

# DIVERSITY, MULTICULTURALISM, AND AFFIRMATIVE ACTION: DUKE, THE NAS, AND APARTHEID

*Jerome McCristal Culp, Jr.\**

## INTRODUCTION

We live in strange times. One presidential candidate has made opposition to the policies enumerated in the title of this essay—diversity, multiculturalism, and affirmative action—one of the leading parts of his stump speech.<sup>1</sup> Our President (as Lyndon Johnson used to say, the only one we have) increased his popularity until late last year by making the notion of a quota bill the heart of his civil rights policy.<sup>2</sup> Representative Henry Hyde, a conservative congressman, believes that the most important threat to colleges is the use of speech codes to restrain racist and sexist speech and activity on our college campuses, and he has proposed extending current interpretations of the First Amendment to private colleges to meet that threat.<sup>3</sup> White academics, mainly male, have become increas-

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\* Professor of Law and Director of the John M. Olin Program in Law and Economics, Duke University School of Law. I would like to thank Angela Harris, Kirsten Mullen, James Coleman, and Walter Dellinger for helpful comments. I would also like to thank Jennifer Baltimore, David Mandelbrot, and Ted Edwards for their excellent research help. All remaining errors are my own.

1. Patrick Buchanan, former speech writer for President Richard Nixon and Director of Communications for Ronald Reagan, attacked multiculturalism and political correctness in his early campaign speeches. See Douglas Jehl, *Buchanan Raises Specter of Intolerance, Critics Say*, L.A. TIMES, Mar. 17, 1992, at A1 ("I think God makes all people good. But if we had to take a million immigrants in say, Zulus, next year, or Englishmen, and put them up in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?").

2. Bob Cohn & Clara Bingham, *A Turnabout on Civil Rights*, NEWSWEEK, Nov. 4, 1991, at 32 ("George Bush had been bashing the civil-rights bill for nearly two years. He called it a 'quota' bill that would force employers to adopt unfair preferences, and last year vetoed the measure after it reached his desk.").

3. To see this point, look at the proposed amendment to Title VI of the Civil Rights Act of 1964 sponsored by Congressman Hyde. 134 CONG. REC. H565 (daily ed. March 2, 1988). Congressman Hyde is a Republican from Illinois. He has been an outspoken opponent of abortion and it is for him that the Hyde Amendment was named. The Hyde Amendment prohibited the use of federal funds to pay for abortions for poor women. Congressman Hyde's most recent foray into free speech has been his successful leadership in support of the president's veto of the bill that would have overturned the Bush Administration's gag rule that prohibits doctors in federally supported programs from "mentioning" abortion in any way. H.R. 2707, 102d Cong., 1st Sess.

ingly apoplectic about any questioning of their actions in or out of the classroom because some believe they may be racist, sexist, or homophobic. These whines have reached such a crescendo that white academics have thought it necessary—like modern day revolutionaries—to form their clubs to defend the academy from its enemies. The times are strange because the truth about our American education system is that it is not very reflective of the concerns that so agitate my colleagues in the academy and its critics outside the academy. Unfortunately, there is little diversity, multiculturalism, or affirmative action in our universities and law schools.

I believe that universities have a role to play in ending the racial apartheid that still exists in this country, and that affirmative action, diversity, and multiculturalism have an important role to play in helping society—including higher education and law schools—achieve that goal.

Thirty years ago this spring the Board of Trustees of Duke University changed a longstanding policy of racial exclusion that prevented anyone who was black from being anything but a menial employee at Duke University.<sup>4</sup> However, even at that time the evidence of racial oppression was clear. The typical work crews were black underlings supervised by white men. It was clear that the role of black people at Duke University was to serve the interests of white men and women from all over the country, and particularly the South. There were no black law students or medical students or undergraduates at Duke University. There were no black faculty of any kind, not in the expanding medical school and hospital and not in the law school that was beginning to achieve a national reputation. White women had been welcome from the beginning at Duke University because like other methodist-inspired universities in the South—Emory, Vanderbilt, American, and Southern Methodist—Duke was meant to be a part of the vehicle for change. Julian Abele, the black architect who designed the chapel and much of the campus, was never able to travel to campus to see in person the

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(1991); MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING HIS VETO OF H.R. 2707. H.R. DOC. NO. 166, 102d Cong., 1st Sess. (1991). Indeed, the gag rule requires that doctors must say that they do not consider abortion an acceptable method of birth control. It is obvious that Congressman Hyde is more concerned that a white college student should be able to yell "nigger" on our college campuses than he is with permitting doctors to communicate legal and sometimes necessary medical information.

4. AMERICAN ASSOCIATION OF LAW SCHOOLS, 1961 PROCEEDINGS (1961).

results of his inspirations.<sup>5</sup> Race mattered at Duke in the Spring of 1962, and my university and most universities in the North and South contributed to that fact.

American law schools have their own sorry history in this area. The Association of American Law Schools ("AALS"), the professional group for law schools, remained quiet for years after the Supreme Court attacked aspects of legally enforced racial oppression in *Missouri ex rel. Gaines v. Canada*.<sup>6</sup> When the law schools slowly adopted what became known as the Yale Plan to require law schools to admit black students,<sup>7</sup> Duke's representative was among those who cautioned against action. His Board of Trustees would not respond to pressure, he said, and he may have been right.<sup>8</sup> When Van-

5. All of you who know the history of Duke University and the Duke family will point out that the Dukes were Republican (when that meant sympathy for black concerns, particularly in the South) and they contributed to black colleges and causes. In addition, the Dukes were instrumental in the so-called Bassett affair, one of the first examples of universities supporting the principle of academic freedom and black rights. This incident led to a presidential visit by Theodore Roosevelt to Duke and Durham to support this view.

6. 305 U.S. 337 (1938).

7. The Yale Plan was first proposed at the 1950 AALS annual meeting. It was offered as an amendment to the AALS articles of incorporation. The Yale Plan provided that "[n]o school which follows a policy of excluding or segregating qualified applicants or students on the basis of race or color shall be qualified to be admitted to or remain a member of the Association." ASSOCIATION OF AMERICAN LAW SCHOOLS, 1951 PROCEEDINGS 278 (1951); see also ASSOCIATION OF AMERICAN LAW SCHOOLS, 1950 PROCEEDINGS 22-26 (1950). The proposal proved too controversial in 1950 and the following resolution was adopted instead:

BE IT RESOLVED, That the Association of American Law Schools opposes the continued maintenance of segregation or discrimination in legal education on racial grounds, and asserts its belief that it is the professional duty of all member schools to abolish any such practices at the earliest practicable time.

In light of the foregoing view, the proposal of the Yale Law School for an amendment to the articles which would require abolition of segregation by member schools as a condition of membership in the Association is referred to a committee of five to be appointed by the President. The committee is instructed to report to the 1951 Annual Meeting with regard to this proposal, and any alternative it may deem worthy of consideration.

1950 PROCEEDINGS, *supra*, at 42-45; see also 1951 PROCEEDINGS, *supra*, at 278.

8. ASSOCIATION OF AMERICAN LAW SCHOOLS, 1957 PROCEEDINGS 96-98 (1957). As Dean Elvin R. Latty, the Duke representative, explained:

First and foremost, the proposal is a social reform. Purely as a social reform, I personally endorse it. I think it is good. My faculty thinks it is good. Discrimination in admission to law school on the basis of color is unsound, unjust, unfair. It is against the tenants [sic] of the Christian religion, I personally believe. Unfortunately, our faculty does not have the final say on these matters. Our University Trustees are not yet prepared to admit colored applicants.

*Id.* at 96.

In further arguing against the Yale Plan, Dean Latty stated:

Here is what is going to happen if the Amendment is adopted: A well qualified Negro applicant will apply. My faculty will recommend to let him in. I will send the

derbilt Law School integrated in the mid-1950s, its alumni met and tried to force the law school and the university back into its old ways.<sup>9</sup> It is likely that many, not all certainly but many, of Duke's alumni would have agreed with the Vanderbilt law alumni that admissions policies excluding blacks should not change.

### I. THE BOX OF RACIAL OPPRESSION

In January 1991, Professor Angela Harris gave a powerful talk at the Duke Frontiers of Law Conference.<sup>10</sup> In the talk she spoke about the box that race creates for all of us in American society.<sup>11</sup> In an earlier career Professor Harris was a writer, and she spoke at the Duke conference of the danger, power, and anguish associated with colleagues wanting her to be a "black" writer. In resisting, she refused to write about "black" topics and instead wrote about things like lounge chairs and summer days. Her talk has challenged me as I have taught about race and the law. The question that the talk provoked—How do we get out of the box of racial oppression?—is at the heart of the quandary that race poses for all Americans. This problem with race is not new. John Hope Franklin wrote about a similar problem for black intellectuals in 1963 at the height of the civil rights struggle.<sup>12</sup> The issues addressed in this article—diversity, affirmative action, and multiculturalism—are methods that have been developed to deal with the box created by race. In thinking about the efficacy of these responses to race, it is important to understand not only how useful each of these courses is but what those

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recommendation over to the president. The president, who is sympathetic with our faculty point of view, will in turn recommend to the trustees that the Negro applicant be admitted to the Duke Law School; and the trustees will say no. I shall then report to the Executive Committee of the Association that the applicant was excluded on the ground of race, whereupon we shall be kicked out of the Association.

*Id.* at 98.

9. ASSOCIATION OF AMERICAN LAW SCHOOLS, 1956 PROCEEDINGS 86-87 (1956).

10. Professor Harris is a Professor of Law at the University of California, Berkeley, and she gave this unpublished talk at the Frontiers for Legal Thought Conference, January 1991.

11. *Id.* I am not sure that I have done justice to Professor Harris's talk. She was able to convey a pride and commitment to being black while at the same time talking about how the social construction of race limits everyone to the box that they are forced to occupy. In that sense, her argument is similar to, but different from, the arguments about race and life that other legal scholars have written about because she understands that race is both socially constructed and important. See, e.g., STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY I (1991) ("To be black and an intellectual in America is to live in a box. So I live in a box, not of my own making, and on the box is a label, not of my own choosing.")

12. JOHN H. FRANKLIN, *The Dilemma of the American Negro Scholar, in RACE AND HISTORY: SELECTED ESSAYS 1938-1988*, at 295-308 (1989).

who oppose them hope to replace them with. All of us have a policy about racial oppression, whether stated or unobserved.

There are really two aspects to the box created by race. The first, as Professor Kendall Thomas says, is that we are all raced by how others categorize us.<sup>13</sup> Even if Professor Harris does not write about "black" topics, her colleagues—white and black—may see her as a "black" writer. The second problem is that race requires all of us to decide how we see ourselves. "Whose side are we on?" is not only a song lyric, it is a question about self-worth and definition. Race thus cannot be eliminated by the actions of any one individual because it lives in the combined activities of black and white people. This is the box that race has created for all of us, leaving us defined by others and ourselves as white or black (and occasionally other).

Affirmative action accordingly is a difficult issue because of how it interacts with the box of race. Affirmative action helps to destroy aspects of the box created for blacks or other people of color when we permit access to jobs and colleges and universities to include people who historically have been shut out. All people are permitted by such changes to see black people as not just laborers and never as *potential* students, professors, and lawyers. However, affirmative action also may provide an excuse to degrade and belittle every achievement of black people as "undeserved" and "unfair." True affirmative action ought not have that impact free of racist feelings, but I will return to that point later.

To see the tricky turns that race and affirmative action produce, let us examine the recent nomination by President Bush of Clarence Thomas to the Supreme Court. Now President Bush is a complicated fellow much in the American tradition. We can observe him on Martin Luther King's birthday this past January holding hands with Dr. King's widow and singing "We Shall Overcome,"<sup>14</sup> or we can see him describing the 1990 and 1991 versions of the Civil Rights Act as "quota bills."<sup>15</sup> In naming Clarence Thomas, a black conservative Republican,<sup>16</sup> to take the place of Thurgood Marshall,

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13. Comments of Professor Kendall Thomas at the Panel on Critical Race Theory, Conference on Frontiers of Legal Thought, Duke Law School, Jan. 26, 1990.

14. Robin Toner, *The 1992 Campaign: Republicans; President Joins King Observance*, N.Y. TIMES, Jan. 18, 1992, §1, at 1 ("President Bush came to the resting place of the Rev. Dr. Martin Luther King, Jr. today, locked arms with his widow and sang 'We Shall Overcome' . . .").

15. Cohn & Bingham, *supra* note 2, at 32.

16. I want to emphasize that I have nothing against someone for being a black conservative or a Republican. It is the weakness of the nominee's credentials and his views on racial oppression

the only other African-American to serve on the Supreme Court, President Bush seemed to be an advocate of affirmative action. A conservative president was appreciating the need to have a black "voice" on the Supreme Court and acquiescing in that effort to include "qualified" blacks on the Court. This acquiescence in the need for a different voice is a kind of multiculturalism and a bow to diversity. In describing who he would select as a nominee to replace Justice Thurgood Marshall, President Bush had claimed he would find the "most qualified person" in America.<sup>17</sup> His selection of Clarence Thomas as that person was thought laughable by many commentators in the legal community.<sup>18</sup> Thomas possessed neither the record of scholarship nor the legal experience of the most outstanding practitioners. Accordingly, his nomination and subsequent confirmation added to (or at least maintained) the racial diversity of the Supreme Court, but it did nothing to eliminate the box created by race. The appointment of a person seen as having superior qualifications would have worked against stereotypes. But President Bush's selection of someone whom the NAACP Legal Defense and Educational Fund called the least qualified nominee of this century<sup>19</sup> simply reinforced the box that race has created for black people.<sup>20</sup> Many people, black and white, accept this view of race by accepting the fact that there are no more qualified people than Clarence Thomas or that any black voice is better than a conservative white voice.

The problematic nature of that acceptance can be seen in the Court's opinion in *Presley v. Etowah County Commission*.<sup>21</sup> This

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that concern me. I would have supported a number of black conservative nominees, including Assistant Attorney General Edward Dennis, and William Coleman (former Secretary of Transportation).

17. Timothy M. Phelps, *Thomas Foes Hit Labeling by Bush; Idea They Are Out of Touch Is "Poppycock,"* NEWSDAY, Aug. 8, 1991, at 17.

18. Jeremy Paul, *Thomas' Past Condemns Him to Public Hypocrisy,* CONN. L. TRIB., Sept. 23, 1991, at 21; *Political Forecast: Will Thomas' Nomination Fight Damage the Court?,* L.A. TIMES, Oct. 20, 1991, at M1.

19. See Ruth Marcus, *Rights Groups, Black Caucus Urge Senate Panel Not To Confirm Thomas,* WASH. POST, Sept. 20, 1991, at A6 (statement of Julius L. Chambers, Director of the NAACP Legal Defense and Educational Fund).

20. It is clear that President Bush has treated Clarence Thomas as the "best black" and not as a good lawyer, unlike the manner that Presidents Johnson and Kennedy treated Thurgood Marshall when Justice Marshall was given nonblack jobs. Clarence Thomas was denied nonblack legal jobs in the Reagan and Bush administrations until he was elevated to the D.C. Circuit. See Washington Legal Foundation, *Briefing on the Nomination of Clarence Thomas,* FED. NEWS SERV., Sept. 3, 1991, available in LEXIS, Nexis Library, Fed. News Serv. File.

21. 112 S. Ct. 820 (1992).

case posed for the Supreme Court the question of whether section 5 of the Voting Rights Act of 1965<sup>22</sup> requires the preclearance of changes in authority of elected officials. In *Presley*, authority over road-building and road-maintenance funds was removed from the purview of the county commission immediately following the election of black officials to the commission. The Court, speaking through Justice Kennedy, concluded that these changes in routine authority did not amount to discrimination in voting. Justice Thomas joined the other five Reagan/Bush appointees in this opinion. *Presley* was a case in which there was an important need for a black voice, but instead we heard only the echoes of a need to protect federalism.<sup>23</sup> This decision increases white supremacy by effectively removing incentives to win for black candidates. *Presley* tells black candidates that if they succeed in winning office, effective power can be taken away from them by changing the nature of the job that they were elected to perform. The Court ignored how its view of the Voting Rights Act will destroy the real effectiveness of the Act. Preclearance was put into the act to stop the very effort undertaken by the white commissioners after the election. The court spoke of federalism and ignored the past actions by these same jurisdictions to eliminate black voting, which had led to the Voting Rights Act in the first place.<sup>24</sup> Justice Thomas' failure to see the power and importance of white opposition turns affirmative action, diversity, and the use of different voices into a mockery in which black people become pawns of white interests.<sup>25</sup> The appointment of

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22. 42 U.S.C. § 1973c (1988).

23. *Presley*, 112 S. Ct. at 828-32.

24. *Id.* at 834-38 (Stevens, J., dissenting) (reviewing the history of deceptive practices in the South to deny blacks the vote).

25. Several other examples of the intellectual failure of Justice Thomas can be garnered from his actions during his brief tenure on the Supreme Court. *See, e.g.*, *Hudson v. McMillian*, 112 S. Ct. 995 (1992). There, in a dissent joined by Justice Scalia, Justice Thomas argues that "[t]oday's expansion of the Cruel and Unusual Punishment Clause beyond all bounds of history and precedent is, I suspect, yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society." *Id.* at 1010 (Thomas, J., dissenting). In this mean-spirited dissent, Justice Thomas reads the Eight Amendment as not applying to the beating of a prisoner because the prisoner's injuries were not extensive enough to amount to permanent and extensive harm. The prisoner in this case who was beaten "suffered minor bruises and swelling of his face, mouth, and lip. The blows also loosened Hudson's teeth and cracked his partial dental plate, rendering it unusable for several months." *Id.* at 997. In *Haitian Refugee Center, Inc. v. Baker*, 112 S. Ct. 1245 (1992), Justice Thomas joined the majority of the court in denying both the stay of the mandates and the petition for certiorari. He emphasized that "[t]he affidavits filed throughout this litigation have sought to describe the conditions in Haiti and the treatment the returnees have received there. I am deeply concerned about these allegations. However, this matter must be

Justice Thomas by President Bush could have helped us out of the box created by race, but instead it helped to reinforce people's notions about black people and the racial oppression of black people. This is racial oppression masquerading as affirmative action.

Those of us who have argued for diversity and affirmative action are partially to blame for such uses of affirmative action. We sometimes have been sloppy in describing what we want. Sometimes we have said that we wanted a black or other person of color hired without making it clear that of course we meant not hiring just anyone.<sup>26</sup> But the real problem is the box that is created by race. Race is sometimes needed to appropriately target change, but the use of race as such a target creates the possibility that others will allow that targeting to reinforce the box of race.

We often do not fully understand the nature of the box of race, but our efforts as a society to get out have taken four different tacks: racial blindness, racial consciousness, racial solidarity, and racial assimilation. Each of these approaches has some strengths and weaknesses. It is possible to identify the strengths and weaknesses of these approaches by understanding that any effort to eliminate race as a box<sup>27</sup> will have two aspects to it: Each of these four efforts, or policies, influences how individuals see themselves and others with respect to racial stereotypes, and each influences how much racial oppression exists against those who are not members of the socially "favored" racial group. I have described the possible choices available in Diagram I.

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addressed by the political branches, for our role is limited to questions of law." *Id.* at 1245-46. Thomas seems unable to turn that concern for Haitians into a concern about whether the government action in the United States violates rights protected by the United States Constitution or international law. His vote not to examine whether the government has violated the law is important because the unstated part of this case, what no doubt is part of his concern, is the racism that sees the black Haitian detainees as not deserving access to the United States.

26. I have not seen any person of color who really subscribed to an any-person-of-color philosophy. However, I have seen that many blacks were not willing to be the hatchet-person when others have proposed weak candidates of color for appointment to be faculty members. The problem that the box of race provides for us is that anything we say negative about a candidate of color is blown out of proportion. In order not to play such a role, persons of color sometimes remain silent.

27. If one were to eliminate the box of race, it would not mean that cultural and religious differences now associated with race might not continue and be important. One does not have to eliminate jazz or country music to eliminate the box of race.

## DIAGRAM I

## IMPACT OF POLICIES ON RACIAL STEREOTYPES

I M P A C T  O N  R A C I A L  O P P R E S S I O N	INCREASE OPPRESSION	INCREASE STEREOTYPES  <i>White supremacy</i>	NO IMPACT ON STEREOTYPES	DECREASE STEREOTYPES
	NO IMPACT ON OPPRESSION		Color-blind policies  <i>(welfare increases anti-poverty packages pell grants)</i>	
	DECREASE OPPRESSION	<i>Racial solidarity</i>  <i>Assimilation</i>  <i>Bad Affirmative action</i>		<i>Race-conscious efforts</i> <i>Good affirmative action</i>

A policy may increase, have no impact on, or decrease the negative racial stereotypes associated with race, and may increase, leave unchanged, or decrease the amount of racial oppression experienced by racially unfavored groups. It should be clear that the way out of the prison created by race is to have policies that both reduce negative racial stereotypes and reduce racial oppression.

The most classic response by American policy makers to race has been racial blindness and/or racial assimilation. Again and again judges and legislators have called for racially blind policies. Justice Harlan's ringing dissent in *Plessy v. Ferguson*,<sup>28</sup> in which he claimed that law is color-blind, is the most eloquent example of that approach. Color-blindness has not worked with respect to black peo-

28. 163 U.S. 537, 563 (1896) (Harlan, J., dissenting).

ple because they have not or are not able to assimilate and become simply white Americans with black skins. Racial oppression and social isolation have increased and decreased despite the notion of color-blindness. Color-blindness has this effect because race-neutral policies do nothing about race. Such policies may in fact decrease the box associated with class and the interaction of race with class, but such policies do nothing about the power of race.

It becomes possible to put current black and white commentators on race into this diagram as well. Each of these commentators adopts some aspects of the four approaches to race and uses them to attempt to get black and white people out of the box created by white supremacy. Shelby Steele, in his book *The Content of Our Character*,<sup>29</sup> contends that blacks must assimilate and become racially blind. Stephen Carter argues for a version of racial solidarity and racial blindness but not for race consciousness or assimilation in his book *Reflections of an Affirmative Action Baby*.<sup>30</sup> My colleague William Van Alstyne has argued for a long time that society should adopt racial blindness as its only criteria.<sup>31</sup> In addition, as a number of people have noted, black racial solidarity can produce a return to and a reaffirmation of racial solidarity among whites, and this solidarity is likely to be very supportive of white supremacy. Those who make this argument contend that the only way out of the box of race is for people to be racially blind and to reject any form of racial solidarity.<sup>32</sup> The problem with this approach is that it tends to leave the box associated with racial oppression unchanged.

Some would point to the history of the civil rights struggle in this half-century and contend that this history proves that racial blindness brings change,<sup>33</sup> but it seems to me that this is more a rewriting of history than an accurate reflection of the history of black experience with the civil rights movement. The modern version of the civil rights movement grew from racial solidarity on the part of blacks in the South.<sup>34</sup> The Montgomery Bus Boycott was built with

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29. SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990).

30. See CARTER, *supra* note 11.

31. *E.g.*, William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 808-09 (1979).

32. See, *e.g.*, STEELE, *supra* note 29, at 127-48, 172.

33. *Cf.* Fred Siegel, *Multiculturalism and Other Mistakes*, 41 DEPAUL L. REV. 1191 (1992).

34. See generally TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63* (1988) (describing how the Civil Rights Movement took root and became a major force in American society); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK*

the power of racial solidarity, not racial blindness.<sup>35</sup> Similarly, the movement for the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were black movements to which many whites contributed their bodies and voices. Neither effort would have been accomplished without some version of racial solidarity and race consciousness. Indeed, the second reconstruction was built on the notion that race had played too large a role in limiting the life chances of black people and, therefore, that the life chances of black people ought to be changed. The economic and social changes in the workplace and in admission to college and graduate school were also not the product of race-blind policies. Some of us have forgotten that it took both positive and negative actions of racial solidarity to produce change. The positive aspects were the efforts of the black mainstream to seek change; the negative were what Martin Luther King described as the vocabulary of the unheard, the riots that influenced too many of the summers of the 1960s. Racial blindness cannot be seen therefore as the creator of much change.

Another example of the power of race consciousness to create change can be seen in the growth of black doctors, lawyers, and professionals due to race-conscious recruiting efforts. For example, if the development of black economists (or at least economists who happen to be black) is examined, it is clear that little has happened with the number of black economists when there have been no race-conscious efforts. When MIT and to a lesser extent Harvard made a considered effort to recruit black graduate students in the early 1970s, the number of black graduate students and black Ph.D.s went up substantially.<sup>36</sup> I was one of the black students recruited to the Harvard economics department by this policy in the early 1970s. In this period, MIT and Harvard educated the majority of black people who now have Ph.D.s in economics. This effort would not have happened if MIT and Harvard had simply adopted a race-blind policy. This does not mean that when these schools stopped using a race-conscious policy, or at least reduced the race consciousness of the policy, that in fact all black economists disappeared, but the differences in result are striking. It is clear that the concern about changing the racial makeup of the profession has declined

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COMMUNITIES ORGANIZING FOR CHANGE (1984) (same).

35. See MORRIS, *supra* note 34, at 51-63.

36. Cf. Telephone Interview with Richard E. Whalen, Statistician, United States Department of Education (June 18, 1992).

since the 1970s, and with that decline, the number of black students who have become economists.

Too often both black and white scholars confuse poverty with the concerns of black people. Some black people are poor; most blacks vote for liberal causes; and all black people are likely to be connected to poverty in ways that are different from the connection of white Americans—blacks are more likely to know poor people, more likely to have family members who are poor, and more likely to return to and stay in poverty than white Americans. But being black is not the same as being poor. Ending poverty will not eliminate racism in America, though it would achieve other noble and important ends. Simply reducing poverty will not eliminate the box structured by the use of race by Americans.

Accordingly, race-blind policies are likely to be located in the middle of the diagram, influencing neither racial oppression nor racial stereotypes. Assimilation—the spiritual if not physical Michael Jacksoning of black America—might have the effect of decreasing racial oppression, but it is likely to increase racial stereotypes.<sup>37</sup> If in order to be a real American I must lighten my skin and become white in every visible way, then there must be something wrong with being black. Such thinking necessarily increases racial stereotypes, at least about those who do not assimilate. Race-conscious policies have the potential to both decrease racial stereotypes and to decrease racial oppression, but as I indicated above with respect to the Thomas nomination to the Supreme Court, “bad” affirmative action produces the opposite result. This means that part of the way out of this box is to understand how to use race to be appropriately conscious and revolutionary, and at the same time not to fall prey to a policy that is counterproductive. The question that has to be answered is whether our current policies at universities and law schools are in fact productive or counterproductive.

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37. Jackson is an African-American singer who has had a number of plastic surgery operations and other procedures that have changed his physiognomy and his skin color (at least on his face). See Valli Herman, *Is Jackson Fading Away?*, STAR TRIB., Dec. 18, 1991, at 1E (reporting that Jackson's publicist contends the most recent lightening of Jackson's skin is the product of makeup and not cosmetic surgery, but others think he has used various methods of peeling and skin creaming to achieve his most recent transformation).

## II. DUKE, AFFIRMATIVE ACTION, AND THE INNOCENT WHITE STUDENT

I will discuss race-conscious policies at Duke in three different arenas: student admissions, the faculty hiring policy of the university, and the faculty hiring of my law school. In a letter asking me to participate in this symposium, an editor of the *DePaul Law Review* asked me to write about the “controversial experience” of faculty hiring at Duke. The controversy to which he was referring was the one generated by Dinesh D’Souza in “The Last Shall Be First: Subverting Academic Standards at Duke,” a chapter in his book *Illiberal Education: The Politics of Race and Sex on Campus*.<sup>38</sup> I will return to Mr. D’Souza in Part III, but I begin here with a discussion of my own experience with college admissions and faculty hiring. My question is, Why is the notion of diversity controversial?

When I applied to colleges in the spring of 1968, I thought I had a pretty good chance of being selected to attend any college I wanted. I cannot say that I was an affirmative action baby like Stephen Carter because affirmative action was not very important in colleges at that time. I had the grades, extracurricular activities, and SAT scores to statistically put me in the top half of the student bodies of the twenty-one colleges I applied to. I come from a modest background. Neither of my hard-working parents had the opportunity to go to college, though both graduated from high school—my father was a coal miner and my mother was a house parent for delinquent children. When I entered college in 1968, I was the second person in my family—my sister had entered a year earlier—to go to college. In addition, I was well read in current affairs and history. I did not expect being black to work significantly in my favor, but I did expect that colleges’ drive for diversity would mean that most would accept me. After all, how many kids from a small coal-mining town like my own go to Ivy League-quality colleges? In 1968 most elite colleges had little affirmative action programs to attract black students. At most of these colleges, even in the late 1960s, you could count the number of black students on your hand. I was admitted to the University of Chicago and every one of the other schools I applied to except Harvard College, although Harvard was

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38. DINESH D’SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 157-93 (1991).

the only Ivy League college I applied to. My rejection was not that unusual for black students applying to elite colleges and graduate schools. There were lots of criteria that entered into an admissions decision, but most militated against black candidates who did not go the right prep school or have the clout to get recommendations from appropriate people; Duke University was not the only school that had official or unofficial policies against the admission of black students. Of course, I cannot prove that I would have been admitted to Harvard if I had been white, just as it is not really possible to prove that for any candidate, but I can prove that I was predicted to be able to do the work.

Almost as my rejection letter got to me, the admissions world of elite American law schools was changed by the assassination of Martin Luther King, Jr., and to a lesser extent Robert Kennedy later that spring. Many affirmative action programs date from that spring and the riots and reaction to Dr. King's death. The universities—particularly those in urban areas like the University of Chicago and Harvard—decided that they could not remain white islands in seas of blackness, and the number of black students increased substantially for a number of years.<sup>39</sup> The University of California-Davis Medical School affirmative action program, later famous because of the *Bakke* case, was a product of this era.<sup>40</sup>

We are now asked by a number of commentators to reverse those policies and eliminate the programs that have substantially increased the number of blacks and other people of color in elite colleges and law schools. This argument consists of two parts. First, it is said that it would be more fair to all concerned if we used "neutral" criteria that are free of race to judge candidates.<sup>41</sup> Second, it is argued that black candidates who go to these schools would be better off if they went to lesser schools and did better.<sup>42</sup> Neither argument is persuasive. Indeed, those who make them sometimes forget that many of the programs were explicitly enlarged to permit the

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39. See *supra* note 36.

40. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

41. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). The *Johnson* affirmative action plan puts pressure on the Johnsons of the world to bear the burden of their effort, instead of burdening people who are not involved and who are innocent of the discrimination attributable to white southerners. In addition to the conservatives who make this argument, an increasing number of liberals and radicals have become concerned about the impact of affirmative action on innocent white victims as a result of "reverse discrimination." See CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 24-69 (1992).

42. See JENCKS, *supra* note 41, at 62-63.

recruitment and education of black and other minority candidates in the 1960s and 1970s.

### A. *Neutral Criteria*

Many commentators worry about whether any use of affirmative action will increase racial stereotypes, but too few worry about whether our efforts to increase the number of blacks and other racial minorities in the pool will have some long-run impact on discrimination and racial oppression. If it is fair to eliminate poverty even if that cure will not eliminate racial oppression, it also can be fair to try to attack racial oppression even if every unfairness is not simultaneously also attacked. Only if the attack on racial oppression increases the unfairness is it important to compare the impact and the unfairness created. No one, including Thomas Sowell, Nathan Glazer, and Christopher Jencks, in talking about the possibility that affirmative action might be particularly unfair to the white middle class, demonstrates that it has that effect. What I suspect is true is that programs that increase racial diversity and reduce racial oppression have no impact or maybe a small negative impact on the amount of discrimination faced by white working-class males.<sup>43</sup>

For example, Christopher Jencks in his most recent book on social policy starts with a chapter on affirmative action.<sup>44</sup> He decries what he calls reverse discrimination when there are any measurable differences between the black and white students or faculty that we attract to our institutions. Professor Jencks suggests black faculty, like Nobel prizewinners, will not be increased by having colleges attempt to recruit them "except perhaps in the very long run."<sup>45</sup> Why is that? Professor Jencks does not quite explain. His comparison of black faculty with Nobel prizewinners seems to be particularly ineffective for universities who create their own supply of teachers in the long and medium runs. This view of black potential academics

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43. This is certainly true of the impact of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* has been attacked as creating an incentive for firms to hire by quotas, but what *Griggs* actually does is to attack measures that are used to eliminate from hiring and promotion consideration many oppressed middle-class whites as well as blacks. Title VII is the only requirement in the private sector for hiring by any measure of merit, despite considerable rhetoric on the other side. It may indeed have been the spirit of Title VII that encouraged Erwin Griswold to adopt his own version of affirmative action in the Solicitor General's office and to hire a recent Vanderbilt graduate, William Bradford Reynolds. See Juan Williams, *In His Mind but Not His Heart*, WASH. POST (Magazine), Jan. 10, 1988, at 10.

44. JENCKS, *supra* note 41, at 24-69.

45. *Id.* at 66.

as being rare as Nobel prizewinners is how my white colleagues view the world, but it is not an accurate picture of the possibilities. Take law school hiring for example. According to a report by the Society of American Law Teachers in 1987, there were approximately 214 black teachers in the predominately white law schools.<sup>46</sup> Of this number, seventy were women.<sup>47</sup> Harvard has said that there are no qualified black women or other women of color who could be added to the law school faculty.<sup>48</sup> The seventy women is just the tip of the iceberg. There have been thousands of black women lawyers who have graduated from law school in the last twenty years: Some are partners in law firms; many would be interested in teaching at one of the premier law schools in the country. The notion that the pool is so thin that there is no one who could add significantly to the teaching and scholarship at these institutions is, to put it bluntly, pure sophistry and at its heart a disguised form of racism.

Schools like Harvard and my own have decided that adding that kind of racial and gender diversity to faculties is not important enough to effectively search the pool of candidates who exist. If Harvard or Duke did this, would this mean that some white male or white female "innocent" of past discrimination would suffer? Perhaps such pure innocence exists (more about this below), but at the heart of this view of hiring and jobs is a belief that the current status quo creates an entitlement to a job. This notion of entitlement is simplistic and wrong. Indeed, if we hired all members of our faculty on some notion of the best available candidate, irrespective of their contributions to the faculty in terms of courses and educational perspectives, we would not have the faculties we now have. It is clear that the affirmative action requirements of Title VII<sup>49</sup> and Executive Order 11,246<sup>50</sup> reduce the nepotism of these hiring decisions.

Everyone who has ever participated in a faculty hiring meeting knows that we often hire the best available "torts" or "contracts" or

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46. Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 557 tbl. 2 & n. on gender and race (1988).

47. *Id.*

48. Christopher B. Daly, *Harvard Law Students Demand Diverse Faculty*, WASH. POST, Apr. 25, 1990, at A3.

49. 42 U.S.C. § 2000e-5(g) (1988 & Supp. III 1991) (allowing courts to fashion appropriate affirmative action remedies in cases where employers or unions discriminate unlawfully).

50. Exec. Order No. 11,246, *reprinted as amended* in 3 U.S.C. § 301 (1988) (imposing on federal contractors an affirmative obligation to remedy racial imbalances in their work forces).

“tax” professor. Those choices are often just as efficacious as the ones we make when we draft the best available talent. What ought to be obvious is that we can hire faculty from the available pool of qualified people if we wish, without making the unchosen the victims of anything. Racial diversity is an important criterion to add to that mix precisely because race is so important in how people are viewed by others and how people view themselves. Indeed, diversity itself may be a needed antidote to implicit biases in our hiring for men.<sup>51</sup> For example, when we say that we are looking for people who will be great teachers, do we look for characteristics like height and depth of voice that are skewed toward men?<sup>52</sup>

William Bradford Reynolds, former Assistant Attorney General for Civil Rights, tells a story about how he first became disenchanted with affirmative action because a black student from his child's high school got into Duke with lower grades and test scores than did a white girl from the same high school.<sup>53</sup> Such apocryphal stories are dangerous and often wrong. Duke recently won a case in which very similar facts were alleged by the plaintiff, but it turned out that the black student actually had higher grades and test scores than the complaining white student.<sup>54</sup> People use affirmative action as an excuse to increase racial stereotypes. William Bradford Reyn-

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51. I am a little sensitive about making an argument for diversity that, at least given the present makeup of American law faculties, is likely to benefit me, a black male, directly or indirectly. I make it despite this danger for two reasons. First, white people and white men in particular benefit from the current rules that implicitly favor their appointment. I see few white men who defend such policies acknowledging their potential conflict. Second, this is another example of the box that race places me in: If I speak out against such policies, I am also likely to be enriched by the positive reaction of my colleagues to that possibility. I think that I could make more money if I were willing to be seen as a black conservative than if I were to run against the current conservative trends. This frees me to argue for what I believe is important and lets me leave the question of minor personal benefits to another day.

52. It is important to understand that by saying they are skewed toward men, I am not making an essentialist argument about qualifications. Many women will be able to create the characteristics that are associated with men.

53. Williams, *supra* note 43, at 10.

54. See Michael Saul, *Complaint Filed Charging University with Discrimination*, DUKE CHRONICLE, Sept. 17, 1991, at 1. In the case, a white woman filed a complaint with the Department of Education claiming reverse discrimination because a black woman from the same high school, with allegedly lower credentials, was admitted over her. The white woman alleged that she outscored her classmate on the SAT (1180 versus 1130) and that she ranked higher in her class. *Id.* According to the university, however, the woman was wrong on both counts. Although the white woman was indeed ranked higher at the time the two women applied to Duke, the black woman actually graduated with the better GPA. As far as the SAT scores were concerned, the black student had taken the SAT more than once, and the university, in keeping with its policy, took her highest score from the two takings, which was higher than the 1130 she got on the first test and the 1180 garnered by the complainant. *Id.* at 14.

olds made it his career at the Justice Department to attack every race conscious remedy proposed by court or employer because of this unfairness.<sup>55</sup> Affirmative action is not unfair to white students. What surprises me more than anything else in a discussion of affirmative action is the number of white students who share Reynolds' anger about it. I have been teaching undergraduates and law students since the 1970s, and this anger seems new and very different. It did not exist among the Harvard undergraduates I taught as a graduate student or among the law students when I first began teaching law students at Rutgers Law School or Duke.

Why are they so angry? Many contend that it is because of the unfairness associated with affirmative action. There is strong evidence that the children of alumni are two to three times as likely to get into elite schools as other similarly situated applicants.<sup>56</sup> The reason that many people are not angry about those legacies of past alumni—which were by definition all-white at Duke University until 1962—is that most people believe that alumni preference is earned. Yet those who earned it are not the children who receive it.<sup>57</sup> Just why the racial oppression visited upon black people by individuals and institutions like Duke does not earn some preference for a while

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55. The most famous example was his reaction to the Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). After that decision was issued, Assistant Attorney General Reynolds wrote to 51 judges to inform them that consent decrees containing race-conscious remedies would no longer pass constitutional muster. See *Statement of Assistant Attorney General Reynolds on Affirmative Action*, Daily Lab. Rep. (BNA) No. 134, at E1 (July 12, 1985).

56. John Larew, *Why Are Doves of Unqualified, Unprepared Kids Getting into Our Top Colleges? Because Their Dads Are Alumni*, WASH. MONTHLY, June 1991, at 10. Larew states:

At most elite universities during the eighties, the legacy was by far the biggest piece of the preferential pie. At Harvard, a legacy is about twice as likely to be admitted as a black or Hispanic student. . . . [I]f alumni children were admitted to Harvard at the same rate as other applicants, their numbers in the class of 1992 would have been reduced by about 200. Instead, those 200 marginally qualified legacies outnumbered all black, Mexican-American, native American, and Puerto Rican enrollees put together.

*Id.*

57. We are not likely to see this Supreme Court apply the same standard of proof to the issue of the admission of children of alumni that it applied in finding discrimination by the Richmond City Council. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The lower courts that have addressed this issue have suggested that the university's interest in alumni contributions could justify such a policy. But what about the possibility in a changing world that black alumni of Yale or Harvard might go far as new members of the race-blind "Cosby generation"? Shouldn't the Court permit the use of diversity on the chance that such possibilities might exist? The reason the Court is unlikely to put such a requirement on universities is because most of the members themselves have benefitted or have children who could benefit from such privileges. See A. Leon Higginbotham, *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992).

is not clear. Some of my students no doubt think that except for affirmative action they would have gotten into a better college or law school. But just as I learned that there is life and a pretty good education without Harvard, so must my students understand that they are privileged. Almost all of my Duke students are going to make a lot of money for themselves and their clients in fashionable and exotic places.

I also do not think they are angry because they are racists of the old type—people who hate all black people and wish them ill. I believe that many of those who are angry are angry because affirmative action seems a threat to the settled order. “My father went to Duke or Harvard and I deserve to go too,” they seem to be saying. It is harder to get into Duke or Harvard now than when their parents were going to college. Many think naively that if we went back to the “good” old days they would have full advantage of their class and social positions. William Bradford Reynolds, scion of the Du Pont fortune, seems the wrong party to be angry about this, but this anger has been legitimated by repeated claims of unfairness by everyone from Ronald Reagan to David Duke (no relation to the university), and white students now feel justified in their anger. Having a reasonable number of black students in the law school class seems an important part of the learning process. All-white classes that in fact do not represent the history and makeup of our society are both unfair and likely to be counterproductive in the long run. Finally, Duke, like most law schools, participated in big and little ways with the creation of racial oppression; modest efforts by our law school to rectify that situation seem to me both fair and equitable. Racism was built up in this country over a period of several hundred years. It will not be eliminated by modest efforts over a very limited period of time.

I want to go back to the innocence of workers and students “whose economic interests are ‘taken’ by a government-instituted affirmative action plan”<sup>58</sup> or who have been impacted by privately initiated affirmative action. What do we mean when we tell the story of the “reverse discrimination baby”? I take it that this person (probably a white male) is the person in the “white-hands” television advertisement from Senator Helms’ Senate campaign of 1990. In that advertisement, the voice-over says that you were the most

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58. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1537 (2d ed. 1988).

qualified but the employer hired another person simply because of his race. My white students also say they have no clout. They are not the sons and daughters of connected people, and they have no white privilege that they can exercise, so it is unfair that they should bear any burden from affirmative action because they have gained nothing from being white in America.

I learned the power of this argument when my white neighbor and friend told me of her surprise that her white male son could win an academic scholarship to college. My neighbor and I have shared a long history of friendship. She and her husband have run a pre-school program for children that actively recruits black children, and they were concerned that these children were in integrated situations. My friends and neighbors had adopted a black child. They are not racist, but she believed that only black kids get scholarships to school. This misperception is so wrong that it is hard to know where to begin. The fact that there is no area of scholarship aid, except for pure need-based awards, where blacks *are* more likely to get the assistance, is lost on most white Americans. This includes athletic scholarships, which are disproportionately held by white Americans.<sup>59</sup> Even with respect to need-based awards, whites from poor backgrounds are much more likely to be able to take advantage of such programs because whites are much less likely to be "permanently poor."<sup>60</sup> People who are opposed to affirmative action almost always make the claim that the only beneficiaries of affirmative action are those blacks who are middle class and who do not need the help. However, in making this claim about the black community,

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59. Jim Myers, *Whites Still Get Most Athletic Scholarships*, USA TODAY, Dec. 18, 1991, at 4C. Myers states:

A claim is sometimes made that black athletes must be getting "all the college scholarships" because of the prominent role black athletes play in college sports shown on TV.

It's an illusion based on appearances: Blacks are underrepresented significantly in many college sports and underrepresented in sports below the major college level.

A definitive survey of race and scholarship aid doesn't exist, but many who have studied the question believe a true accounting of all aid to all schools would show that blacks, who represent 14% of the college-age population, get less than 14% of athletic scholarships.

*Id.* But see Douglas Lederman, *Blacks Make Up Large Proportion of Scholarship Athletes, Yet Their Overall Enrollment Lags at Division I Colleges*, CHRON. HIGHER ED., June 17, 1992, at A1 (noting that only 6% of students at Division I schools are blacks but that 42.9% and 59.9% of football and basketball scholarships of Division I schools are held by blacks).

60. Jerome M. Culp & Glenn C. Loury, *The Impact of Affirmative Action on Equal Opportunity: A New Look*, in *BAKKE, WEBER, AND AFFIRMATIVE ACTION* 124-34 (Bernard Anderson ed., 1979) (working papers from a Rockefeller Foundation Conference).

most do not see that if it applies to blacks it will apply even more to whites, who appear comparable by nonrace-based standards. Because of the connection of race with income and social status, it is very difficult to disentangle them. The impact of efforts to use color-blind policies often leaves the racial aspects unchanged or may even leave blacks relatively worse off because these policies do not help everyone equally.<sup>61</sup>

### B. *Avoiding the Ivy League*

The second argument against affirmative action also seems to be unjustified to me. I know of no evidence which suggests that sending black students to lower-ranked law schools or colleges would increase the income or the happiness of black law and college students. Indeed, it is likely that it would reduce the number of black students who go to law school. I know that most of my colleagues would not hire a black graduate of a historically black law school or a nonelite law school who finished at or very near the top of the class. This preference for elitism is reflected in the advice most white parents give their white children. Most people are encouraged to go to the best school they can.<sup>62</sup> The reasoning that leads white parents to tell their children to go to Harvard or Duke should not mean that we ought to encourage black candidates who are still faced by the box of race not to do the same. Without the imprimatur of elite education, many black law graduates will be seen as "not qualified." Of course, I am talking about those candidates who are able to do the work at these institutions. Indeed the most vociferous

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61. Many people believe that equality is easy to define when in fact it is not. For example, many schools maintain that the small number of minority students they do attract is due to slightly larger scholarships to college. It turns out that these same students end up with approximately the same amount of debt as white students. What is equality? Is it creating a program that leads to similar debt for black students at the end or giving everyone the same aid at the beginning? Either approach can claim the "equality" description. See *Minorities Still Receive Preferential Aid Grants*, N.Y. TIMES, Nov. 6, 1991, at B9. These facts make the controversy over scholarships generated by Michael Williams at the Department of Education partially a definitional issue. See *Equal Education Lip Service*, BOSTON GLOBE, Dec. 26, 1990, at 12 (editorial) (describing "confusion" surrounding Assistant Secretary of Education for Civil Rights Michael Williams' pronouncement that race-based minority scholarships were illegal).

62. I certainly do agree that it is possible to admit a student with no chance of surviving at an institution, and that some institutions have done so. However, it is important to understand that this is not true of most blacks or other racial minorities admitted to schools of higher education or to affirmative action admits in general. It has been my experience that the black students who fail or do not live up to their potential are often the best and often among those who are predicted to do well.

proponent of this view, Thomas Sowell, got an undergraduate degree from Harvard and a Ph.D. from the University of Chicago, places that I would describe as elite. This is true of Justice Thomas as well.<sup>63</sup> If one looks at the background of blacks and other racial minorities teaching in American law schools, one sees that they too have come from these same elite educational backgrounds.

### III. AFFIRMATIVE ACTION HIRING PLAN

Shortly after I joined the faculty of the law school I was asked to serve on the university's committee on black faculty. The committee then was in the middle of its second five-year plan to double the number of black faculty, but the number had remained approximately the same over this period. This committee had been working for a number of years to increase the number of black faculty on campus. The efforts to increase the number had largely been unsuccessful. When I joined the committee we decided to meet with the chairperson of every department that had significant pools of black Ph.D.s. This effort was an eye-opening experience. None of the departments had much positive news about hiring black candidates. One department said that it had tried a number of years before and had been rebuffed by our university appointments, promotion, and tenure committee and that it would do nothing more. Another department chair told us that hiring black faculty was not a very high priority on his department's agenda, and he would not be hiring any black faculty in the near future. The responses from a number of departments and deans was similar: Hiring black faculty was not an important issue. I was on leave and not active on the committee the year that the committee adopted the Duke Hiring Proposal, but I know that this proposal grew out of the long and vigorous effort to increase the number of black faculty.

Duke University has been given too much and too little credit for the adoption of the hiring unit affirmative action plan in 1988. Others, especially Dinesh D'Souza, have parodied the plan for asking departments to do the impossible.<sup>64</sup> This parody is simply wrong. The plan adopted by the Academic Council had four parts. First, the plan required each hiring unit in the university to make a good faith effort to hire at least one black professor by 1993. "Recogniz-

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63. Higginbotham, *supra* note 57.

64. D'SOUZA, *supra* note 38, at 167-69.

ing that some hiring units may have more difficulty than others in fulfilling this requirement, those that are unable to increase their black faculty must provide documentation of their efforts."<sup>65</sup> Second, each hiring unit was encouraged to take one or more of five steps. These five steps are:

- a. Hire a black faculty person under the existing policy of "opportunity appointments."
- b. Request new positions in sub-fields with relatively high proportions of black Ph.D.s, where such choice of sub-fields is consistent with other departmental priorities.
- c. Use contacts with faculty at other institutions, especially senior black faculty, to locate promising black candidates for all positions open in the department, and invite candidates located in this way to apply for these positions.
- d. Utilize the visiting professor program to identify and recruit candidates (a visiting black professor, it should be noted, does not meet the goal of adding a faculty member at regular rank).
- e. Recruit additional black graduate students to increase the availability of potential black faculty here at Duke.<sup>66</sup>

The third part of the proposal required each unit that failed to meet the goal to submit a recruitment form describing the unit's efforts to recruit over the past two years; a recruitment plan for the unit approved by the appropriate dean; and a review of the hiring unit's applicant pool prior to the extension of offers for campus visits, with approval contingent on the inclusion of one or more black candidates among the invitees or demonstration that every reasonable attempt had been made. The fourth part of the plan instituted efforts to increase the potential pool of black faculty by doubling the number of black doctoral candidates enrolled by 1993, developing a postdoctoral program to facilitate the recruitment of potential black faculty, and funding fellowships for black graduates of the college and the school of engineering to study elsewhere at a graduate school of their choice. The plan was balanced and required the hiring units to live up to a pledge to increase the number of black faculty that they had been evading. Despite arguments to the contrary, the plan did not ignore the pool issue;<sup>67</sup> it simply required the departments to do something about it. It is scandalous for colleges and universities to decry the depth and size of pools when they get

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65. See DUKE DIALOGUE, Feb. 1992.

66. *Id.*

67. D'SOUZA, *supra* note 38, at 167-70.

to decide within some limits what those pools of potential faculty will look like.

This plan has had very mixed results. In 1987 there were thirty-one black faculty at the university; now there are thirty-four.<sup>68</sup> There have been more changes than simply three additions: Several black faculty have left for appointments elsewhere, including two to Harvard and one to Brown, and others have been denied tenure or retired. It is clear, particularly given resource constraints on faculty hiring, that we have no chance of meeting the 1993 desire to double the number of black faculty. The university has been successful in increasing the number of black graduate students from twenty-eight to sixty-three, but we have largely failed to make much of a dent in the total number of faculty.

There are three reasons for this failure. First, a number of largely white faculty members have been adamantly opposed to this initiative. Their opposition stems not from simple racial animus, but from fears that this proposal would limit their right as faculty to make appointments and fears that resources would be diverted from some departments to others to meet these goals. Second, some of those who opposed the plan engaged in a form of guerrilla warfare against some of the black faculty hired. James David Barber, James B. Duke Professor and liberal activist, decided that we paid too much money to Henry Louis Gates to come to Duke. In a letter to the editor of the *Duke Chronicle*, he and others attacked Professor Gates's scholarship, his teaching, and his commitment to Duke with distorted facts and allusions to untold wealth being given to Professor Gates by Duke.<sup>69</sup> When Professor Barber suggested that we should not have hired Professor Gates because he had been denied an offer at Stanford,<sup>70</sup> he was both wrong about Stanford and wrong in suggesting that Professor Gates's salary was out of line with his credentials as the foremost expert on black literature in the country. Professor Gates subsequent appointment to be Du Bois Professor of English and African-American Studies, and his recent appointment as Chairman of Afro-American Studies at Harvard, prove that the market disagrees with the charges bandied about by those who, for

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68. See DUKE DIALOGUE, Feb. 1992.

69. James D. Barber, *Brodie's Leadership Crisis: We Need To Know Who's in Charge*, DUKE CHRON., Apr. 25, 1989, at 8 (letter to the editor) ("An opposite example is buying a young black fiction critic, recently said to be turned down by Stanford, by slipping his salary well up above six figures and prematurely awarding him a chaired professorship.").

70. *Id.*

a number of reasons, were not supportive of this effort. Third, a group of professors decided to secretly form a chapter of the National Association of Scholars ("NAS"). The unstated but implicit part of the agenda of this group seemed to be to attack the university's efforts to increase black faculty. Professor Barber has increased the racial box that black faculty have to live with, and those who have joined his effort are also to blame.

Adam Smith said that whenever businessmen meet it is only a short time before they begin to conspire to raise prices. Faculty have a similar problem: Whenever they meet, they begin to complain about the intrusions of affirmative action, diversity, and multiculturalism on their rights and responsibilities. The development of the NAS is indicative of that problem. This eclectic group of scholars represents an effort to save the academy from the deconstructionists, the Afrocentric and feminist scholars, and the change in focus embodied in things like affirmative action. It includes people who are traditional liberals, Marxists, and conservatives, all of whom see the efforts of people of color, women, and homosexuals to change the academy as a threat to them. A group of professors, including some of the most distinguished in the university, formed a chapter of the NAS last fall.<sup>71</sup> The founding members included almost all of the most senior professors of law at Duke.<sup>72</sup> My senior colleagues appear to believe that multiculturalism, diversity, and affirmative action are bad ideas. (I say appear because despite an invitation from me to debate the issue, none of my law school colleagues have had a serious discussion about what their concerns are at the law school or at Duke University in general.)

However, from whispers in the hall, it is clear that my colleagues see the key concern as not so much an issue of many cultures but an issue of created cultures. In their view, we have a Western or perhaps an American culture, and our most important job as members of the university community is to protect and nurture that culture from the attacks of outsiders and vandals. There are two reasons for the development of this problem in the current law school community. First, I have alluded to the fact that we are no longer the ho-

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71. To avoid criticism from people on campus about the politics of the NAS, the Duke chapter changed its name to Duke Association of Scholars and now disclaims any connection to the national group.

72. Of the five faculty holding chairs at Duke Law School, four were founding members of the Duke Chapter of the NAS.

mogenous community of white male law students that we used to be twenty years ago. The addition to the law school community of blacks, latinos, Hispanics, native Americans, Asians, white ethnic minorities, and that majority group that is just being fully integrated into the legal academy—women—has changed the academy fundamentally. We speak more languages and start with many more assumptions than in the past. Second, this change has been accompanied by students questioning the authority of their teachers. How should students be able to participate in the academy? Ultimately it is important for the university community to resolve this issue of authority and participation in a way that does not give up the responsibility of the university to teach moral values or become intolerant. Evidently many of my colleagues believe that it is possible for universities to be neutral about racial oppression in our society and to have no values. We hear this often in these debates—the university must be open to all ideas and therefore cannot express an opinion—but of course this is silliness. It is not possible to be completely neutral about values even if the only values we care about are those of academic freedom and faculty rights.<sup>73</sup> Universities do have standards and values. The key question is whether those values will help us out of the box of race and racial oppression. I want to make it clear that I believe it possible for a university to stand against racist and sexist actions without becoming McCarthyite or too intrusive of fundamental freedoms. The way out of the box is not racial or political neutrality.

#### IV. TOLERANCE AND THE UN-PC PROFESSOR

All of these issues of affirmative action, diversity, and multiculturalism come together in the debate about political correctness and the nation's campuses. I believe it is possible to deal with these concerns in ways that are both tolerant of the important and legitimate concerns of teachers and students, particularly students of color who are disempowered by current classroom and pedagogic decisions. I want to raise three examples of this cultural conflict created by di-

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73. One of the silliest examples is my colleagues who contend that we must have all sides in every debate. The fact that it is not possible to include all viewpoints is one response, but with respect to some issues, where is the opposition? Do we include "wife batterers" in a colloquium on battered women, or people in favor of slavery in a program about racial discrimination? The fact is that we agree on some values and perspectives, and we do not choose to debate them all the time. This is good because otherwise we would never accomplish anything.

versity and affirmative action and briefly discuss why they are difficult questions for the university community. The first two examples deal with the issue of the authority of teachers and students in the academy while the final is an issue that arose last year at Duke Law School.

The first is taken from a column by Nat Hentoff in the *Village Voice*. Hentoff writes:

Al Gini [is] an associate professor at Loyola University in Chicago. He has won three teacher-of-the-year awards.

During a class on business ethics on January 22, 1990, Gini was talking about unethical behavior, and how it can lead to sanctions, including being fired. It has become improper, he said, to call a black person a Negro now. Worse yet, he added—pointing to a student, Sandra Westmoreland—"if I called this student a nigger student and really meant it, it would be grounds for termination." He was trying, he explained later, "to make people realize how wrong it was."

After class, Sandra Westmoreland went up to the professor and said she had been offended by his use of the word "nigger." Gini said he had not intended to offend her, but since he had, he apologized.

Three months later, writes Basis Talbott of the *Chicago Sun-Times*, Sandra Westmoreland "called a press conference to complain that Gini had singled her out as a 'nigger.' She demanded Gini's dismissal. Charges were lodged with the United States Education Department."<sup>74</sup>

The second example is an issue that came up at New York University. In a different Nat Hentoff piece in the *Washington Post*, the situation at NYU is described in these words:

At NYU, as at most law schools, there are moot court competitions through which students learn to write briefs and then defend them in oral argument before invited judges—including real judges. This fall, the hypothetical case concerned a soon-to-be-divorced husband's attempt to get custody of his 5-year-old daughter. The mother, he claimed—and she did not deny it—was involved in a lesbian relationship with a woman who was now living in the mother's home.

The Family Court gave sole custody to the mother, saying there was no evidence of any negative impact on the 5-year-old as a result of her mother's lesbian relationship. The father was given leave to appeal, and at this point,

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74. See Nat Hentoff, *The Ordeal of the 'Offensive Professor,'* VILLAGE VOICE, Apr. 16, 1991, at 22-23. Hentoff explained further:

Gini then was subjected to investigations conducted by four Loyola University offices and the Office of Civil Rights of the Education Department. On September 14—eight months later—the federal investigators ruled that Sandra Westmoreland had not been discriminated against by reason of race. Still, the pressure was on Loyola to get rid of this "racist." The administration did not fire him. He was tenured. But the university, feeling it should do *something*, set up a speech code.

the NYU moot court competition begins. Certain students are assigned to become appellate advocates for the father, and other students take up the mother's case.

Soon a revolt broke out. A number of students—assigned to the father's argument—that it is not in the best interest of the child to grow up among lesbians—said the argument was offensive to them. "Fueled by hatred," wrote one student, the argument so consists of "biased beliefs and attitudes" that "it is impossible to write a meaningful brief on this side of the issue." Moreover, she went on, it is so weak a position that she and others on that side will be at a disadvantage in the moot court competition.

Worse yet, "writing arguments on the side of the petitioner [father] is hurtful to a group of people and thus hurtful to all of us."

The student-run moot court board surrendered. The repellent child custody case was removed from the competition as not being "appropriate." Some members of the board, it was explained, thought that the issue "was not an open question in a law school community that has a policy of condemning anti-gay biases, both in the law and society."<sup>75</sup>

The final example is from an incident that happened at Duke in the fall of 1990. The day after Senator Jesse Helms defeated Harvey Gantt in a close and heated reelection battle, a student *anonymously* put the following flyer into the box of every student and faculty member at Duke Law School:

Congratulations Senator Helms on your triumphant victory!

You have proved once again that evil and hate-mongering cannot prevail over the nobility of righteousness and simple common decency. But the sweetest thing about your—*America's*—victory is that the left-wingers scoff at that truth, so obvious to the people of North Carolina. Your decisive defeat of the servant of special interests: Homosexuals and other perverts; Big unions; Racist pressure groups; and the "Tax and Spend Crowd" proves the timelessness of the traditional values of patriotic love of God, Country, and family. *God Bless you, Senator Helms!!!*

These are but three examples that demonstrate the difficult problems facing academics today. I will briefly describe my reac-

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75. Nat Hentoff, "*Politically Correct*" at NYU Law, WASH. POST, Nov. 3, 1990, at A23 (emphasis added). The journalist continued:

At this point, a number of law students loyal to the notion that a law school is a place of free inquiry protested strongly. It was noted sardonically that the case substituted for the child custody problem could not be more uncontroversial. It has to do with homeowner tort liability. Or, as one dissenting student said, "We were so unwilling to make a politically incorrect argument—or maybe afraid of being perceived as agreeing with it—that we fled to the safety of arguing whether or not homeowners have to trim their trees."

The moot court board has now revolved again. The child custody case is back in play, but students can have the option of briefing and arguing the tree-trimming case.

tions to these problems and then discuss how we can disagree about our reactions and still not violate the interests of white professors or racists.

The two problems that Nat Hentoff discussed above are both about the amount of deference that ought to be paid to teachers. I believe students have the right to criticize their teachers. When they do so, they will sometimes be wrong and will misinterpret or misunderstand what teachers have said or done. This can be a painful process, but the alternative is to require students to accept their teachers on faith. Nat Hentoff tells us that Professor Gini is an award-winning teacher, but he does not tell us what kind of student Sandra Westmoreland was or is. What Nat Hentoff and many in the university community want is for students to accept their teachers' good humor as a matter of faith. If you back some of them into a corner, they will admit that there were or are a few racists around but will suggest that most of the people now teaching in the academy believe in racial equality. White professors truly are members of the "Cosby generation." However, it is not possible to know from these stories whether Sandra Westmoreland is right or Professor Gini is. Gini's story—even as told sympathetically by Nat Hentoff—could be interpreted in a number of ways.

I have been teaching for ten years since graduating from law school, and I taught for a number of years before that as a graduate student. What we sometimes forget is that we have to change as students and issues change over time. I hear in Nat Hentoff and my colleagues' unthinking defenses of Professor Gini the cry for the status quo when students were students and knew their place.<sup>76</sup> For many students, that status quo is not comforting or appropriate. Whenever I am in the company of black alumni of Duke from the 1960s, they describe their experience at Duke Law School in ways that demonstrate the problem. Teachers would not call on black students or would only call on them on a designated "black" day. Others describe being called names by their teachers that were offensive. Even today I hear students complain that teachers ignore the hands of black students.<sup>77</sup> I know of discussions that are both

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76. I believe that the status quo is the only explanation for the reaction of many of my colleagues at Duke to Henry Louis Gates. Concern that he was making too much money seemed to be partially driven by racist notions that black people should not make more than white people and should know their place and appreciate the opportunity to be a Duke professor.

77. I have even heard this complaint about me. I think it is wrong, but I have tried to be sensitive to the possibility. Black teachers and female teachers are not immune to being

insensitive and inappropriate, at least as described by students to me, which occur in our law school. For many black students, though of course not for all, concerns about inclusion have not gone away, and I would suggest that we cannot expect them to until they cease to exist out in the "real world." This means that requiring students to accept the classroom without the possibility of protest is to require a potentially damaging experience for some blacks, females as well as some religious and ethnic minorities.

I believe the same issues are raised in a slightly different way by the NYU moot court example. Students have to have the right to say that there are some things they do not want to discuss. They may be wrong in that wish. I certainly think a strong argument can be made that given who the judges are in America, mainly white heterosexual American males, people who care about lesbian mothers should learn how to persuade those who do not care very much. But I also think a powerful argument can be made that it is important to take some issues off the table. I do not want to discuss whether slavery or racial dominance would be better for black people today. There are many people who believe that is a useful discussion. (I would cite the seventy-five percent of white males in Louisiana who voted for David Duke for the United States Senate as support for this fact.)<sup>78</sup> I believe that we do not necessarily violate the First Amendment if we say that we are not going to discuss that issue *just* because someone thinks it is a "neat" idea.<sup>79</sup> Students have a right to say, "I do not want to spend a significant part of my day thinking about an issue that many of us think is settled." This does not mean that people cannot raise it in other forums or that teachers can be disrespectful to students who raise it in their classes, but we disrespect the power of students to say anything if they must acquiesce in every decision that is made. We cannot talk about every issue. Our job as teachers is to teach values and concerns. Students have to have a right to contribute to that debate.

The final example is in many ways the most difficult. The visiting student who subsequently acknowledged putting the note anonymously in all student and teacher boxes has the right to do so, un-

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insensitive.

78. *Alabama*, USA TODAY, July 2, 1991, at 8A.

79. Some of the same people who raise this issue with me or other black people do not want to discuss all the time whether white people are intrinsically bad or that all white people are responsible for slavery.

less there is a rule against such anonymous flyers, but he passed over into something akin to Ku Klux Klanism with the tone and the anonymity of the note. It was a note that was meant to intimidate, not inform. I think the note was intimidating and mean-spirited in much the same way that too many articles in the *Duke Review*<sup>80</sup> are mean-spirited and wrong. I said so in a comment posted on my door. I also said so in a Federalist Society forum on hate speech last spring and in a number of conversations with students and faculty over the last year. This student's response was wrong (by wrong I mean both uncivil and threatening), but would not subject him to punishment. It is part and parcel of the discussion that ought to take place in the academy. This discussion cannot simply be the toleration of racist speech, but must include the negative reaction of people to the racist speech. I do not believe that a response is always the only constitutionally appropriate way to contour coercive speech, but when a response will counter racist, sexist, and homophobic activity, those who oppose such activity must also involve themselves, or they too become participants in racial oppression.

## V. CONCLUSION

Many of my colleagues are going to disagree with my reaction to these problems. The appropriate goal it seems to me is to strive for tolerance of our differing views without necessarily imposing one perspective on the academy. I do not believe that it is easy to build such a consensus about a "correct reaction" to any or all of these concerns, but I do believe that it ought to be possible to describe what would make for the "tolerant" response.

There are three parts to the tolerant response. The first part is civility. We are going to disagree, but it ought to be possible inside the community to do so in ways that do not disturb civility. This does not mean that we cannot be angry, but our anger should not lead to responses that are outside civil discourse. (Being civil does not require that people not tell the truth or leave out substantive points for fear of being offensive. It is possible to say that someone is a "sexist" or is "wrong" in a civil way.) The second principle is maturity. It is important in responding to criticism to do so as a mature person. Assuming that the person who disagrees with us is a

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80. The *Duke Review* is a conservative publication in the Genre of the *Dartmouth Review* at Dartmouth and a number of other publications supported with outside money to give "balance" to campus debate.

cretin or an idiot is not a useful way to begin discourse. This is true of students who are offended by offhand remarks of faculty and of faculty who begin to hide behind First Amendment principles whenever any student, particularly black or other racial minority, challenges them. Maturity requires listening to opposing views and hearing what others are saying. Finally, being tolerant requires that we all entertain the possibility that we are wrong without concluding that there is no right answer. I believe it is possible to believe in right answers and to be tolerant. To do so is a difficult job for law professors and students in the years ahead. We as law school professors must struggle with the "just" and "right" in our teaching and our scholarship, and students have to find a way between competing versions of that just and right approach. A truly tolerant community will permit you and me to do so. In addition, a truly tolerant response will begin to eliminate the notions of racial oppression and intolerance of the concerns of women, people of color, and other traditionally not-powerful groups. This will not eliminate the box of race and racial oppression, but it will begin to move us toward its eradication.