# SPEECH

# Keynote Address: Redefining Our Roles in the Battle for Inclusion of People of Color in Legal Education

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I am happy to be here with you today at the Second Annual Northeastern People of Color Legal Scholarship Conference and appreciate the opportunity to speak to you. I was relieved to learn from the pamphlet announcing this conference that I was identified as the co-president-elect of the Society of American Law Teachers (SALT), a position I share with Stephanie Wildman of the University of San Francisco. Quite frankly, when Deborah Waire Post first asked if I would speak, I thought perhaps that I had been invited as the token old-timer, a senior person who'd been around and was on the south side of the journey to talk about better days ahead. I *have* been around a while—about fifteen years—but I still see myself as junior in the sense that I am still trying to define my niche—establish my space and my speed—just like many of you. Perhaps that explains why I would agree to serve on the Executive Committee of AALS (Association of American Law Schools, the governing body of the organization representing over 160 law *schools*) and to be SALT's president at the same time. (SALT, as many of you know, is an organization composed predominantly of law *professors* and represents individuals seeking to promote social justice and progressive goals related to legal education.) Because most of us struggle to keep our heads up without such additional responsibilities it might seem a little crazy, even somewhat schizophrenic to do both—but it has given me a chance to be exposed to some of the institutional problems confronting law schools and to learn how both institutions and law faculty

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are responding to these times of extraordinary change.

From this vantage point, I have in fact seen significant movement in the way law schools have recognized and verbalized a commitment to inclusion of racial and ethnic minorities and women; data suggest that more than a token step has been taken in some institutions. Yet, the future is uncertain and unsettling. In several respects we face extraordinary turning points for institutions that can have great significance to law faculty, generally, and people of color and other marginalized groups in particular. Some of these changes threaten to destabilize the efforts undertaken by law faculty of color over the last fifteen years to open doors of legal education and keep them open for faculty and students of color and ultimately these changes can affect the potential for progress in other areas of the legal enterprise. I want to speak a little about these concerns and consider how we most effectively can address the changes in our actions and our writing.

Many of us came to academe because we saw it as *more* open to change—promoting the interests of inclusion more than other parts of the profession, or at least providing contemplative space for us to think and write critically about systemic injustice here and elsewhere. The changes I speak of today raise questions about the openness to change in our institutions and among our colleagues and suggest that an environment of exclusion may be upon us if we do not organize, align ourselves with others, strategize, and speak out. We stand in a particularly important, though potentially vulnerable, place from which to speak, and thus our focus and planning are critical. It may require shifting our thinking and some of our writing.

Some of the changes that I am concerned about have been well publicized, though the full impact on people of color in legal education is yet to be fully appreciated. For example, *courts and legislatures have obviously become hostile to affirmative action although that hostility is masked by the narrative of colorblindness, fairness and justice.* The media have focused on the Fifth Circuit's response in *Hopwood* and Proposition 209, the so-called "Civil Rights Initiative," suggesting that affirmative action is an unpopular, misdirected, special interest effort about to come to closure.[1] Administrators have begun to use *Hopwood* in

1. The Court of Appeals for the Ninth Circuit upheld the amendment to California's constitution, approved by 54% of the voters, which bars the use of race and gender in decisions about hiring, contracting, admissions, and financial aid. Indicative of the media approach, THE CHRONICLE OF HIGHER EDUCATION ran the headline, "*For Affirmative Action, a New Setback*" THE CHRON. OF HIGHER EDUC., Apr. 18, 1997, at A1.

ways that assume its ruling reaches beyond the borders of the Fifth Circuit. Politicians have advocated action in other states similar to those taken by the California Regents and ultimately the voting public by referendum in California. I know that you have spent a good part of yesterday talking about *Hopwood* so I will not give you my rendition of its wrongheadedness, but I want to emphasize that *Hopwood* should be considered in the context of other appellate cases that have taken a strident position on race-sensitive selection procedures and diversity. In *Podberesky v. Kirwan*,[2] in which a Latino brought suit challenging the scholarship program directed toward Blacks, the Fourth Circuit Court of Appeals ruled that race cannot be used as a basis for determining scholarship awards. It is not insignificant that the two states where the most newsworthy judicial and political anti-affirmative action steps have been taken—Texas and California—are locations where over one third of the nation's underrepresented populations live. In *Taxman v. Board of Education of Piscataway*,[3] the Third Circuit Court of Appeals concluded that a nonremedial affirmative action plan promoting diversity in a public school system is prohibited by Title VII. *Piscataway*'s narrow interpretation of Title VII, and crabbed value placed on diversity, confirms that the legal battlefront in promoting inclusion will extend to the workplace and across the country.

Such decisions come at a time when many educational institutions and law schools in particular have verbalized a strong commitment to diversity, even acknowledging the dangers of racial isolation in providing meaningful education to their students. There is a likelihood that many institutions believe themselves to be hamstrung by these cases and the political environment, permitting the institutions to see themselves as willing to take the morally high ground without subjecting themselves to more accountability than lip-service commitment. Some institutions (like the University of Texas) have vowed to use alternatives like class or socio-economic status (SES) to get around the courts' hostility to race, though there is now powerful data that suggest that SES need not achieve the kind of racial and ethnic diversity that is desirable and would probably result in reallocation of minorities to a limited number

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2. 38 F.3d 147 (4th Cir. 1994).

3. 91 F.3d 1547 (3d Cir. 1996). *But see* Wittmer v. Peters, 87 F.3d 916, 917 (7th Cir. 1996) (stating that race is permissible in promotion decisions involving staffing of "boot camps" of juvenile offenders, in which only two correctional officers were black and 68% of the offenders were African Americans). Judge Posner recognized that law enforcement and correctional settings are locations where "departures from racial neutrality are permissible." *Id.* at 919.

of law schools, with far reaching consequences in terms of exposure and career placement.[4] Little attention has been addressed institutionally to the attitudes and assumptions that have contributed to the courts' hostility to affirmative action or to the systemic reasons for focusing on race and gender as illegitimate "preferences." The perception persists that competitive grades and GPA *entitle* their holders to positions in law school, and that but for the fact that a few Blacks and Latinos ought to be let in, deserving whites have earned these positions and rightfully should have them.

More subtle retrenchment-related events may further contribute to the shift away from an emphasis on broader inclusion (particularly racial and ethnic inclusion). For example, a number of universities currently under consent decrees or desegregation orders being monitored by the Office of Civil Rights have reacted to what they perceive as "intrusion" on their autonomy. Some schools have cited the lack of clarity and double bind of limitations on affirmative action and desegregation orders.[5] The present environment is perceived as an opportunity to seek release from their obligations to desegregate, noting financial costs associated with these obligations as well as competitive costs (for example their ability to compete for the "brightest and best" through scholarships and other incentives).[6] Notably, what has been their legal obligation under such decrees may well be interpreted by the administration and would-be litigators as illegal race-focused preferences in the future.[7]

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4. *See generally* Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996); *see also* Chris Klein, *Law School Diversity Hinges on Race Policy*, NAT'L L.J., Jan. 27, 1997, at A1 (reporting on a study that concluded if law schools had given an advantage to applicants with lower "SES" they would have wound up with fewer, less talented students).

5. *See, e.g.*, Patrick Healy, *State Considers Desegregation Plans Amid Uncertainty Over Federal Goals*, THE CHRON. OF EDUC., Feb. 21, 1997, at A31 (noting that officials in Kentucky and Virginia recently asked the civil rights office to clarify the court decisions and advise them on legally defensible steps that they could take to close their desegregation case files).

6. The NEW YORK TIMES recently reported a significant increase in "merit-based" aid offered to students which it viewed as "slowing the trend toward the ever-greater concentration of talent in more elite institutions." Peter Passell, *Rise in Merit-Based Aid Alters College Market Landscape*, N.Y. TIMES, Apr. 9, 1997, at B10. But the author acknowledged that because these grants are offered, despite the ability of families to pay full tuition, there is concern that the "merit discounts" will reduce the aid available for needy students. Indeed, the author noted that Donald Kennedy, former president of Stanford University, was pessimistic about need-based scholarship remaining available for the needy as more colleges are drawn into the "very serious game of tuition discounting." *See id.*

7. The University System of Georgia was sued by 11 state residents (7 white

Perhaps you have heard about the Georgia case in which Blacks and whites are challenging Georgia's college entry and related procedures as discriminatory. You may not know that the lawyer for these plaintiffs is the lawyer who persuaded the United States Supreme Court to strike the black voting district in Georgia.[8] There have also been reports that law schools which have been directed by the university (under desegregation orders or monitoring by the Office of Civil Rights) to increase racial and ethnic diversity of their faculty have imposed more stringent tenure requirements at the time they are pressured into hiring people of color.

*Uncertainty about public sources of financial support for colleges and universities may also contribute to an environment of isolation.* Just at the time that most law schools have become most vocal about their commitment to diversity (voluntarily, or under the sanction of desegregation orders), financial uncertainty looms large for public and private institutions.[9] It appears that many law schools are restricting the number of hires they make in light of such uncertainty; and some are making hires with no promise of tenure or job permanency.[10] It need not be paranoid to imagine that in the future contract review can be a time for faculty and administrators to consider whether the candidate has demonstrated the appropriate civility and collegiality warranting renewal—a time, in other words, to isolate and discipline some faculty members.[11] Thus even if people of color continue to be hired (and that

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and 4 black plaintiffs, among them alumni and students) claiming that racial segregation persisted at the system's 19 universities because of policies like affirmative action. They claim that race-conscious policies that were meant to weed out vestiges of discrimination perpetuated separation, and that the policies violated the civil rights in attempting to address the vestiges. *See* Patrick Healy, *A Lawsuit Against Georgia University System Attacks a Range of Race-Based Policies*, THE CHRON. OF HIGHER EDUC., Mar. 14, 1997, at A25.

8. *See generally* Miller v. Johnson, 115 S. Ct. 2475 (1995) (drawing of Eleventh District rejected as unlawful racial gerrymandering).

9. *See* Terry Hartle, *The Specter of Budgetary Uncertainty*, THE CHRON. OF HIGHER EDUC., June 28, 1996, at B1 (noting that federal aid saved from substantial cuts in 1996 faced an uncertain future in light of "broad economic, social and demographic changes" shaping federal and state policy-making); Patrick Healy, Second Thoughts, THE CHRON. OF HIGHER EDUC., June 28, 1996, at A21.

10. These decisions are part of a growing national debate about tenure in a time of downsizing. *See, e.g.*, Jennifer Reese, *Is Tenure Outdated?*, DARTMOUTH ALUMNI MAG., June 1996, at 26; Robin Wilson, *Scholars Off the Tenure Track Wonder If They'll Ever Get On*, THE CHRON. OF HIGHER EDUC., June 14, 1996, at A12; Adam Yarmolinsky, *Tenure: Permanence and Change*, CHANGE MAG., May-June 1996, at 16.

11. For example, the Oklahoma Legislature and the University systems in Texas,

may not be a good prediction in the anti-affirmative action environment), we may find our job security in question as the protection of seniority and tenure begins to change. It may come as no surprise to some of you that senior tenured faculty members and deans who are sitting on university committees considering these resource problems are often supportive of such tenure changes. Seldom underscored is the fact that these changes come at a time when more women and people of color are poised to obtain tenure and seek its protections in order to do critical work. One young faculty member at a school that will remain nameless, recently told me that her faculty (largely white, male, and unproductive in terms of writing) had moved to a three-article-before-tenure rule after the university had pressured the law school into hiring several people of color. Is this racially hostile action? At the very least this kind of action seems designed to allay the concerns of majority faculty about the competency of these young hirees.[12]

AALS has in recent years taken forceful positions about the need to hire and retain a diverse faculty. As many of you know, the track record in terms of hiring and retaining faculty, like recruiting and retaining students, is considered in the site inspection and is a particular focus of the AALS Summarian's review. Recent data made available by

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Minnesota, and Maryland are re-evaluating the institution of tenure itself; some have already authorized changes, providing for post-tenure review among other alternatives.

THE CHRONICLE OF HIGHER EDUCATION and other news sources have reported a surprising number of de-tenuring cases this year, including a case at Temple University involving the award-winning writer, David Bradley, a black member of the faculty in the English Department. As a condition of funding some legislators are also seeking greater accountability of teachers, including heavier course loads and peer review after tenure.

The post-tenure review issue is somewhat problematic. On the one hand, it bears noting that these moves have come just at the time that white women and people of color have entered the tenure ranks, suggesting that second-guessing about the quality of decisionmaking (consciously or otherwise) underlies this movement. On the other hand, post-tenure procedures open the possibility that unproductive senior faculty members—among whom faculty of color are not in great numbers—can be pressured to work harder or leave, perhaps opening new positions for women and people of color.

12. Rather than being paranoid, this observation is consistent with the understanding of the pervasive influence of the precept of inferiority described by Judge Higginbotham in his recent book. It is a precept designed to "presume, preserve, protect and defend the ideal of the superiority of whites and the inferiority of blacks." A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 195 (1996). Judge Higginbotham's theory disputes the proposition raised by affirmative action opponents that promoting affirmative outreach policies creates stigma and produces self doubt.

AALS comparing 1986-1987 and 1996-1997 hiring years, indicate twice as many Blacks and a little less than twice as many Latinos registered for the AALS Faculty Appointment Register. More than twice as many Asian or Pacific Islanders registered and five times as many Indians (but that is an increase from one individual to five!). Thus it can no longer be seriously contended (if it ever was) that the pool is too shallow for the hiring of faculty of color. Despite the good news suggested by the data, in this time of economic downturn, far fewer get hired and of those who do get hired, data support the claim that minority men and women take a statistically significant longer time to get promoted. More disturbing is that five, six and seven-year reports from 1990 on promotion of whites as compared with minorities, and males compared with females of both groups, indicate that minority men have a promotion rate much lower than other groups. Again this raises the spectre of the persistence of racially-focused doubt about the competency of minorities affecting decisionmaking.

Notably, in some quarters concern is raised about whether law schools have the resources to make the kind of commitment to quality education—including diversity—that AALS promotes. This concern obviously affects the kind of sanctions that the organization can support in the context of membership review.[13]

*Declining student interest in law reflected in declining admissions in many of our law schools.* At least in so far as current events have redefined the environment, we face the prospect of continuing decline in minority law school admissions, not dissimilar to that already found to be occurring in medical schools.[14] The impact of the decline on the

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13. *Cf. Widening Gap: Private Colleges Fight for Financial Health; Public Institutions Find State Support Unreliable*, THE CHRON. OF HIGHER EDUC., June 14, 1996, at A15. An official of one college has said "there are 3,600 institutions, and I think 1,000 are going to be out of business in ten years." *Id.*

14. *See* Katherine S. Mangan, *Minority Enrollments Drop at Medical Schools*, THE CHRON. OF HIGHER EDUC., Jan. 10, 1997, at A49 (noting that the national 5% drop is most notable in California (where the drop is 19%) and will result in the Association of American Medical Colleges more than likely failing to attain the 1991-established goal of enrolling 3000 new, underrepresented minority students in a single year by 2000). Jordan J. Cohen of the medical association said that the drop indicated that "30 years of work to achieve a truly diverse work force of physicians is in serious danger of collapsing" and attributed the declines to the "anti-affirmative action climate." *Id.* It has been reported that whereas the University of California at Davis had attracted double-digit percentages of students of color to attend its medical school, next year's entering class will include two Latino/a students. Notably, in the medical arena at least one study has been recognized as supporting the argument that Black and Hispanic physicians serve a unique and important role in the delivery of health

ability of lawyers to address the problem of serving poor communities has not been broached, as far as I know.

Facing the general issue of declining admissions, many schools have made decisions to downsize rather than to reach out to other candidates. Concerns about LSAT-driven ranking and unspoken assumptions about competency likely steer some faculties away from making a commitment to increase the numbers of students of color, although sometimes it has led faculties to change the socially understood meaning of inclusion. For example, at a meeting I attended, one faculty member, discussing declining resources of the institution, sought to redefine diversity away from race and ethnicity as a means of maintaining their competitive advantage while meeting their vocal commitment to inclusion.

The implications of these declines seem strikingly apparent to me but not nearly as distressing to others.[15] First, it would be a mistake to attribute the decline of minority admissions solely to lack of interest. There are sobering indications that state and federal policies affecting tuition costs, preferences for loans over financial grants, and decisions to move away from need-based to merit-based financial aid *in addition to changing admission standards* will contribute to fewer students being able to make the choice of attending law school.[16] Those students affected are disproportionately people of color. Second, data suggest that students are making choices focused on whether the campus will offer an hospitable environment. There are already signs that students and their parents are prepared to turn their sights away from flagship schools that are the subject of litigation and political battles.[17] It seems that we have utterly failed to make the case for linking racial and ethnic diversity and the education of all people, or to adequately identify the public value lost when racial isolation persists, particularly in professional education.

What does all this mean for us? Rather than circumspection and defeat, I see this as an extraordinarily important time for forming alliances and honing our skills as lawyers and writers to promote social

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care for poor people and members of minority groups. *See generally* Miriam Komaromy et al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 N. ENG. J. MED. 1305 (1996).

15. *See, e.g.*, Peter Schmidt, *A Federal Appeals Court Upholds California Measure Barring Racial Preferences*, THE CHRON. OF HIGHER EDUC., Apr. 18, 1997, at A28 (reporting that Governor Pete Wilson claimed that the ruling will lead to "genuine equality of access to opportunity to all citizens").

16. *See supra* note 9 and accompanying text.

17. *See* Peter Applebome, *Universities Report Less Minority Interest After Actions to Ban Preferences*, N.Y. TIMES, Mar. 19, 1997, at B12.

justice. Perhaps that sounds too high-flying; I suspect, however, that it is rather the case that many of us already see our individual work—our scholarship and our teaching—as serving the interest of social justice. Here I'm emphasizing collective action and adaptation because there seems to be a particular urgency for us not to remain preoccupied with isolated efforts, but to seek opportunities to promote dialogue and forge new and stronger alliances with others who share our fate.[18]

Some of you know that the Society of American Law Teachers over the years has been involved in initiatives to make law schools, the legal profession, and society more inclusive, attacking racial and gender hierarchy in each of those arenas. You may have attended the Teaching and Diversity Conferences that SALT has been sponsoring over the last several years. Recently, the Board of Governors voted to respond to the assault on affirmative action by launching a faculty-driven multi-year campaign to refocus the public debate on issues of race and gender inequities, and to reassert the legitimacy of using race and gender in determining how public goods are allocated. We aim to shape a progressive action agenda that replaces the liberal policies for change of the past and attacks the conservative efforts to maintain the status quo. We invite you to join us in this effort. But whether or not you join the movement in SALT, there is much work for you to do.

*Reshaping the Debate About Affirmative Action*: The onslaught of attacks on affirmative action is widespread and requires forceful response from all of us. Much of the reason why the attack has been so successful in the media and ultimately in the courts and legislatures (as Professors Lani Guinier and Susan Sturm point out in a recent article in California Law Review)[19] has been a consequence of the media's focus on hot button words (such as "quotas," "racial preference," people "earning" a seat being "deprived" because of "reverse discrimination"). Accounts of white men suffering at the heels of unqualified women and Blacks abound. What has been left out of the discussion of affirmative action is not only the fact of continuing discrimination against minorities and women, but also the fact that the system itself unfairly privileges the wealthy. The focus in the discussion of the double bind of affirmative action and desegregation has been on the hardship on the universities, rather than the adequacy of their efforts to address persis-

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18. This is a lesson we should have learned from Professor Derrick Bell. *See generally* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

19. *See generally* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996).

tent racial and ethnic inequalities. SALT is looking for allies to help us reshape the debate and reframe the discussion about racial and gender exclusion in admissions in legal education, pointing out how language and factual distortions disserve the interests of equality.

Professors Guinier and Sturm have urged us to explode the myth of meritocracy, which suggests that the only preferences that have been made in the selection process in work and education are for race and gender, and to challenge the very definition of merit as it is defined in the law school context by over-reliance on the LSAT and GPA. They demonstrate that reliance on test scores promote wealth preferences and that the fairness of the selection system itself can be challenged because it keeps many of those who may be fit to practice and to serve clients out of the pool, and legitimatizes their exclusion. The conception of affirmative action as permitting unqualified Blacks and other ethnic group members to displace qualified whites is false and masks the fact that many whites as well as Blacks and other groups are held at the margins and excluded by a "paper and pencil"[20] ranking system that works best for and privileges wealthy whites.[21] (In SALT we have begun to wage the battle cry, "Hopwood is our ally, not our foe," in redefining merit and deconstructing the myths around affirmative action.) By this battle cry we seek to move away from being preoccupied with the gender- or race-plus factoring that has been the hallmark of affirmative action, because it is treated as a marginally legitimate add-on to a merit system. We seek to focus attention on the fact that the evaluation system itself is flawed, constructed to exclude racial and other outsider groups. In short, we seek to examine the real underlying structural barriers to participation including unfair, underinclusive standards of merit.

Professor Michael Olivas has written that critics of affirmative action—and many federal judges—have become convinced that higher scores on tests translate into more meritorious applicants, and that reliance on objective measures constitutes a fair, race-neutral process.[22] Professor Olivas calls their view of the quality of such so-called race-neutral tools "near-magical." Typically judges have confined the basis

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20. *See* Sturm & Guinier, *supra* note 19, at 976.

21. Notably, Professor David White at Tulane Law School has been making these claims for many years.

22. *See* Michael Olivas, *The Decision Is Flatly Wrong*, THE CHRON. OF HIGHER EDUC., Mar. 29, 1996, at B3 (discussing how judges and anti-affirmative action proponents seem to find "near magical" the ability of test scores to predict the aptitude for the study of law).

of selection of their law clerks to what they consider to be "objective" criteria, such as grades and LSAT scores. However, one might find other considerations relevant to the task of identifying the best law clerks. For example, life experiences or community service might be significant factors for the evaluation of candidates who have done reasonably well in law school.

By his own example, Richard Delgado has encouraged us to tell stories that deconstruct the myths of affirmative action and offer counter-narratives that question the assumptions about who is qualified and who holds power.[23] If affirmative action has resulted in the substantial preferences favoring minorities, why are there still so few Blacks, Latinos and other people of color in positions of power? Who *are* the people getting the jobs (and law school seats) and keeping them? How do veteran's preferences, geographical factoring, alumni points, and athlete considerations relate to the discussion of the illegitimacy of race and gender preference? For example, Professor Olivas points out that the supposed massive dislocation of deserving whites, displaced by undeserving students of color, is simply contradictable by the data. The number of white law students in law schools today is at an all-time high. More than 120,000 or 85% of the total enrollment in states and the District of Columbia are white. In contrast, Blacks make up 6% and members of other minority groups an even smaller percentage. For Mexican and Puerto Rican groups—among the fastest growing in our population—enrollment figures are actually declining since the early eighties, according to Professor Olivas.[24] More whites were taken from the University of Texas' waiting list in 1992, the year Cheryl Hopwood applied, than the total number of minority group students enrolled; and a substantial number of them had test scores higher than Cheryl Hopwood.

One way of getting attention in the debate about affirmative action is to make people confront the reality of racial isolation that existed before affirmative action, and that can quickly resume without a system promoting inclusion. A strategy we have suggested to members of SALT who are women and people of color is that they use opportunities for speaking in public to explicitly recognize the fact that affirmative action has benefitted them and tell stories about how they have been benefitted. Professor Mari Matsuda made such a recognition at the recent AALS annual meeting[25] and I believe that it is a dramatic way

23. *See, e.g.*, Richard Delgado, *The Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1364 (1992) (observing that: "Merit sounds like white people's affirmative action!").

24. *See* Olivas, *supra* note 22, at B3.

25. AALS Workshop on Achieving a Diverse Student Body in a Time of Re-

of providing a concrete context for reshaping the debate. I must add, however, that I wonder how successful that strategy will be, not because I do not believe that we who are in academe have not benefitted from affirmative action, but because I suspect that many of us feel the need to justify our place and demonstrate our fitness within the existing meritocratic scheme.[26] Indeed, the fact that we are at least somewhat successful at playing the ranking and credentials game (or we would not have gotten where we are under the present system) may make it difficult for us to challenge it.

As we confront our own collaboration with exclusion under the present meritocratic regime—what Professor Guinier has called the "testocracy"—we should try to do more than challenge the myth of incompetence of people who are the product of affirmative action. We should promote dialogue about constructing new visions of merit and redefining who should be in our law school classes.

*Defining Who Should Be Our Students*: A broadened notion of merit—say one based on job performance, as suggested by Professors Sturm and Guinier,[27] or on selection criteria other than the LSAT—should be driven by some clearer understanding of students we seek to reach and teach. Ultimately we must confront other questions concerning our work. What kind of students do we seek to educate? With what skills need they come to law school? What kind of legal education should we offer them and how can we encourage academic success? What kind of law schools do we want to promote?[28]

In short, this project has transformative potential extending well beyond the admissions and hiring process. It reaches curricular and effective teaching concerns and issues related to student and faculty retention, and should be affected by our sense of the needs of the clients of the future and the direction of the profession.[29] Few law

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trenchment: Rising Controversy and Renewed Commitment (Washington, D.C., Jan. 4, 1997).

26. At a recent gathering, I heard Cornell West observe that *all* of us suffer from the effects of white superiority; in people of color it is exhibited in our own self-doubt about our competency and the need to prove ourselves outside the racial mold and therefore acceptable.

27. *See* Sturm & Guinier, *supra* note 19, at 997.

28. Dean Barbara Aldave has posed the broader question facing us: "Who should be teaching what to whom and for what purpose?"

29. *See* Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Toward an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1301 (1992) ("[L]aw has come to define the problems of ordinary people in ways that may have little meaning for them, and to offer remedies that are unresponsive to their needs as

schools—even those that have expressed a passionate commitment to diversity—have struggled with these questions.[30]

In fact, experience persuades me of the validity of the criticism that affirmative action, as we now know it, serves to marginalize and even mask the toughest issues of inclusion. As I have mentioned earlier, racial and gender inclusion is seen as at best morally appealing, but not quite part of legitimate institutional concerns about educating lawyers. In fact many law schools verbalize a commitment to diversity *and* persist in wringing their hands about whether the minority students they admit can *really* do the work as compared to students who have come through the "regular" admissions process. Few schools examine their own teaching and curriculum holistically—with an eye toward the clients that lawyers will be serving in the twenty-first century, or if they do, the assumption is that the clients will be wealthy, globe-trotting megacorporations, not the underserved; even fewer link those discussions back to admissions and selection criteria.[31] Because of our own experiences, this is a project that must include faculty of color.

There are real barriers to having these discussions today. Two reasons related to the affirmative action controversy come to mind. First, in this time of retrenchment and declining admissions, institutional rankings have taken on new proportions. U.S. NEWS AND WORLD REPORT's ranking as well as the ABA's proposed "consumer's guide," reflect efforts that define a pecking order driven by conceptions of competition that are quantitative and rest on the same kind of narrowly defined, troublesome merit standards discussed above. Second, concerns about bar passage rates have tempered enthusiasm for diversity. Faced with low bar passage rates in these competitive times even law schools in which there has been historic support for diversity in student and faculty recruitment are tempted to rely on ways of "weeding out" students before they graduate and take a bar exam. But bar examinations, like LSAT rankings, have defined merit in terms of "pen and pencil" tests,[32] rather than other standards developed to assess competency to

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they see them."). *See generally* Phoebe A. Haddon, *Education for a Public Calling in the 21st Century*, 69 WASH. L. REV. 573 (1994); Austin Sarat, *"The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990).

30. *See* Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43, 43 (1991) ("Law schools pay virtually no attention to client service and ghettoize instructions having to do with clients and client counselling in clinical courses.").

31. *See generally* Haddon, *supra* note 29, at 573.

32. Sturm & Guinier, *supra* note 19, at 976. Even the new "Multistate Perfor-

serve clients and other benefits to the classroom discussion and to the profession. It becomes apparent that taking on the challenge to existing systems of selection is a project with far-reaching consequences and concerns.

*Why Us?* Because the issues transcend the university boundaries and affect the profession, I believe that law professors are well suited for this project of reshaping the debate about affirmative action and that faculty of color should exercise leadership. We have the capacity to use language to reconstruct the debate, to tell stories that can expose the unfairness of the system of selection and retention of students and faculty, and to develop strategies designed to reach faculty as well as people outside the ivy towers concerned about continuing racial and gender inequality. In law reviews, many of us have engaged in scathing critiques of the use of colorblindness as a governing narrative of courts, exposing its capacity to maintain white superiority and related subordination. We need now focus on more public ways of communicating the value of racial and gender diversity and educating lay people why the lack of meaningful inclusion of racial and gender groups makes the legal system and society unjust.

Because we will be speaking about matters that challenge the status quo, we need the support of allies on our faculties and in the university. As I mentioned earlier, the environment of retrenchment leaves open possibilities that our interest in challenging the status quo will lead to charges of lack of civility and other disciplining sanctions. But as I hope I have conveyed, many of these issues are linked to issues of importance to other groups—for example the Hopwoods, university faculty who are increasingly without tenure protections or benefits like health benefits and competitive salaries, and underserved people in our communities. As the preliminary debate about merit has reflected, it is not the case that all of those who have been aligned with progressive politics in the past will necessarily join us here.[33] Moreover, because we are all products of the meritocracy and have been successful at playing the ranking and credentials game, we may ourselves be hard-pressed to move away from the present structure. We are rugged individualists often used to working in isolation writing and studying rather than engaging in this kind of public discourse.

Critical Race Theory and Feminist Theory have challenged us to

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mance Test" (MPT), a skills test adopted by thirteen states, focuses on analytical writing in a timed framework—similar to the more traditional bar examination.

33. *See generally* Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 101 (1995).

combine praxis and theory, to move beyond our own isolated musings to collective efforts to address social inequality. At conferences and workshops like this we have become comfortable engaging in critiques of our own work—and examining the tensions that persist and sometimes divide us into discrete racial and ethnic groups. We have come far, though not far enough, in seeing ourselves as allies in these struggles but this project requires our coming together, as well as outreach.

The discourse should include our students as well as our underserved clients.[34] From our students we can learn more about how becoming a lawyer can destroy one's sense of self—what Lani Guinier has called the process of "Becoming a Gentleman."[35] Peter Alexander,[36] Paula Johnson,[37] and others have written eloquently about the education we can receive from our students—if we only listen as well as converse. We need a better understanding of the way students who are admitted to law school lose their identity, self-esteem, and ultimately their will to succeed as they integrate into the law school culture if we are seriously going to consider how law school education needs to change.[38] Of course, some of us have some sense of the feeling of isolation when we find ourselves marginalized by our colleagues and our students.[39] But as Peter Alexander points out, we can lose the ear for students' sense of well being as we get caught up in our own work and sense of purpose. Getting some sense of what it means to be a lawyer from the vantage point of students in legal education today seems critical if we are to advance the discission of what is needed to be a lawyer able to serve the needs of underserved groups in the future. From underserved clients we can learn more about the skills that are needed to serve them. And as one young lawyer reminds us, we

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34. *See* Haddon, *supra* note 29, at 573; *see also* Cunningham, *supra* note 29, at 1298. Professor Cunningham and others suggest that the legal system has become irrelevant to the society that lawyers serve. For example, legal remedies are often irrelevant to victims of abuse. *See, e.g.*, Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 496 n.12 (1989).

35. *See generally* Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 5 n.16 (1994); Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN'S L.J. 93 (1991).

36. *See generally* Peter C. Alexander, *Diversity Challenge: CLEO Students in Search of an Identity*, 14 UCLA NAT'L BLACK L.J. 157 (1995).

37. *See generally* Paula C. Johnson, *The Role of Minority Faculty in the Recruitment and Retention of Students of Color*, 12 N. ILL. U. L. REV. 313 (1992).

38. *See, e.g.*, Guinier et al., *supra* note 35, at 1.

39. *See* Okianer Dark, *Just My 'Magination*, 10 HARV. BLACKLETTER J. 22-23, 34-35 (1993).

can find increased meaning in our work by engaging in the lives of clients who are underserved.[40] Of course this is an area in which clinicians have written, but perhaps it is another area where faculty of color should be more involved.

As legal scholars, we have noted that the civil rights movement may have become defined by the litigation strategies that were developed, rather than driven by independent goals.[41] As I mentioned earlier, SALT seeks to define a progressive agenda that does not rely on liberal policies that were a product of the civil rights movement, and to attack conservative policies that have used civil rights laws to deny rights to people of color and women. It cannot be gainsaid that we need to seek other forums besides law reviews and the courts to engage in collective action. For example, we should utilize writing opportunities on "op ed" pages of major newspapers, radio appearances and other media. SALT has proposed the organization of a traveling road show in which law teachers can "teach-in" and make presentations across the country. These teach-ins would be designed to draw the attention of students, academics, the media, and the public. To encourage law schools to experiment with admission and hiring policies and respond to concerns about litigation exposure, we also seek to identify sources for the creation of an indemnification fund. I offer these ideas to suggest that there are a number of creative ways in which you can be part of the battle.

In closing, I want to return to the retrenchment concern and our security in this work. It is clear to me that retrenchment gives institutions both a reason to shrug off *and* a reason to solidify a verbalized commitment to inclusion. There are real possibilities for collective action to encourage institutions to make such choices. And legal education institutions should be encouraged to think more deeply about the benefits of taking leadership in promoting an environment of inclusion for faculty and students, given the demographic realities of the twenty-first century. As I have emphasized, we have a strategic role to play in this

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40. *See, e.g.*, Barbara Bezdek, *Reconstructing a Pedagogy of Responsibility*, 43 HASTINGS L.J. 1159, 1162 (1992) (noting that the present posture of professional responsibility views lawyers as disconnected from the social world). I am grateful for receiving further insight on this point from comments made subsequent to the delivery of this Keynote by Julie Su, an attorney with the Asian Pacific American Legal Center of Southern California, who spoke about her vision of a new legal practice at the SALT Conference on April 11, 1997.

41. *See generally* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

project. A first step is to locate safe environments like this one where we can work out our differences and begin to create collective, mutually supportive strategies. Seen in its more critical light, affirmative action raises possibilities about participation that go beyond race and gender and can link us to a much broader constituency. We need to be at the forefront or we may find ourselves outmatched by the political strategists aiming to put an end to policies favoring inclusion.

The lawyers who successfully challenged University of Texas' admissions program, the Center for Individual Rights, a nonprofit law group centered in the District of Columbia, have filed a similar suit recently in the state of Washington. Its Executive Director, Michael S. Greve, admitted not having any proof that the University of Washington Law School had used lower admissions standards to admit minority students than it did for whites. He said, however, that under the former law dean (later President of AALS, Wallace Loh) the school in a few years had more than doubled its proportion of students from minority groups to about 40% in 1994. "The only way to do that as everybody knows, is to lower admissions standards."[42] We must challenge such inflammatory assumptions and strategies that promote them, proposing new ways of effectuating greater inclusion in our law schools and beyond.

42. *Suit Challenges Affirmative Action at U. Of Wash.*, THE CHRON. OF HIGHER EDUC., Mar. 14, 1997, at A27.