⁸⁶ *Id.* at 48.

⁸⁷ *Id.* at 48.

⁸⁸ *Patrolmen's Benevolent Ass'n*, 310 F.3d at 53.

Therefore, race-conscious hiring may consequently combat perceptions of racism that lead to violence. A race-conscious hiring policy is more easily tailored to the holding in *Grutter*, in part because the benefits flowing from a diverse police force are not likely to be experienced immediately upon the hiring or transfer of minority officers to the force excepting their visible presence, which may arguably bear fruit in an emergency situation.

The passage of time is necessary before the benefits of diversity described in *Grutter* are realized. For example, multiple exposures to different minority students who espouse differing opinions or value systems may be necessary before the myth of the minority viewpoint can be extinguished in a law school setting. On the first day of classes, each student will not necessarily announce her closely held opinions, whether they concern politics, religion, or any other subject. Instead, students will more likely get to know one another over the course of their educations and only then, through extended interaction, will the myth of the minority viewpoint be dispelled. Likewise, non-minority officers working with minority officers may require time and experience to become familiar and comfortable with one another. As was noted in *Patrolmen's Benevolent Association*, officers previously assigned to the 70th Precinct were suspicious of the newly transferred officers.⁸⁹ People take time to warm up to one another; police officers should not be expected to be any different in this respect.

The passage of time will also be important for the community. Even in a community where police officers enforce the law equitably, resentment and suspicion of officers, rooted in America's racist history, persist.⁹⁰ The presence of a "critical mass" of minority police officers in a community will function to dispel the notion of the police as an occupying force. In a community where minority officers equitably enforce laws alongside non-minority officers who do the same, community members will more easily distinguish the racist history from contemporary law enforcement. Minority officers who may be more familiar with the culture of the community will nevertheless require a period of time before they are accepted as friends to the community. The passage of time that only a permanent placement offers allows an officer to build trust within the community.

⁸⁹ *Id.* at 48.

⁹⁰ Sandra Bass chronicles the racist history of American police forces,

The interactive relationship between race, space and policing has been of social and political significance since the earliest days of American history. Monitoring the movement of slaves was a central concern for plantation masters and slave patrollers. The desire to regulate and subjugate the behavior of newly manumitted slaves was the primary impetus for creating new legal rules against vagrancy and loitering in the post-antebellum South. The rise of Jim Crow and the location and construction of urban ghettos and public housing were deliberate efforts to promote social control and isolation through racial containment. For the better part of our history, race has been a central determinant in the definition, construction and regulation of public spaces.

3. The Danger of the "Colored Car"

Lurking behind this somewhat sterile analysis is the case history of black police officers assigned exclusively to patrol black neighborhoods.⁹¹ Immediately following desegregation, police departments argued that black officers were better able to communicate with the black residents of a community and consequently were better able to investigate criminal activities.⁹² In 1968, black policemen in St. Petersburg, Florida, were assigned to cover a single zone of the city and were also "assigned to a particular patrol car, which was colloquially referred to in the department as the 'colored car.'"⁹³ The *Baker* court rejected this "blanket assignment" of all black officers to a single area, branding the transfers as "the kind of badge of slavery the thirteenth amendment condemns."⁹⁴

Notwithstanding this result, the circuit court at this early stage recognized the benefits of a diverse police force. The *Baker* court cited a report which recommended a fully and visibly integrated police department.⁹⁵ The court noted that "special assignments might also be justified during brief periods of unusually high racial tension."⁹⁶ *Grutter* is consistent with *Baker* in that it limits diversity to a "critical mass" thereby eliminating the problem of a "blanket assignment." No rational reading of *Grutter* could stand for a policy requiring members of a particular race to exclusively police a specific community.

IV. CONCLUSION

Since *Grutter's* recognition of a "critical mass" of minority students as a constitutionally cognizable goal of law schools, many other organizations are likely trying to construct their own affirmative action programs within the framework described by the Court. Police departments are in a particularly strong position to invoke the principles of *Grutter* because of their duty to protect the public. As outlined above, even Justice Thomas, who dissented in *Grutter*, has indicated a degree of tolerance for racially motivated government action when the public safety is at risk. In a period of racial unrest the possibility of the outbreak of violence may justify the transfer of a "critical mass" of minority officers to an embroiled community. The "aesthetic" value of this temporary transfer may be felt in the short term and defuse the potential violence.

However, transferring officers to a community in the throes of racial strife may have only a temporary effect. Police departments should consider structural changes to promote the diversity of its force permanently. A narrowly tailored policy is critical to an affirmative action program's compliance with the *Grutter* framework. The policy must be limited in its goal, in that it can only seek a "critical mass" of minority officers, rather than a quota or an exact percentage of

⁹¹ See *Baker*, 400 F.2d 294.

⁹² *Id.* at 296.

⁹³ *Id.* at 300.

⁹⁴ *Id.*

⁹⁵ *Id.* at 301, n.11 (citing the *Report of the National Advisory Commission of Civil Disorders* 315-316 (1968)).

⁹⁶ *Id.* at 301, n.10.

officers. *Baker* indicates that a "blanket assignment" of minority officers to a single community is unconstitutional. *Bakke*'s requirement of an "individualized consideration" that distinguishes potential assignees insures that a "blanket assignment" of minority officers to a minority community will not occur. Police departments may employ a "plus-factor" for race when determining their placement in the department so long as the department also includes other "plus-factors" in the decision. Finally, the government must demonstrate the existence of an "operational need" for the policy and that it has considered and exhausted other options. It may be helpful to have a record of community leaders seeking such a policy, but such a request would not be dispositive.

Police departments can model an affirmative action policy after *Grutter* in an effort to combat rising racial tension in the community it polices. The duty to promote public safety and the potential for violence to spring from the racial divide between a community and its police department leads to a compelling interest in diversity within police departments. *Grutter*'s "critical mass" provides the guidepost that police departments can follow to narrowly tailor a policy to meet a state's compelling interest in public safety.

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