

The **EQUALIZER** **SALT**

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BRINGING THE MARGINALIZED INTO THE MAINSTREAM

SALT speaks out on diversity,
inclusion and the promise of "affirmative action"

During recent months we have witnessed serious attacks against "affirmative action" on many fronts – from the Supreme Court, members of Congress, the Justice Department, within the White House, on ballot measures, on university campuses, and within the legal academy. No doubt this will be a central issue in the 1996 presidential race. In response, the Society of American Law Teachers has established as its first priority the reaffirmation of the principles supporting diversity. We take this opportunity to restate them for a new generation of law students, as well as for a wider audience which seems to have lost sight of the moral underpinnings of an inclusive society. It is our hope that the essays contained in this Special Issue will inspire renewed efforts within the legal community to "stay the course."

Although much remains to be done, the demographics of the legal academy has certainly improved in the last decade. Having taught constitutional law in a virtually all-white classroom just ten years ago, then more recently in one with token minority representation, and today where a critical mass of minority students is enrolled, I have hope. With a marked transformation in the profile of our faculty and our student body, classroom discussions, scholarly discourse and law school policy-making have qualitatively changed. Across the nation, law schools are inching their way toward "looking more like America," and we are turning out a generation of lawyers better informed about and more sensitized to the needs of our diverse and largely underserved communities. Yet, national figures demonstrate that the increase in minority representation in the legal academy has been painfully slow. Women have fared significantly better, but their representation on law school faculties is still only one-half that of women in our student bodies. Thus, the bulk of our task still lies ahead.

Although we represent a minority of the general population (as well as of our law school constituents), middle-aged white men such as myself continue to overwhelmingly dominate law faculties. And within this powerful group, too many of us with impressive "progressive" credentials seem to have abandoned the struggle, choosing instead, for example, to denigrate academic support programs aimed at reducing minority student attrition as a "misallocation of institutional resources" or to challenge legislatively-mandated set-asides on judicial nominating commissions because "they're simply unAmerican." Clearly, we, as SALT members, have our work cut out for us. It is time to re-affirm our commitments . . . and there can be NO RETREAT.

– Professor Michael Rooke-Ley,
Editor

THE UNFORTUNATE RHETORIC OF AFFIRMATIVE ACTION

– Professor Pat Cain
*University of Iowa
School of Law*

"In my opinion, affirmative action is always wrong." The pronouncement came from a first-year student in my property class. We were discussing *Starrett Cities* and whether the use of racial quotas to encourage integrated housing violated the Fair Housing Act. Most of my students, regardless of race, thought that setting racial quotas to prevent "tip-ping" was a bad idea. There was a greater division of opinion, but still not race-based, over whether integrated housing in and of itself was a sufficiently important goal to warrant any sort of race-conscious remedy. But when the morality of affirmative action became the focus, the class discussion quickly divided along noticeable racial lines. Yet, what troubled me most about the discussion was not the racial divide, but rather the fact that none of us seemed to be talking about the same thing when we used the phrase "affirmative action." Many students viewed affirmative action as the granting of preferences to unqualified individuals. Others viewed affirmative action as any effort made to increase diversity of a workforce, a university, or a neighborhood. And some viewed affirmative action as just one means among many to ensure nondiscrimination. How could we have an intelligent conversation about such an emotionally charged topic when we weren't even speaking the same language?

I don't like the term affirmative action, and

I rarely use it. From now on, I will require students who use the term to define the exact "means" they have in mind. My term of choice is diversity. Diversity is, of course, more of an end than a means. In the university context, the principles at stake are: (1) creating a diverse university population that represents world diversity, and (2) ensuring nondiscrimination and equal opportunity. When we recruit students, faculty and staff from previously underrepresented groups, we are, according to my first-year student, engaging in affirmative action. His term lumps together efforts

that include advertising in minority and women's publications, making extra calls to identify candidates who may be in a different pipeline, using current students of color to recruit prospective students of color, granting attractive financial aid packages to students who would not otherwise come to Iowa, and expanding the criteria against which we have traditionally judged quality. His term, "affirmative action," focuses on the recruits as the only beneficiaries of affirmative action, as persons who are being given preferences solely for their own benefit. I call these affirmative efforts "diversity efforts," and I believe they are all justified means to accomplish a necessary and important goal. By using the term "diversity efforts," I mean to keep the goal of diversity in the forefront of the conversation. Diversity at a university or a law school benefits

everyone who plans to live and work in this diverse world and not just the persons recruited to increase diversity. The point may seem obvious, but the point is easier to make when it is divorced from the unfortunate rhetoric of "affirmative action." ■

ACCESS TO POWER

– Professor Leslie Espinoza
*Boston College
Law School*

"I have no doubt that I am an 'Affirmative Action Baby,' now full grown. To what extent admission standards were bent or broken in admitting me to college, law school, lawyering and now the academy, I do not know. (Of course, such standards exist as hard and fast rules only when admission of outsiders is being evaluated.) More important is how the concept of affirmative action, institutionalized and legalized, made me feel. Affirmative action was a welcoming mat. I did not belong to a network that clued me in to what the standards were. From high school, I applied to one college, irrespective of race and/or ethnicity, to be accepted to Harvard Law School. I only applied to Harvard as a favor to a favorite professor. He was as certain I would be admitted as I was certain that I didn't have a chance. And I almost didn't go. I knew then, as I know now, that Harvard is not the end all and be all. However, I had no idea then, and it still amazes me now, how that name would open doors. Access to power is still what affirmative action is about. Exclusion on the basis of race and/or ethnicity is still what American society is primarily about."

THE SPOILS OF VICTIMHOOD

— Excerpted from Michael Kinsley's excellent article, "The Spoils of Victimhood: The Case Against The Case Against Affirmative Action," *The New Yorker*, March 27, 1995, at 64, 69.

. . . Of course, it is widely believed that the proper goal of civil rights is a society where people are judged as individuals and not as members of a group. This ideal, many people say, is what divides "good" civil rights from "bad" affirmative action. But, like "equal opportunity" and other shibboleths of the affirmative action debate, the appealing notion of "individuals, not groups" is more a slogan than a coherent principle.

What does it mean to judge people "as individuals" and not as members of a group? Does it mean that each person should be evaluated in a way that does not involve assumptions based on that person's membership in some group? In that sense, no one is ever judged as an individual. Every criterion used in the meritocratic selection process, whether for a job or a place at school, is a generalization from some group trait. Those generalizations are always approximate, and sometimes wrong. Even the most seemingly scientific and individually tailored measurement — say, a score on a medical school entrance exam — cannot predict with perfect accuracy who will make the best doctors. People who score high on the exam are being judged, as a group, more likely than others to become good doctors, and as a generalization that may be perfectly valid. (More refined selection machinery may be impossible or too costly.) But it is a group generalization.

True, there are groups and groups. "People who score high on their medical school entrance exams" are not self-identified as a group and feel no group affinity. Other groups that get systematic group preference in our society — veterans, for example — have more of the symptoms of "groupiness." Giving veterans preference (e.g., for civil service jobs) violates the "equal opportunity" principle that a job should go to the best-qualified candidate. It does so in favor of the apparently superior principle of rewarding those who have sacrificed for their country. But that, too, is only a generalization. Some veterans may have sacrificed nothing in

particular, while non-veterans who have sacrificed greatly in other ways get no preference, or may even lose out to a less deserving veteran. The point is not that giving veterans preference is a bad idea — only that, like any group generalization, it is approximate. Yet we live with it . . .

But what of group generalizations that discriminate in favor of blacks? . . . The answer must be that race is such a toxic subject in American culture that it should not enter into calculations about people's places in society — even in order to benefit racism's historic victims. That is a respectable answer. But it understandably rings hollow to many blacks, who see this sudden and ostentatious anathema on racial consciousness as a bit too convenient. Where was color blindness when they needed it? . . .

Affirmative action has become a scapegoat for the anxieties of the white middle class. Some of those anxieties are justified; some are self-indulgent fantasies. But the actual role of affirmative action in denying opportunities to white people is small compared to its role in the public imagination and the public debate. Black unemployment is still higher than white unemployment, and blacks still trail whites in every major prestige occupation outside sports. That reality raises many troubling questions — about affirmative action, among other things. But it also suggests

that few whites have actually lost a career opportunity to a less qualified black — certainly far fewer than the number who have been whipped into a fury of resentment over affirmative action.

What is most poisonous about the campaign against affirmative action is that it invites whites to blame blacks for their problems. What is almost as poisonous, though, is the way attacks on affirmative action reinforce the one-to-two-hundred-and-sixty-million myth: the myth that, in the absence of racial discrimination, we would all find our places in life according to our just deserts. Oddly, the philosophy of affirmative action itself derives from, and reinforces, the same myth. This myth nurtures frenzies of resentment that do our politics plenty of damage. American society would be healthier — and not only on the race issue — if people, black and white, would keep in mind that neither just deserts nor nefarious discrimination is as important, in determining one's lot in life, as simple luck. ■

"[T]he campaign against affirmative action . . . invites whites to blame blacks for their problems."

EMBRACING DIVERSITY

– Professor Stephanie Wildman
University of San Francisco
School of Law

Affirmative action is a widely misunderstood notion. Affirmative action is necessary in order to achieve the goal of non-discrimination which our societal ideals support. Acting affirmatively is the only way we can ensure that our institutions reflect the ideals of equality, fairness and equal opportunity which are so important in our culture.

There are four principal objections to affirmative action: (1) it violates the democratic ideal of color and sex blindness; (2) it undermines merit-based selection; (3) it is unfair to those who have not actively discriminated, and (4) it stigmatizes those it purports to assist. Let's examine each of these objections.

Our societal ideal is that race and sex should be irrelevant. But that imagined culture is not our culture. The "ignore color and gender" argument is attractive because it is advanced as if it is not an ideal, but reality. We are asked to believe that the discrimination-free society is here and that to pay attention to race or sex would turn back the clock to the days before racism and sexism were eliminated.

One begins the argument with a false, but attractive premise: that the future is now, that except for the occasional aberrant bigoted sexist, we live in a society that is neutral as to color and gender. A moment's reflection reveals that this is not our cultural reality.

The second argument against affirmative action is related to the myth of meritocracy and the fear that affirmative action results in a lowering of so-called "standards." Consider the following riddle:

A father and his son were driving to a ball game when their car stalled on the railroad tracks. The car was hit by the oncoming train. An ambulance sped them to the hospital, but on the way the father died. The son was still alive, but his condition was serious and he needed immediate surgery. He was wheeled into an operating room and the surgeon came in expecting a routine case. Upon seeing the boy, the surgeon blanched and said, "I can't operate on this boy. He's my son."

How could this be?

The answer, of course, is that the surgeon is the boy's mother. An obvious answer once you think about it or get it only after thinking. Most people's instantaneous reaction is to picture the surgeon as male.

This riddle makes visible our societal default assumptions, unconscious assumptions that our mind makes and that channel our thoughts. These assumptions are made automatically, not as a result of consideration and thought. We have trouble at a gut level seeing women as surgeons, lawyers and senior vice-presidents. The images we associate with these words are male. Intellectual knowledge – knowing that women can be surgeons – doesn't help because our mind makes the culturally accustomed leaps without rational thought process. We have to change people's experience to change their default assumptions.

Thirdly, the unfairness argument simply does not sustain objections to affirmative action.

We as a society pay for much we didn't personally do, e.g. the Chrysler bail-out, and it would be particularly ironic to begin reversing this practice by abandoning those most in need of inclusion.

Finally, the majority's professed concern that affirmative action beneficiaries are

being further stigmatized is misdirected (and seemingly disingenuous). The stigma of being a woman law professor or a minority law firm associate comes from society's default assumptions, the preconceptions that we must not be able to do the job, and not from the existence of affirmative action.

I am an affirmative action professor. I wouldn't be a law professor today if the University of San Francisco School of Law appointments committee hadn't sought me out when I was clerking at the Ninth Circuit and asked me to enter the field of law teaching.

When we try to assess the qualifications of prospective law students, faculty members or law-firm associates, we shouldn't assume, albeit unconsciously, that those applicants who look most like ourselves are the most qualified. We should act affirmatively to embrace the diversity which will strengthen us and our institutions. ■

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REVERSING DISCRIMINATION: The Case for Affirmative Action

— Excerpted from Gerald Horne, "Reversing Discrimination: The Case for Affirmative Action," Political Affairs, February/March 1992, at 7, 11, 12, 13.

... [A]ffirmative action often is denounced as "reverse discrimination" against Euro-American males. This is curious thinking. When buildings are forced to build ramps for the physically challenged or lifts for buses, is this "reverse discrimination?" Does the cinema engage in "reverse discrimination" when it charges children and senior citizens less to be admitted? Is it "reverse discrimination" when veterans receive special benefits from the government? "Reverse discrimination" seems only to arise when programs that are perceived as benefiting African Americans are considered.

Affirmative action is a group remedy for a group wrong. When a Mexican American is denied a job because of national origin discrimination, this wrong is committed not because the perpetrator had a particular animus against that particular person; indeed, the perpetrator most likely hardly knows the individual in question. The discrimination is visited upon the individual because she is a member of a group. The essence of bigotry is this kind of collective punishment.

Consider the baseball players, who before 1946 were able to get to the Hall of Fame more easily since they did not have to compete against the Bob Gibsons and Juan Marichals of their era. Moreover, past patterns of discrimination means that even with affirmative action many non-minority families enjoy advantages in wealth that not only can be passed on to their children, but can be parlayed into educational and vocational advan-

tages for the entire family. Either affirmative action is pursued or we run the risk of freezing in place a devastatingly institutionalized bigotry.

Colleges seek diversity, and not just of the ethnic and gender variety — geographic diversity is sought as well. If they have teachers instructing in areas like electrical engineering or Spanish or Yiddish, they must seek out students with those interests, and such students may be admitted with lower test scores or grades over a student whose interests are overrepresented in the student body, e.g., one who seeks to major in business. Once again, it is curious that on college campuses only measures to push ethnic diversity tend to cause controversy, while measures to insure other forms of diversity go unremarked.

Consider veterans' preferences... Obviously, the determination has been made that veterans have had to bear a special burden and thus deserve a special compensation as a result...

Affirmative action has been a government initiative that has sought to bring benefit to those traditionally barred from any form of government largess. Agri-business receives massive subsidies from the government and those are dollars that could have gone to education and health. Textile manufacturers benefit from tariffs placed by the government on imports. Lee Iacocca and other

auto industry fat-cats have demanded all manner of restrictions on Japanese exports to this country, including goals, timetables, quotas and the like. Those who argue that affirmative action overrides merit have not made a similar argument about overriding the merit of Japanese exports.

It is often suggested that affirmative action... helps to inject a note of self-doubt among recipients concerning their self-worth and merit. One wonders [if]... Lee Iacocca experiences self-doubt because his company requires government aid. ■

MERITOCRACY

"The argument that equates opposition to affirmative action with a quest for a meritocracy rings false. It assumes that Americans agree on a definition of a meritocracy and that we have a tangible notion of how to bring one about.

"None of these propositions is true. Determining real merit is so difficult that we generally find ourselves focusing on test scores. Much of the case against affirmative action ends up being a case for people who test well as opposed to people who don't. But good as tests might be at measuring certain types of intelligence, few people believe they assess overall merit well. No one, for instance, would propose choosing a chairman of a corporation — or even a department head — solely on the basis of a test."

— Ellis Cose, as quoted in Miami Herald, April 2, 1995, at 1C.

SLAVERY'S CONSEQUENCES

– Professor David Chang
New York Law School

California's Governor Pete Wilson, like too many others, hopes to achieve his political goals – in his case, the presidency – on the proposition that affirmative action “erod[es] the American ideal that anyone who works hard and plays by the rules has an equal chance to achieve the American dream.”

In my view, abandoning affirmative action would erode the American ideal of equal opportunity. In particular, race-specific programs designed to redress the efforts of profound and pervasive racial discrimination against African-Americans are necessary to achieve Wilson's stated goal of equal opportunity.

The moral justifications for this affirmative action rest on these facts: (1) Africans were enslaved to serve European settlers in the Americas; (2) this enslavement represents the most hideous of practices based on the vilest attitudes and philosophies of which modern humanity has been capable; (3) the practices of slavery devolved into deep and pervasive public and private practices of discrimination against blacks reflecting the same racist immorality that undergirded slavery; (4) these

practices have persisted generation after generation; (5) generations of deep and pervasive racist discrimination against blacks have had the most harmful and debilitating consequences for African-Americans; (6) these consequences are reflected in the underrepresentation of African-Americans in the professions and in nearly every circumstance that society most values and that individuals most desire; (7) these consequences also are reflected in the overrepresentation of African-Americans among the poor, the unemployed, the undereducated, and in nearly every other circumstance that society least values and that individuals least desire; (8) these consequences also are reflected in a widening schism between black and white perspectives suggested

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by voting patterns and even in poll numbers about reactions to the O.J. Simpson case and the Stacey Koon, et al. (a.k.a., Rodney King) case; and (9) from the beginning until shamefully recent times, the legal system has required, supported and/or tolerated racial discrimination and its effects.

Of particular concern to members of SALT is affirmative action in higher education. Governor Wilson would forbid any consideration of race in university admissions decisions. Yet, the effects of racial discrimination include an enormous disparity in UGPA and LSAT scores. According to LSDAS figures from April 1994, for example, the average UGPA and LSAT for white applicants were 3.14 and 154.7 respectively, and for black applicants 2.78 and 143.2. There were 1061 white applicants presenting both UGPA and LSAT scores higher than 3.50 and 170, respectively. In the entire nation, only six black applicants presented this admissions profile.

Do these figures mean that African-American applicants to law school have not “worked hard” or “played by the rules?” Or do these figures mean that because of profound and pervasive racial discrimination, African-Americans who do work hard and play by the rules do not have Governor Wilson's cherished “equal chance to achieve the American dream?” If Wilson believes the former, he is a racist. If he believes the latter, then he must rethink his position on affirmative action.

In truth, of course, Wilson's expressed concerns for ensuring fairness and “an equal chance to achieve the American dream” readily support race-specific remedies like affirmative action. Indeed, these values justify other more fundamental efforts to redress this nation's legacy of racism. I am confident that the increasingly virulent opposition to affirmative action could be cured if the public had better knowledge about America's history of racism and the past and present consequences of that history. However difficult it might be to promote such a better understanding, it is our responsibility to do so. ■

AFFIRMING AFFIRMATIVE ACTION

– Professor Stanley Fish
Duke University
School of Law

The arguments against affirmative action are now rehearsed so routinely that you can tick them off in a verbal shorthand and be immediately understood. Here they are:

- it's not needed.
- it's not working.
- it's not fair.
- it's not merit.
- it's reverse racism.
- it's quotas.
- it lowers self esteem.
- it provokes race consciousness.

The argument that affirmative action is not needed comes in two versions: (1) it's not needed because discrimination is already illegal and nothing more is required; and (2) it's not needed because the pendulum has already swung too far in the direction of women and minorities. The first version falls before the undoubted facts of systemic discrimination – glass ceilings and redlining practices that keep neighborhoods all white and deny loans to well-qualified African Americans; the second version is belied by every statistical survey that shows the pendulum just where it has been for years. As a *Los Angeles Times* news story recently put it: "The prevailing public sentiment that . . . preferences have had a huge effect on the workplace or in universities . . . is flatly untrue" (Feb. 19, 1995, A24).

The argument that affirmative action is not working also comes in two (contradictory) versions: (1) it's not working because the problems of the underclass have more to do with economics than with race, and (2) it's not working because the

gap between blacks and whites is genetic not cultural and we are only throwing good money after bad. The first version collapses under its own weight: if the problem has multiple causes, then a multiple strategy is required and it makes no sense to discard one prong of it. The second version is The Bell Curve argument. It says that blacks occupy inferior social and economic positions because they are naturally inferior. The fact that many believe this, despite the overwhelming scientific consensus that the concept of race has no biological foundation and cannot be correlated with anything, is a tribute to the appeal of any argument that can serve as a rationale for the status quo.

The third argument is a favorite. It's not fair because those who pay the penalty did not inflict the injury. Why should white males in 1995 be taxed for acts performed fifty or one hundred or two hundred years ago by people long dead? The question is its own answer: if today's white males do not deserve the (statistically negligible) disadvantages they suffer, neither do they deserve to be the beneficiaries of the sufferings inflicted for generations on others; they didn't earn the privileges they now enjoy by birth, and any unfairness they experience is less than the unfairness that smooths their life path irrespective of their merit.

Merit is the heart of the fourth argument. It goes like this: people should get jobs and places in college because they merit them, and neither

race nor gender could be a component of merit. The trick here is to define merit narrowly – with test scores or examination results – and then stigmatize any other consideration as unwarranted preference or bad social engineering. But merit is just a word for whatever qualifications are deemed desirable for the performance of a particular task, and there is nothing fixed about those qualifications. Some medical schools now decline to certify aspiring doctors who have proven themselves

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technically but lack the skills that enable them to relate to patients. These schools are not abandoning merit, but fashioning an alternative conception of it rooted in an alternative notion of what the job requires. In the same way, it may be a qualification for a policeman or policewoman in the inner city to be black or Hispanic; and it may be part of the merit of a worker in a rape crisis center that she is a woman. Merit is not one thing but many things, and even when it becomes a disputing thing, the dispute is between different versions of merit and not between merit and something base and indefensible.

The fifth argument is the big one and the most specious. If it was wrong before 1964 to penalize people just for being black, then it is equally wrong in 1995 to prefer people for just being black. It's reverse racism. But the reasoning works only if the two practices are removed from their historical contexts and declared to be the same because they both take race into consideration. According to this bizarre logic, those who favor minority set-asides are morally equivalent to Ku Klux Klanners. It is just like saying (what no one would say) that killing in self defense is morally the same as killing for money because in either case it is killing you're doing. When the law distinguishes between these two scenarios, it recognizes that the judgment one passes on an action will vary with the motives informing it. It was the express purpose of some powerful, white Americans to disenfranchise, enslave and later exploit black Americans. It was **what they set out to do**, whereas the proponents of affirmative action did not set out to deprive your friend's cousin's son of a place at Harvard.

The sixth argument – it's quotas – is on one level easily dismissable because quotas are illegal. What is permitted under current affirmative action law are ranges, targets and goals. But, reply those who oppose affirmative action, ranges, targets and goals amount to quotas in the end because they require employers and school administrators to move toward proportions numerically defined. This is, in fact, a strong argument which should be answered not by re-invoking the distinction between quotas and goals, but by asking the question, "what's wrong with quotas anyway?" What's

wrong with quotas, presumably, is that they require taking race into consideration when making hiring or admissions decisions. But that is precisely what affirmative action is all about. The objection against quotas is really an objection to the word affirmative in the phrase affirmative action; and, as the historical record surely shows, without affirmative action the inequalities and inequities produced by massive legal and cultural racism would not be remedied. But isn't a quota that reserves a number of places for women and minorities the same as the old, now

despised, quotas that prevented all but a few Jews and even fewer African-Americans from entering colleges, law schools and medical schools? The answer is no because the objection fails to distinguish between quotas imposed to keep people out (what is often called "first order" discrimination) and quotas designed to let previously excluded persons in, which might in some small measure have the secondary – not intended – effect of marginally disadvantaging members of the majority. Finally, the case against quotas is often misrepresented as the case against "strict racial quotas."

"... [Y]ou might prefer the low self-esteem that comes along with wondering if your success is really earned to the low self-esteem that comes with never having been in a position to succeed in the first place."



"The ... argument [that] ... affirmative action provokes race consciousness ... is a variation on the blame-the-victim-strategy ... like saying, 'don't complain or agitate or we'll hit you again.'"

But that is a misnomer; there are no strict racial quotas in the sense that a contractor or chairman or college admission officer is told to go down to the mall and pick out the first 10 minority-looking persons he sees whether or not they are qualified. In fact, when quotas – or ranges or goals or targets – are in place, their implementation always occurs in relation to a pool of already qualified applicants. No one is telling anyone to hire or admit persons who are unqualified; rather, employees and admissions officers are being told that when the pool of qualified workers or applicants has been assembled (and new ways of assembling it are also a part of affirmative action imperatives), choices within it can take minority status into consideration in cases where gross, disparate representation is obvious and long standing.

The seventh argument – affirmative action lowers the self-esteem of its clients – has little statistical support and is dubious psychology. Some beneficiaries of affirmative action will question their achievements, others will be quite secure in them, and many more will manage to have low self-esteem no matter what their history. Affirmative action is a weak predictor of low self-esteem, and even if there were a strong correlation, you might prefer the low self-esteem that

comes along with wondering if your success is really earned to the low self-esteem that comes with never having been in a position to succeed in the first place.

PREMATURE EVALUATION

“ . . . An education-based meritocracy makes its judgments about people before they’ve ever really done anything, based on a measure, school performance, that depends heavily on who their parents are and what kind of environment they create . . .

“[W]e should recognize that the meritocracy is structured in such a way that one criterion, educational performance, is overweighted and has become too much the sole path to good jobs and leadership positions. It shows how far we’ve gone in this direction, how much we accept the present social arrangement as the natural order of things, that affirmative action plans governing school admissions and entry-level hiring for 22-year-olds are so often criticized as constituting “equality of result.” Rationally, a first job or a place in school is an opportunity; it’s only because we sort people so firmly so early that it looks like a result. There is a real difference between affirmative action plans that seek to divide up the spoils and plans that seek to get African-Americans into a position where they have a chance to prove themselves through individual performance.

Every child born in America doesn’t have access to good schools and doesn’t have parents who encourage study. Many blacks go to the worst schools and live in the toughest family circumstances. To argue that by late adolescence black people have run a fair competitive race and that if they’re behind whites on the educational standards they deserve to be permanently barred from the professional and managerial classes is absurd. It constitutes not just a denial of opportunity to individuals but a denial of talent to the society.”

– Excerpted from Nicholas Lemann, “What Happened to the Case for Affirmative Action?,” N.Y. Times (Magazine), June 11, 1995, at 52, 62.

The eighth argument – affirmative action provokes race consciousness – is a variation on the blame-the-victim-strategy. If there were no affirmative action, it tells us, whites would not be resentful and racial hostility would be dissipated. This might make sense were it not for the little fact that racial hostility antedates affirmative action which is a response to its effects. To say that as a response it only creates more of what it would redress is like saying, “don’t complain or agitate or we’ll hit you again.” The affirmative action backlash is certainly real but it reflects discredit on the backslashers and not on those who continue to press for justice.

There they are, the easy eight arguments and the counter-arguments that remove their sting. But don’t be surprised if some of those you talk to persist even when the unchallenged force of their reasons has been blunted. Sometimes the reasons people give for taking a position are just window dressing, good for public display but only incidental to the

heart of the matter, which is the state of their hearts. ■

RUTGERS PROUD OF LAW SCHOOL'S SET-ASIDES

[SALT Board member Nadine Taub writes that "we are very proud of what we've done at Rutgers - Newark." And with good reason! Reprinted below are excerpts from staff writer Dale Russakoff's excellent article in The Washington Post, April 10, 1995, at A1.]

Decanda Faulk was a nurse who wanted desperately to be a lawyer. She knew she was a long shot - raised in riot-scarred Newark, already in high school before a teacher told her to say "isn't" for "ain't," untutored in analytical thinking and writing skills expected of law students. Yet she was determined to fight for a law degree.

But when Rutgers University Law School informed her that she had been accepted through its affirmative action program, she recalled, "I said, 'Oh no! What's this? Affirmative action!?' I thought it meant I wasn't good enough.

"Then a friend of mine said, 'Candy, are you on drugs? What about the white parent who knows the judge, calls the judge, the judge calls the dean of the law school and says: Admit my friend's son. What's the difference?'" she said. "If this is how I have to get my foot in the door, just open the door. And let the race begin."

The conflicts plaguing affirmative action in the United States are played out daily in the Minority Student Program at Rutgers Law School. Faulk and other beneficiaries struggle with stigma. Some white students consider the program discriminatory. But there is no debate about its results: It has changed the face of the law in New Jersey.

The 1970 census counted 10,000 lawyers in

the state, all but 98 white. By 1990, there were 2,000 black, Hispanic and Asian lawyers, 40 percent of whom had come through the Rutgers program. School officials said most would have been rejected in the regular admissions process for want of higher grades or law board scores.

The program offers an unusually stark study in the trade-off that is affirmative action. Every year, white students are systematically rejected with higher grades and test scores than those accepted in the program. But the performance of the program's students dramatically exceeds what their grades and scores would predict; and without them, the law school would be almost all white - just as it was before affirmative action began.

The program is unusual in that it bluntly informs students they were admitted through affirmative action and encourages "MSP pride" through academic and moral support groups. Officials said some white students would assume minorities got into law school through affirmative action anyway. "We'd rather confront the stigma upfront," said assistant dean Janice Robinson . . .

The Minority Student Program was proposed in 1967, as the Newark riots turned sections of the predominantly black city to ashes. Rutgers-Newark had graduated only 12 blacks since 1960, and the civil rights advocates who led the all-white Rutgers law faculty (a lone black was on leave) felt a moral obligation to make drastic changes.

Within days of the Rev. Martin Luther King Jr.'s assassination in 1968, the faculty voted to admit 20 blacks to the class entering that fall, and 40 more in each of the next two years. Wade Henderson, now Washington bureau director of

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the NAACP, who was in the third class, said the atmosphere of urgency was palpable: When he arrived on campus the air still smelled of char from burned-out buildings.

"There was clearly an overwhelming social need to increase the number of minority lawyers in the bar," recalled professor Frank Askin. "Nobody asked how long we would do this or when it would stop. We were starting at point zero."

Regular admissions requirements were suspended. Any minority who graduated in the top half of the class at an accredited college was deemed eligible. Later, 25 percent of the class was set aside for minorities, who came to include Hispanics, Asian Americans and Native Americans. In 1978, the set-aside grew to 30 percent when "disadvantaged whites" were added. Each class now has 240 places, of which 72 are reserved for the MSP; about one in 10 MSP students is white.

The program's yardstick remains dramatically different from that of the regular admissions process – a mean Law School Admission Test score in the 50th percentile, as opposed to the 90th. There is a smaller disparity in college grade averages. The assumption is that if not for disadvantages, MSP students would have performed better. Robinson, who rules on applicants, said those admitted would be accepted somewhere, but likely not by a school in Rutger's class . . .

MSP students arrive two weeks early for an orientation to the rigors of first-year life, including

a mini law course, a mock exam and frank discussions about resentments they are likely to face from non-MSP students. The program also includes tutorials in each first-year course, special summer internships, regular seminars with successful alumni, banquets at which "Proud to Be MSP" pins are worn, and an advantage in the competition for the law review.

"The orientation was the two most valuable weeks of my life," said Julius Turman, class of '92, a black alumna whose college grades and LSAT scores pegged him a risk but who graduated with a B+ average. "The first week and a half, I didn't say a word," he recalled. "By the end of the second week, I began talking. I was in the flow. From then on, Dean Jan [Robinson] was telling me over and over, 'You can do this! You can do this!' The minute I started believing her, that's when I started doing well."

In ranking applicants, Robinson said she looks for evidence of hurdles overcome. Turman got extra credit for graduating from an urban public school; Michael Roche, who is white, for being the first in his family to make it to high school; Kenny Padilla, who is Hispanic, for being a leader in the South Bronx neighborhood where he grew up on welfare; others for growing up in a broken home or juggling college with work or family responsibilities. More than half the

MSP students in the current first-year class grew up in homes where at least one parent did not fin-

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" . . . [T]he performance of the program's students dramatically exceeds what their grades and scores would predict; and without them, the law school would be almost all white – just as it was before affirmative action began."



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ish high school . . .

. . . Most minority students said they consider affirmative action a form of rough justice – compensation for a massive, age-old spoils system controlled by whites.

“There might be a white male who gets into law school because his father went there. Is that not affirmative action for white males? Being black in Montgomery, Alabama, hurt my father’s chances of becoming educated. I don’t see that being black shouldn’t help me,” [observed Turman.] . . .

The problem with this view is that the children of white working-class parents also come to Rutgers, where tuition is one-half to one-third that of comparable schools.

“I’ve gotten really tired of being lumped into this stereotype of white males as WASPs from the old boy’s club,” said Richard Nugent, the first in his family to go to college. “You’re looking at somebody who is just a typical, blue-collar, connectionless kid from Bayonne, New Jersey. I support diversity as an end, but what about the means? Who are we discriminating against and what have they done?”

Janice Robinson answers this question by referring to the makeup of the profession: Even with 2,000 minority lawyers, the New Jersey bar remains 93 percent white (down from 99 percent in 1970). Only in the last few months did a black woman become a partner in a major New Jersey firm. And there is only one Asian judge on the bench, she said.

“Racism takes such a toll, emotionally and socially, that it clearly creates another hurdle that’s not there for everyone,” she said. “I know the rest of America is tired of this discussion. I’m sick of it

myself. I wish I could have three days when I didn’t have to think about race. But tell that to a student of mine who was on law review, is clerking for a federal judge, doing everything society asks, and then he was stopped four times by cops in Newark because he fit somebody’s profile. This is the reality.” . . .

. . . [Rutgers is now addressing] the explosive question of how much affirmative action is enough . . . In this debate, . . . the lives of individual beneficiaries often . . . [paint the clearest picture].

Sara Manzano, who applied to the MSP in 1981, was the fourth of six children of Puerto Rican immigrants in a Harlem housing project.

“She was the only person in her family who spoke English. She took people to the social services office, to the doctor. She had to take care of any business the family had,” said [Oliver] Quinn, [an] MSP alumnus now at the Labor Department, who ran the program in 1981. “She commuted to law school by public transit every day from Harlem. To compare her

grades to someone who grew up middle class tells you nothing. That woman was a born advocate. She had industry and strength. I’ll put my money on that person any day.”

Manzano now works at the Department of Housing and Urban Development, where she is special assistant to the general counsel. Her actions there affect life at her old project on 125th Street, where she visits often.

“I want kids who see despair all around them to see that a kid growing up in the projects, growing up on welfare, from their same background, can still make it in the society, one way or the other,” she said. ■

OPENING DOORS

“Affirmative action does not mean selecting a less qualified person over a more qualified person . . . Rather, affirmative action acknowledges the history of America and its effect on society today. Affirmative action opens doors so that additional groups may have an opportunity to succeed and to contribute to America.”

– Assistant Dean Janice S. Robinson,
*Director of the Minority Student Program,
Rutgers School of Law - Newark, as quoted
in “Unlocking the Doors to Legal Education:
Rutgers - Newark Law School’s Minority
Student Program,” New Jersey Lawyer,
November/December 1992, at 20.*

KEEP THE DREAM ALIVE

– Quisaira Y. Almanzar
New York University
School of Law '95

[Quisaira Almanzar is a 1995 graduate of New York University School of Law and was a student speaker at the graduation ceremony in May. Her speech preceded that of Presidential candidate Lamar Alexander, who struck a theme of individual responsibility and reduced government. The following essay is adapted from her remarks.]

I present myself as a different voice – that of a woman, a Latina, who grew up surrounded by poverty, crime, prejudice, racism and sexism.

My perspectives as a woman and as a Latina are very much interrelated. I was born in the Dominican Republic. When I was five years old my family emigrated to the United States. We did not speak any English. When I was seven, my father passed away. My mother chose to stay in the U.S. and raise two children on her own, rather than go back to her family for help and support, because she knew that my brother and I could succeed here through hard work and a good education.

She worked long hours in a factory at below minimum wage. She didn't have the time to go to school to increase her own opportunities. My mother was forced to sacrifice not only her life for us, but her pride as well. She applied for welfare, Medicaid and food stamps. She never let these conditions defeat her.

My mother once took me to the factory where she worked and had me work by her side. At the end of the day, when I was tired and hungry, she turned to me and said, "This is only one day of the rest of your life. Learn from it. Go to school, learn English and become someone with means, so that no one can put you through what I

go through every day."

From my mother I learned the value of hard work. In school, I initially attended bilingual classes because I could not speak any English. I learned English, excelled, and did well enough to be admitted to Cornell University. Today I stand before you as a graduate of NYU Law School, and I thank my mother. Mami, gracias por todos su sacrificios, amor y dedicacion para ayudarme a alcanzar mis metas.

Yes, I've worked very hard, but if it weren't for the opportunities afforded me, my hard work alone wouldn't have mattered. Without welfare, I may have been another homeless child in the streets. Without bilingual education, I could not have learned how to read English. Without affirmative action, I would never have had the opportunity to attend an Ivy League

institution. No matter how exceptional my grades, those doors would not have been open to me.

Today, many people are in the position where I was twenty years ago facing even more obstacles than I did. The undeniable result of cutting welfare and social programs like bilingual education and affirmative action will be to keep more talented, culturally-rich people out of America, to force more to leave once they get here, and to

leave still others with precious few opportunities to succeed in business and the professions.

Law schools are currently pursuing the goals of diversity and inclusion in the midst of a society that systematically abolishes social programs. Fellow graduates, as leaders of the next generation, we must struggle more than ever to keep the dream alive. In the words of Reverend Jesse Jackson, "Time is neutral and does not change things. With courage and initiative, leaders change things."

Thank you all, good luck, and best wishes always. ■

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Without
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ARE WE "JUST ONE RACE HERE"?

– Professor Lisa Chiyemi Ikemoto
Loyola Law School

"To pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government we are just one race here. It is American." Adarand Constructors, Inc. v. Pena, 63 LW 4523, decided June 12, 1995, J. Scalia concurring.

Straw Objects

Look at who affirmative action opponents single out as examples of why affirmative action doesn't work: White women, Black women and Asian Americans.

The anti-affirmative action rhetoric sets up white women as straw objects in at least two ways. Conservative whites have made the unsupported assertion that women (meaning white women) have achieved equality, and, therefore, affirmative action is no longer necessary. Some African Americans have used the same assumption of achieved equality to make the point that affirmative action has benefitted only white women, not African Americans. And the assumption behind these straw arguments is that women are less deserving than those whom affirmative action supposedly harms.

These lines of reasoning present a twist on the more common use of the category of white women. More often, some notion of white womanhood is used to demonize a non-white group (e.g., Reconstruction rape and miscegenation fear stories; Yellow Peril rape and miscegenation fear stories, etc.), for the purpose of separating and subordinating non-whites with respect to whites. Here, the reasoning demonizes white women for the purpose of aligning white and black.

The anti-affirmative action campaign has made black women straw objects within the African American community. The argument is that black women get an unfair double boost under affirmative action because they are women and they are minorities. The argument concludes that this double boost

occurs at the expense of black men. Again, a racialized gender construct is being used to garner support against affirmative action across racial lines. Here, the double-boost argument also uses the category of black women to unite two racial groups on a male axis.

The main argument that sets up Asian Americans as straw objects relies on the myth that Asian Americans are the model minority. It concludes that the success of Asian Americans in our educational institutions indicates that affirmative action is no longer needed, or alternately, that affirmative action is not working. This aligns conservative whites and some Asian Americans. It also garners support from other non-whites who have concluded that affirmative actions helps "them," but not us.

The model minority-based argument uses Asian Americans in ways that parallel the use of white women as straw objects. This parallel probably strengthens the notion that Asian Americans are "honorary whites," just as the assumption of (white) gender equality positions white women as honorary men. At the same time, the gender equality and model minority-based arguments rely on the premises that women are not men and Asian Americans are not white. In the midst of these arguments, black women in the double-boost argument become the true "other." They are not honorary whites, nor honorary men (and hence, not honorary women either). They become the ultimate straw objects for every-

thing that is supposedly wrong with affirmative action.

Affirmative Action as Market Regulation

A look at who is being used and how not only belies Justice Scalia's point that "we are just one race here," it also reveals that the anti-affirmative action movement's biggest success has been reframing the debate as one about marketplace competition. Within this narrow and morally impoverished framework, affirmative action programs become just another set of inefficient regulations. All persons are merely market competitors – and nothing more. The most insidious aspect of the marketplace framework is that it so efficiently obscures the race, gender and class logic inherent in the market. (See Karen J.

"... [T]he anti-affirmative action movement's biggest success has been reframing the debate as one about marketplace competition."

Hossfeld, "Hiring Immigrant Women: Silicon Valley's 'Simple Formula,'" in *Women of Color in U.S. Society* (1994) at 65.)

Peter Gabel has observed that "[t]he reason for the success of the assault on affirmative action is that the idea of affirmative action has largely lost its idealistic meaning." (Gabel, "Affirmative Action and Racial Harmony," *Tikkun*, July-August 1995, at 33-36.) He asks the hard question: "Why should we support a market-based theory of affirmative action that legitimizes meritocratic judgments that are evil in themselves and that breed injustice and racial hatred." He answers with another question, "What is the alternative?" We can perhaps look to Richard Delgado's more pointed conclusion – the alternative to affirmative action, the "merit" system, is affirmative action for whites. (Delgado, *The Rodrigo Chronicles*, Chapter 4 (1995).)

Yellow Peril Redux

A recent Review & Outlook essay in the *Wall Street Journal* came to a different conclusion than did Delgado. Titled "The Asians at Berkeley," it states that "statistics indicate that if admitted on merit alone, ethnic Asians would make a clear majority at UC Berkeley, arguably the most esteemed public univer-

sity in the nation." (*Wall St. J.*, May 30, 1995, p. A14.) The essay then retells the model minority myth in its most simplistic, patronizing and racist form and

ends on a note that is slightly, but intentionally threatening. "No doubt more shocks in this area such as the Berkeley numbers are to come, notably the California Civil Rights Initiative on affirmative action."

Think about what might happen if we used the *Wall Street Journal's* prediction about an Asian majority to campaign against affirmative action. In the "best" case scenario, many current affirmative action opponents, fearing an Asian American majority, would switch positions and support affirmative action in order to prevent an "Asian invasion." Unfortunately, the most plausible part of this scenario is the racist, nativist fear that an Asian American majority generates.

"Americans" in the Marketplace

And this brings me back to Justice Scalia's statement that "We are just one race here. It is American." Within the framework of anti-affirmative action rhetoric, Justice Scalia is frighteningly

correct. All Americans are marketplace competitors. All deserving competitors are white or honorary whites. And few of them are women. ■

SERVING SOCIETY'S NEEDS

"Patrick Chavis, who took Allan Bakke's place at U.C. - Davis med school, fits the stereotype of the affirmative action beneficiary in one way: as he freely admits, he would not have been admitted strictly on the basis of his grades and test scores, though they were good. In other ways, though, he does not fit. He is not a product of the cushy black upper class: he grew up in South Central Los Angeles, the eldest of five children of a welfare mother who had migrated to California from rural Arkansas. Chavis first met his father three years ago, when he was 40 . . .

"Another way in which Patrick Chavis doesn't fit the stereotype of the affirmative action beneficiary is that he doesn't give the impression of being tormented by self-doubt over whether he really deserves to be where he is . . . He says he works harder than his white medical school classmates do and in tougher conditions. He and his four black classmates set up a primary care clinic when they were at Davis and worked there as volunteers, but they couldn't get any of the white students to join them. While he was still a resident at the University of Southern California, he and one of his black classmates from Davis each put up \$500 and opened a small practice, so that they could "hit the ground running" when they graduated. He ticks off what the black doctors admitted under Davis's special minorities-only program (which was eliminated after the Supreme Court's *Bakke* decision, resulting in subsequent classes having only one or two black members) are doing now: almost all are in primary care in underserved areas . . . If Chavis hadn't gotten into medical school, his patients wouldn't be treated by some better qualified white obstetrician; they'd have no doctor at all, and their babies would be delivered the way Chavis was – by whomever happened to be on duty at the emergency room of the county hospital . . .

"So Patrick Chavis fiercely defends affirmative action and holds himself up as an example of the good that it does. – [I]f it wasn't for some kind of affirmative action, there wouldn't be any black doctors," he says. "Maybe one or two. Things haven't changed that much."

– Excerpted from Nicholas Lemann, "What Happened to the Case for Affirmative Action?," *N.Y. Times* (Magazine), June 11, 1995, at 62, 66.

THE END OF RECONSTRUCTION

– Professor Angela P. Harris
University of California - Berkeley
School of Law

The historian Eric Foner terms the first Reconstruction (1863-1877) "America's unfinished revolution." Under the thirteenth, fourteenth and fifteenth amendments, orders given by President Lincoln, and civil rights laws passed by Republican Congresses, black people became citizens of the United States rather than chattel. For the first time in history, Americans of African descent owned their own labor. They could vote, be educated, marry, purchase and transfer property, and participate in the business of government. African Americans served in state legislatures and in the halls of Congress. For a moment, it seemed that the former slaves would truly be free.

But, as Foner notes, though it is not certain which of many factors was the cause, "[w]hat remains certain is that Reconstruction failed, and that for blacks its failure was a disaster whose magnitude cannot be obscured by the genuine accomplishments that did endure." (Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (1988) at 604.) The successful backlash against Reconstruction – the movement white Southerners proudly called "Redemption" – involved a campaign of unprecedented state-sponsored terrorist violence that left African Americans once again economically exploited and politically silenced. The next step was an elaborate web of social oppression called "Jim Crow," which whites insisted did not in the least disturb racial equality and which the Supreme Court obediently ratified in *Plessy v. Ferguson*. After all, as President Johnson had remarked, federal civil rights protection for black people discriminated against whites.

The era roughly from 1954 through 1968 is termed by many the "Second Reconstruction."

Again, African Americans and whites troubled by injustice joined together in the cause of political and social equality; again, they were met with Southern calls for states' rights and the assertion of white supremacy. This time, however, African Americans had the political and social strength to take their own case to America and to the rest of the world. And, as in the first Reconstruction, Congress passed a new host of federal laws and policies directed at giving African Americans both greater economic and social liberty and a political voice.

Affirmative action was one legacy of that Second Reconstruction, and it has now become a potent symbol for Americans who argue that attempts to acknowledge generations of open white supremacy constitute discrimination against white people. Once again, the national government has become an enemy, and states' rights must be protected. Once again, the immigration of people classified as racially "other" is a cultural and economic threat to America and must be curbed. And once again, the answer to injustice for many anxious whites is to proclaim that racial equality already exists and therefore need not be sought.

How should we, as progressive law teachers, react to the campaign to eradicate affirmative action? Of course, we should attempt to counter lies and half-truths about what "affirmative action" is and what it does. Of course, we should defend the very important values, policies and institutions that are currently under attack. Of course, we should acknowledge and fight the racism that so often is just below the surface of resentful complaints about "preferences," "quotas" and "political correctness." But even the most fervent defenders of affirmative action are organizing with a heavy heart.

Their pessimism stems from the recognition that the backlash against affirmative action cannot finally be conquered by facts and rational

"... [T]he refusal of history is visible in at least two features of contemporary American life: the social politics of innocence, and the legal reduction of racial justice to credits and debits."



"To look hard at historical injustice might mean to lose the sense that it is always morning in America... To look hard at historical injustice might also mean that we would have to do something about it..."

judgment, for it is based on denial, resentment, bigotry and fear. It is of a piece with the hysteria about immigrants stealing our jobs, the desire for more and more prisons, the fear of and contempt for the poor, and the drive to make death the punishment for more and more crimes. This kind of social panic does not respond to statistics and rational arguments. The most striking thing to me about the battle for affirmative action, then, is the pervasive sense that it has already been lost: that the Second Redemption is in full swing.

* * * * *

The Second Redemption is the result of many different forces, but one that should be particularly troubling to us as intellectuals is a refusal of history. In my mind, the slogan "No justice, no peace" should be accompanied by "No history, no justice." But the refusal of history is visible in at least two features of contemporary American life: the social politics of innocence, and the legal reduction of racial justice to credits and debits.

The sanctification of innocence pervades our culture. It is reflected in the rush to proclaim ourselves victims, in the deification of the fetus among anti-abortion groups, and in the increasingly hostile denials that sexism and racism exist in our society. And innocence, it seems, intertwines with ignorance. One of our most popular recent movies, "Forrest Gump," exalts a cheerful white male know-nothing who moves through history without ever being touched by it. To be a racist in this day and age is somehow to be irredeemably guilty and sinful. Therefore, no one is a racist, everyone is innocent, and the real victims are straight white men who are always being blamed for things they never personally did.

The high premium we place upon innocence, and its intimate relationship to ignorance, means that we don't like to remember our history except as frozen moments of glory. To look hard at

historical injustice might mean to lose the sense that it is always morning in America, and that seems unbearable. To look hard at historical injustice might also mean that we would have to do something about it, and our privileges are too precious a thing to risk losing. We deserve them, after all. We're good people. We never enslaved or massacred anybody. We are innocent.

The price of innocence is also a certain willful blindness to the experiences of others, a determination to stay ignorant. Each publicized case of police brutality against African American men is treated as a shocking revelation, as if it had never happened before. Each urban uprising is a novelty, an occasion for the media to breathlessly discover the frustration, apathy and despair that institutional racism spawns. And then the problem fades from our collective consciousness again, only to be discovered anew the next time there are shocking pictures to be flashed on the television news.

The second aspect of America's refusal of history is visible in the legal reduction of justice, particularly racial justice, to a market transaction. In his concurrence in *Adarand v. Pena*, in which the Court imposes strict scrutiny on federal affirmative action programs, Justice Scalia states piously, "Under the Constitution there can be no such thing as either a creditor or a debtor race. We are just one race in the eyes of govern-

ment." This view of racial justice as involving debits and credits is one the Supreme Court itself has encouraged, recognizing affirmative action programs as constitutional only as a "remedy for past discrimination." But affirmative action is not the payment of a debt. Just as the murdered cannot be brought back to life, the targets of racial subordination cannot be somehow made whole, by jobs or even by cash payments. Rather, legal remedies for discrimination, even in the form of affirmative action or reparations, are gestures of reconciliation

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"The social meaning of affirmative action was a promise of inclusion, an act that was transformative rather than remedial."



"No history, no justice; no justice, no peace."



"The trade of Thurgood Marshall for Clarence Thomas in the 'black seat' on the Supreme Court symbolizes the loss of a historical consciousness on the Court."

that look to the present and the future in light of the past.

The trade of Thurgood Marshall for Clarence Thomas in the "black seat" on the Supreme Court symbolizes the loss of a historical consciousness on the Court. At issue here is not which form of scrutiny should be applied to government programs that take race into account, or the proper scope of such programs; there is no one right answer to these questions. I am talking about the sense of historical sweep and purpose that gave opinions like *Brown v. Board of Education* and *Loving v. Virginia* meaning and moral force. Constitutional law is one of the few places where a public conversation about race that is not dominated by sensationalism can take place these days. But the current Supreme Court seems bent on reducing race from a complex and tragic legacy to a matter of creditors and debtors and protecting innocent white people. As Justice Marshall remarked in his dissent in *Richmond v. Croson*, "In constitutionalizing its wishful thinking, the [Court] does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity."

* * * * *

What it means to live in history is to recognize that the past is not past. Justice is not about

establishing creditor and debtor races; it is about transcending those distinctions by acknowledging wrongs and refusing to perpetuate them. In this context, the wrong was not the mere recognition of

racial categories, as the Court would have it, but rather exclusion. The social meaning of affirmative action was a promise of inclusion, an act that was transformative rather than remedial.

As the Second Redemption is being consolidated around us, it is time for progressives to gather our strength and wisdom for the Third Reconstruction. This time around, Asian Americans, Latinos, African Americans and Native Americans need to talk to one another, as well as to whites, in search of an understanding of our mutual history and then issue a call for social justice that can take us into the next century.

One of the positive legacies of American history is a belief in equality and justice, even among the most disenfranchised, and the willingness to fight for these beliefs. My sadness is in wondering how many lives will be lost - both by what Patricia Williams calls "spirit murder" and by literal murder - before the next attempt to finish

America's unfinished revolution comes to fruition. As long as Americans keep trying to reject the past - as long as slavery, genocide and oppression remain things that have nothing to do with us - our refusal of history will only lead us into yet another cycle of ignorance, suffering and racial violence. No history, no justice; no justice, no peace. ■

ABOLISH AFFIRMATIVE ACTION?

"What would the country look like without affirmative action? . . . [T]here would be an enormous decrease in black representation everywhere in . . . America, with a big, noticeable depressive effect on black income, employment, homeownership and education levels . . .

"If affirmative action were entirely abolished, does anyone really believe the Government would undertake, say, an expensive upgrade of education for blacks as a more meaningful substitute? . . .

"The goal of affirmative action is . . . to bring blacks into the mainstream of national life. The ironic result of affirmative action being abolished could be an increase, not a decrease, in the kind of black demands for reparations and mandated percentages of the action that whites find so annoying: if you're out of the system completely, then you don't seek access to jobs and school places. You just want more resources . . .

"[B]ecause the country is so segregated, the natural default position for white people is to have no contact at all with blacks. It's healthy to have some way of pushing people, as they make hiring and contracting and admissions decisions, to go far enough past the bounds of their ordinary realm of contacts to find black candidates. Even the opponents say they want this, but it won't happen if it's not required because the black-white social gulf is so great."

- Excerpted from Nicholas Lemann, "What Happened to the Case for Affirmative Action?," N.Y. Times (Magazine), June 11, 1995, at 54, 62.

RACISM AND JUSTICE

– Excerpted from Gertrude Ezorsky's excellent book, *Racism and Justice: The Case for Affirmative Action* (1991).

[T]agging AA numerical remedies as "quotas" is misleading, for that label suggests that such AA measures are relevantly similar to the old quotas that decades ago excluded many Jews from professional schools. But the old exclusionary quotas against Jews were motivated by a false, derogatory notion of their social inferiority, a notion that defined Jews as pushy, vulgar and mercenary. Those quotas aimed to maintain a professional society restricted by such immoral bias – a society dominated by Christian gentlemen. In contrast, an important purpose of AA numerical remedies is occupational integration, a workplace society where biased stereotypes of blacks as inferior have largely been dissipated. To tag such AA measures as quotas falsely suggests that they, like yesterday's quotas, serve an immoral end . . .

* * * * *

Some analysts characterize whites who are excluded by AA racial preference as objects of reverse discrimination. But such characterization suggests – incorrectly – that the overt racism blacks have suffered is now being inflicted on these white candidates. A candidate rejected because of race, however, is not necessarily an object of overt racism . . . Similarly, a white candidate excluded by a racially preferential program is not subjected to racially prejudiced treatment. His rejection is not based on a derogatory false notion or racial inferiority; thus he is not a victim of overt racism, even in reverse . . .

* * * * *

Other minorities in the United States – European immigrants, for example – who have been victimized by discrimination moved up in American society without the assistance of AA measures. The success of other persecuted groups, such as the Jews, has suggested to some individuals that fault for the depressed status of blacks may

lie not in racism but in themselves. If this view is correct, the justification for AA appears questionable.

The situations of yesterday's European white immigrants and blacks are not analogous, however. Ethnic prejudice was not as virulent or pervasive as racism. White immigrants could assimilate while blacks were forced, in many states by law and the threat of lynching and in other states by unwritten law, to remain segregated from white society. Indeed, overt racism contributed to the occupational ascent of newly arrived whites. For many such whites, eviction of a black worker from a job was the beginning of upward mobility. Thus white immigrants drove black employees out of railroads, streetcars, construction and shipbuilding. The influx of whites into Birmingham's mills destroyed the concentration of blacks in a number of trades. When New York City's European immigrant population reached 76 percent of the total population, eviction of blacks was intensified. They were steadily pushed out of their jobs as wagon and coach drivers, house painters, tailors, longshore workers, brick layers and waiters . . .

Also, the attitude of trade unions toward white immigrants and blacks differed sharply. In the early twentieth century, trade unions contributed to the impoverishment of black people either by excluding them, as did the craft unions, or, like the powerful International Ladies' Garment Workers Union, by cooperating in their segregation into the lowest-paid employment . . .

* * * * *

From a backward-looking perspective, blacks have a moral claim to compensation for past injury. The paramount injustice perpetrated against blacks – enslavement – requires such compensation. If the effects of that murderous institution had been dissipated over time, the claim to compensation now would certainly be weaker. From the post-Reconstruction period to the present, however, racist practices have continued to transmit and reinforce the consequences of slavery. Today blacks still predominate in those occupa-

continued on page 20

"The groups that benefit from AA measures constitute the overwhelming majority of the nation."

tions that in a slave society would be reserved for slaves.

Such ongoing racism has not been the work only of private parties. The racism of government practices encouraged race discrimination by landlords who blocked the escape of blacks from ghettos, and by employers and unions who refused to hire, promote, or train them, as well as widespread communication of an insulting stereotype of blacks, derogatory to their ability and character. During the first two-thirds of this century, racism was in many respects official public policy. That policy included: legally compulsory segregation into inferior private and publicly owned facilities such as schools, which – as recognized in *Brown v Board of Education of Topeka* (1954) – violated the constitutional rights of black children; court-upheld racially restrictive covenants in the transfer of private residences; anti-miscegenation laws that resembled the prohibition of marriage by persons with venereal diseases; race

discrimination in government practices such as public employment, voting registration procedures, federal assistance to business persons and farmers, and allocation of state and municipal services to black neighborhoods (e.g., police protection, sanitation and educational resources); manifest racial bias in the courts; and pervasive police brutality against black people.

The practices of the Federal Housing Authority exemplified governmental racism. For decades after its inception in 1934, the FHA, which insured mortgage loans, enshrined racial segregation as public policy. The agency set itself up as the protector of all-white neighborhoods, especially in the suburbs. According to urban planner Charles Abrams, the FHA's racial policies could "well have been culled from the Nuremberg Laws." Today white suburban youths continue to benefit from the past racist practices of this government agency. Not only will they inherit homes

purchased with the FHA assistance, denied to blacks; they also enjoy racially privileged access to

GAINS IN DIVERSITY FACING ATTACK AT UNIVERSITY OF CALIFORNIA

"People like to say that affirmative action is kind of a way to redress past wrongs; I don't see it that way," says Berkeley's Chancellor, Chang-Lin Tien. 'Especially in a university, it's about creating the best education atmosphere for all students. Affirmative action isn't for underrepresented minorities. It's for the benefit of the larger society.' . . .

"Troy Duster, a Berkeley sociologist who has studied affirmative action for years, said it is being made a scapegoat for rejection . . . To Professor Duster, the furor over affirmative action is fueled by two illusions. The first is that opportunity today can be divorced from the historical conditions that created huge gaps in resources and achievements separating different ethnic groups. The second is that there is a simple, quantifiable way, like test scores, to assess merit.

"There's an arrogance in the idea that you can put people on an ordinal ranking system,' he said. 'I'm not opposed to people getting straight A's. But I don't want society to see that as the only thing worth talking about.' . . .

"Who has the more promise, a student where there's been a tremendous economic investment put in by affluent parents, or the poor kid whose G.P.A. may be a little bit lower, who hasn't had the kind of preparation for the S.A.T.'s, but who has struggled and been relatively successful?' asked Ralph Carmona, a [university] regent of Mexican descent. 'Which holds more promise for California and America? That's the kind of question the admissions process has to address.' . . .

"[M]any board members and most of the leading educators in the state say it would be terrible social policy to have an increasingly diverse state shutting out minorities from its elite schools, particularly from law and medical schools that could prepare them to help serve their communities.

"In a few years, there will be no majority in this state; we're nearing 40 percent underrepresented minorities – African-Americans, Hispanics and Native Americans,' Chancellor Chang said. 'If we don't educate some of the future leaders from that constituency, it's going to be very bad for all of us.' . . ."

– Excerpted from Peter Applebome's fine, above-titled article, N.Y. Times, June 4, 1995, at A12.

the expanding employment opportunities in all-white suburbs. In 1973, legal scholar Boris I. Bittker summed up governmental misconduct against blacks: "More than any other form of official misconduct, racial discrimination against blacks was systematic, unrelenting, authorized at the highest governmental levels, and practiced by large segments of the population." The role of government in practicing, protecting and providing sanction for racism by private parties suffices to demonstrate the moral legitimacy of legally required compensation to blacks.

This past of pervasive racism – public and private – follows blacks into the labor market, as we have seen. They are also especially vulnerable to recessionary layoffs because they possess far smaller reserves of money and property to sustain them during periods of joblessness. Such vulnerability also affects many newly middle-class blacks who, lacking inherited or accumulated assets, are – as the saying goes – two paychecks away from poverty . . .

* * * * *

[One] version of the meritocratic claim might be that . . . merit selection . . . ought to be the rule, and thus preferential treatment should not be extended to blacks. According to this meritocratic claim, all practices that often conflict with merit standards, such as selection by seniority ranking, veteran status and powerful personal connections, should be eliminated. In that case, why not begin the struggle for merit in American employment by calling for an end to these practices? Why start by excluding members of a largely poor and powerless group, such as black people?

[Consider] . . . the consequences simply of denying preference to basically qualified blacks. Let us assume that this denial would produce some gain in social utility, that is, efficiency. That benefit would, I suggest, weigh very little in the moral balance against the double accomplishment of preferential treatment: compensation to blacks for past wrongs against them and achieving what this nation has never known – occupational integration, racial justice in the workplace.

* * * * *

Some commentators suggest that preferential treatment may be morally injurious to black persons. Thus Midge Decter and the economist Thomas Sowell worry that preference damages the self-respect of blacks.

Does preference really insure the self-respect of those it benefits? Traditional preference extended to personal connections has occasioned no such visible injury to self-respect. Career counselors who advise job seekers to develop influential contacts exhibit no fear that their clients will think less well of themselves; indeed, job candidates who secure powerful connections count themselves *fortunate*.

It might be objected that blacks (or any persons) who gain their positions through preferential treatment ought to respect themselves less. But this claim assumes that these blacks do not deserve such treatment. I believe that, because the overwhelming majority of blacks has been grievously wronged by racism, they deserve to be compensated for such injury and that black beneficiaries of employment preference – like veterans compensated by employment preference – have no good reason to feel unworthy.

Moreover, telling blacks – the descendants of slaves – that they ought to feel unworthy of their preferential positions can become a self-fulfilling prophecy. Where are the black persons whose spirit and self-confidence have not

already suffered because of the palpable barriers to attending white schools, living in white neighborhoods, and enjoying relations of friendship and intimacy with white people? Those blacks who, despite all the obstacles of overt and institutional racism, have become basically qualified for their positions should be respected for that achievement. Justice Marshall reminds us that the history of blacks differs from that of other ethnic groups. It includes not only slavery but also its aftermath, in which as a people they were marked inferior by our laws, a mark that has endured. Opportunities created by preferential treatment should symbolize an acknowledgement of such injustice and a commitment to create a future free of racism. ■

"Opportunities created by preferential treatment should symbolize an acknowledgement of . . . injustice and commitment to create a future free of racism."

DEBUNKING PRETENSIONS TO OBJECTIVITY

— Excerpted from Georgetown law professor Gary Peller's insightful article, "Espousing a Positive Vision of Affirmative-Action Policies," *The Chronicle of Higher Education*, December 18, 1991 at B1.

[T]he ways that law schools teach are not intrinsic to law. The current institutional culture of

legal education was created by whites during a period of racial segregation; in many ways this culture embodies the symbolic codes of racial domination itself. For example, the cool, impersonal, and abstract character of discussion in most legal classrooms responds in part to a need to present law as passionless and objective and thus to justify the exclusion of blacks and other groups based on their perceived passion and emotiveness. The culture of rationality and impersonality is part of a rhetoric in the West generally, by which elites identify themselves as more civilized and controlled than those over whom they exercise power. In the United States, with its Socratic method of logical questioning, this elite self-image is encoded in our very educational practices and methods.

If the culture of law schools were transformed so that, say, cooperation and empathy replaced the current norms of competitiveness, dispassion, and aloofness, different people would be deemed "quali-

fied" and would succeed. "Qualifications" rest on what we believe the social roles of "law student" and "lawyer" should embody . . .

There is simply no consensus about what the appropriate pedagogy in law schools should be today . . .

The question of how to distribute the benefits of education, whether by limiting admissions to those with a particular standardized-test score or by practicing affirmative action, inevitably is

political. The two possibilities simply would produce two different sets of lawyers and presumably two different professional cultures. But the choice between these alternatives cannot be predicated on the existing concepts of merit or qualification.

Norms of social justice support race-conscious admissions. African Americans are entitled to participate in the construction of the legal profession and the laws that govern society. The legal culture that evolved during America's long racial segregation has been impoverished by its all-white character and its failure to include the visions of justice developed by African Americans. And African Americans have been wrongfully denied the cultural and economic resources that broad participation in the legal profession provides . . .

The real case for affirmative action debunks the pretensions to objectivity and neutrality

that are so much a part of our institutional life . . . ■

DOING BETTER

". . . I find it somewhat peculiar to hear universities complain about lack of qualified . . . [minority candidates for faculty positions]. It's one thing for General Electric to say there is a lack of qualified engineers, but it is the universities themselves that provide the credentials for university employment, and they can certainly be expected to do better."

— Howard Glickstein, Dean of Touro College Law Center (former SALT President and former counsel to the U.S. Civil Rights Commission) as quoted in Ezorsky, *Racism and Justice*, at 43.



SOCIAL SOLUTION

"Affirmative action is deeply flawed, as is any human enterprise. It's abused. It is sometimes ridiculous," said [Troy] Duster, who directs Berkeley's Institute for the Study of Social Change. But racism in America goes back generations, he noted: 'You can't overturn the caste system by treating (it) as if it doesn't exist. You have to treat a social problem with a social solution.'"

— Excerpted from Ben Wildavsky's article "UC Berkeley Weighs Cost of Affirmative Action Policy," *San Francisco Chronicle*, May 16, 1995, at A6.

WHITE POLICY-MAKERS

– Dean Howard A. Glickstein
Touro College Law Center

The need for affirmative action was brought home to me early in my career as a civil rights lawyer. It was 1962, and I was working in the Civil Rights Division of the Department of Justice. The Supreme Court had agreed to hear its first school desegregation case since *Brown v. Board of Education*. One issue in the case was the transfer provisions of a school desegregation plan. The Department of Justice had prepared an amicus brief that considered various desegregation remedies.

A meeting was held to review the final draft of the brief. I looked around the room and realized that everyone there was a white male. It struck me that we were suggesting policies that would affect many thousands of black students and had never asked any member of the black community for an opinion. I called this to the attention of the head of the Civil Rights Division, and he agreed with my concern. He asked me if I knew any black lawyers who could review the government's brief. Fortunately, I knew a lawyer

in the District of Columbia who had worked briefly for the Civil Rights Division. This lawyer, who later was to become a distinguished judge, spent a few hours with me reviewing the brief and making some suggestions. It was only tokenism, but at least we had one member of the black community tell us white lawyers what he thought was in the best interests of the black community.

This incident made clear to me the critical importance of diverse views for the successful practice of law. And it is not only the practice of civil rights law that diversity is important. Virtually every area of law impacts differently on differing communities. It is not possible to provide a legal education of the depth and richness required for effective practice in a multi-cultural world in a law school without a diverse student body and faculty. Nor is it possible for a legal system to be truly fair unless those responsible for administering the system – lawyers and judges – are representative of the many different elements within our society.

Affirmative action is more than a remedy for past discrimination. It is an essential ingredient of a sound legal education and a fair system of justice. ■

"Affirmative action is more than a remedy for past discrimination. It is an essential ingredient of a sound legal education and a fair system of justice."

If you have found these essays useful and you are not currently a member of the Society of American Law Teachers, we would love to have you join us.

*SALT members are entitled to reduced rates at SALT conferences, receive quarterly issues of *The Equalizer* (including our annual salary survey) and periodic bulletins on issues affecting legal education, and enjoy the opportunity to work with more than 800 colleagues across the nation who are committed to progressive values in legal education. Constituting the oldest and largest organization of law professors, SALT members regularly express their views on matters of law and public policy through amicus briefs and nation-wide lobbying.*

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