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Transforming the Powerless to the Powerful: The Public Responsibilities of Law Schools

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INTRODUCTION

Since the Civil Rights Movement of the 1960s, there has only been a modest increase in the numbers and percentages of lawyers of color in the United States. Even with affirmative action efforts, people of color continue to constitute a very small percentage of lawyers nationally. Nationwide, only 3.6% of lawyers are African-American; 3.2% Latino; and 1.4% Asian-American. Approximately 2,000 American lawyers are Native American. Despite the small numbers of minority lawyers, attacks have been made on the programs designed to increase the number of people of color in the legal profession. Recognizing these attacks and the need to continue to increase minority representation in the bar, Dean Gregory H. Williams of The Ohio State University College of Law relates his personal experiences and urges law schools not to forsake their special role in facilitating access to the legal profession. The following is adapted from a speech delivered at the University of New Mexico Law School, sponsored by the Order of the Coif, on Friday, April 25, 1997.

I. STUDENT ACCESS TO LEGAL EDUCATION OPPORTUNITIES

It is truly a pleasure to be at the University of New Mexico School of Law. In many respects, I feel this is much like a homecoming. I first visited Albuquerque twenty years ago as I began teaching law. At that time, you were hosting a Law School Admission Council training program for neophyte admission officers, and I was preparing for a new job as Assistant Dean for Admissions at the University of Iowa College of Law. The New Mexico training program, led by nationally recognized experts like Dean Orin Slagle of Ohio State and Associate Dean Peter Winograd of the University of New Mexico, did much more than provide basic information about the law school admissions process. It encouraged serious thought about issues like student access to legal education and the importance of such opportunities for the development of our society.
II. BACKGROUND

Issues of access to legal education and, especially, minority representation in the nation’s law schools were very important that first year of my work in law school admissions. This achieved national attention one year later in 1978 when *Regents of the University of California v. Bakke*[^5] was decided by the Supreme Court of the United States. After extensive discussion, the role of affirmative action in higher education was largely deemed to be settled.

It is truly ironic that, twenty years later, we are once again grappling with the issue of affirmative action in professional schools and in fact minority representation in all of higher education. Despite the societal changes in the past twenty years, I believe that there are basic principles that transcend time. And it is my strong belief that fairness and opening doors to higher education for all people is one of those principles that is of great importance to this nation. I am pleased that many law schools, despite the growing national climate of resistance to affirmative action to ensure access to legal education, have recognized their role in helping to achieve this great principle.

The University of New Mexico School of Law certainly has played a special role in opening doors of opportunity and is recognized for its work and achievements across the nation. The law school has embraced as part of its core mission the objective of inclusiveness, or if you will, the task of providing the opportunity for transforming the powerless to the powerful. Two examples that symbolize a commitment to inclusion, professional development and service to the nation are the establishment of the American Indian Law Center[^6] and the Institute of Public Law.[^7]

In New Mexico, the effects of a law school willing to undertake the responsibility of inclusiveness and professional development have been witnessed for a generation. There has been a steady and constant increase of Hispanic, Black, Asian American and Native American lawyers in this state.[^8]

III. PUBLIC ROLES OF LAW SCHOOLS

Across the nation in the last three decades, law schools have played a central role in transforming the powerless, or those who are traditionally excluded from the


[^7]: *University of New Mexico Institute of Public Law* (last modified July 1, 1997) <http://wwwipl.unm.edu/>.

professions because of race, religion, ethnicity or gender, into lawyers, judges and other influential members of society. Law schools have opened their doors in three major areas. First, they have served as an educational source about the nation’s history of discrimination and produced lawyers who are skilled at fostering inclusion. Second, law schools have instilled in students a sense that there can be no justice if access is restricted by wealth. Third and most important, law schools have begun to teach about the lawyer’s role in bridging conflict.

Today, policies that provide access to higher education and employment are threatened and challenged. Increasingly we hear claims that America’s white majority are excluded from positions of power and influence. Yet the fact is that white males continue to constitute 97% of senior level managers in Fortune 500 companies. Claims of widespread reverse discrimination are made even though college-educated Hispanic women annually earn less than white males with only high school diplomas. And it seems clear that critics of access do not want to be reminded that, while white men constitute only 44% of the labor force, they make up 80% of tenured university faculty.

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10. See Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55 (arguing that mediation, which has grown in popularity in legal institutions in the last twenty years, humanizes the conflict resolution process and fosters the inclusion of disadvantaged groups into the legal system).


12. See Leonard L. Riskin & James E. Westbrook, *Integrating Dispute Resolution Into Standard First-Year Courses: The Missouri Plan*, 39 J. LEGAL EDUC. 509, 510 (1989). The University of Missouri-Columbia School of Law includes the teaching of dispute resolution in all standard first-year courses. “The principal goals . . . included broadening the students’ understanding of the lawyer’s role to include other perspectives and acquainting them with alternatives to traditional litigation so that they could assist their clients and society in choosing efficient and just dispute resolution methods that meet real underlying needs.” Id. at 510. See also Jacqueline M. Nolan-Haley & Maria R. Volpe, *Teaching Mediation as a Lawyering Role* 39 J. LEGAL EDUC. 571, 575 (1989). Alternative dispute resolution became a part of the curriculum at many law schools in the 1980’s as mediation courses were integrated with traditional courses or taught as independent separate courses. The educational goal is to “heighten law students’ awareness of the professional role of nonadversarial lawyering.” Id. at 575.

13. See supra note 9.


16. See, e.g., Lorenza Munoz & Carlos Lozano, *No Hiring Impact Seen from Ruling*, L.A. TIMES, Apr. 9, 1997, at B1 (quoting Simi Valley Councilwoman Sandi Webb: “I have always felt that affirmative action was reverse discrimination and not any more fair than discrimination.”)


19. See id.
In November 1996, the so-called "Civil Rights Initiative" to end affirmative action in California passed with 54% of the vote. Although it was a majority, I think it is important to note it was not a mandate. In fact, one of the authors of the California "Civil Rights Initiative" admitted that a vote of less than 70% could be considered a failure. Failure or not, there are now similar efforts around the country to follow the California precedent. One of the proponents of the California "Civil Rights Initiative" announced, on Martin Luther King Junior’s birthday, a plan to export the California anti-affirmative action strategy across the country. Even specific states have been targeted.

In our present political climate, we find in the law schools that many people who support teaching the history of discrimination in mainstream society are shouted down by cries of "political correctness." In other areas, perhaps fearful of intruding into public policy debates, law schools have not made their voices heard as federal funds that provided access to justice have been reduced by a third. Legal service programs have not been able to offset the recent decline in federal funding causing an inability to provide effective legal assistance to poor Americans. The number of legal service attorneys available to provide legal assistance to those in need has decreased by one-half since 1980. For nearly a generation, law schools have provided an opportunity for non-traditional leaders to develop. However, law schools may now be losing the will to play their public roles, especially in ending racial division and uniting a society moving toward deep division. For me, this has a special concern because I vividly remember the divided country of my youth.

IV. REMEMBERING A DIVIDED WORLD

I remember America in the 1950s and 1960s where there was little opportunity for minorities either in education or employment. In fact, one of the reasons for writing my book, Life on the Color Line, was to help others remember those times as well, and to attempt to convey the pain, desperation, and loss to the world when an entire class of people is closed out of society and must struggle to survive in a hostile world.

Until age ten, I lived a comfortable life as the son of a wealthy white Virginia restaurant owner. I attended whites-only schools and frequented whites-only skating rinks and theaters. My life was truly privileged. Our family was sufficiently prosperous that I had no material wants or desires. I considered all the wealth and opportunity of my Virginia years as part of my birthright. I saw no barriers to my life goals and I approached the future with great optimism and high expectations.
Though those early years were spent in the rigidly segregated south; my family lived near black neighborhoods. I visited the schools that my black playmates attended. Even as a youngster I realized the tumble-down buildings and meager opportunities for learning in those segregated schools were very different from those provided at my "white" school. Though the differences between our schools were vivid and stark, I never considered the injustice of the situation until my own world began to unravel at the age of ten.

My early life was one of total economic security. My father's success was enormous. He had a restaurant, a beer tavern, and even a septic tank truck, which ironically he won in a crap game. In Virginia, my father was known as "the man with the Midas Touch." Virtually every financial scheme he undertook reaped enormous financial benefits. I remember seeing a tax return in the early 1950s where he earned approximately $50,000. However, my father's drinking exploded into full-blown alcoholism and he became an abusive husband. In the middle of the night, my mother took a younger brother and sister and fled because she could no longer stand the beatings. Another brother and I remained alone with my father. Six months after my mother left, the restaurant, the tavern, and even the septic tank truck were lost. We were destitute and penniless.

Though the economic fall was hard and unremitting, the greatest change in my life occurred in January 1954. That change occurred as I sat at the rear of a Greyhound bus as it raced from Washington D.C. to Muncie, Indiana. My brother Mike and I thought we were off to visit my mother's parents, who lived in Muncie and with whom we spent many happy holidays. We thought we were about to escape the poverty and anguish of Virginia, and the hard economic slide downward. As that bus sped across Ohio in the dead of winter, my mind was on Muncie. I knew without a doubt that in Muncie I would be saved from the pain of watching my father beg passing strangers for a quarter so I could have at least one meal per day. Muncie would be my salvation! I was certain my mother's parents would offer shelter, love, and understanding, even if my mother was no longer part of our lives.

V. ABRUPT CHANGES

Just outside of Dayton, Ohio, my father leaned across the aisle of the bus. "Remember Miss Sallie?" he asked. I did remember her. She was a tall, thin black woman who worked in our kitchen at the restaurant. She was a cook, a maid, not a person of consequence to a young boy who had already internalized America's power structure and the division between black and white. My father leaned even closer and in a whisper, lest he be overheard by the white passengers on the bus and said, "She's my momma and your grandmother!" I was in an absolute state of shock. The black woman who I thought was our cook was actually my grandmother, and I never knew it. I resisted and protested. I refused to believe him. I knew that I did not look black, and I did not want to be black. For the first time, I looked very closely at my father. He had bronzed skin and wavy hair. Memories started to filter back to me. My mother had said, in our Virginia days, he was Italian or Greek. It was all kind of fuzzy. Then I began to recall family ramblings about his passing as a Greek boy named Jimmy Willmatis during the days he spent on the Atlantic City boardwalk in
the 1930s. In Virginia, in the days of my family’s masquerade, he became Tony Williams, an Italian paisano.

The bus ride to Indiana was well before the famous 1954 Supreme Court decision of Brown v. Board of Education\(^\text{28}\) outlawing segregation in America. In the America of the 1950s segregation was lawful and a part of my everyday life. At the age of ten, I knew instinctively that I did not want to be black. Even though I was not schooled in the law, I wanted to be white because I had already learned about the structure of rewards and benefits in America. Life is better if you are white. Try as I might on that bus to Indiana, I was unable to resist the truth of my life and of my heritage. According to the social norms and the laws of America and Indiana, I was black.\(^\text{29}\)

I remember my father’s words the afternoon he revealed my family’s deepest hidden secret. He said, “Life is going to be different from now on. In Virginia you were white boys. Now you’re going to be colored boys. But I want you to remember that you aren’t any different today than you were yesterday. Still, people in Indiana will treat you differently.\(^\text{30}\)

That afternoon in January 1954, my brother and I arrived in Muncie uncertain about our future. Once we stepped off the bus, we saw a Muncie unrevealed on prior visits. Instead of traveling to the new suburban housing development of our white grandparents, we trudged forlorn and totally confused down Muncie’s racial dividing line, Madison Street. On the West side lived the poor whites. On the East side lived the poor blacks. As we made our way deep into Muncie’s black ghetto, I hoped that the change of address from Pitt Street in exclusive Old Town, Alexandria, Virginia to 602½ Railroad Street, Muncie, Indiana would not change my life. But, as we stood at the door of my black grandmother’s home, a two-room shack in fact short steps away from the railroad, I had a great sense of foreboding. It was at that point in my life that I began to learn that race can determine not only one’s future, but one’s attitude about the future. America in the 1950s was less concerned about my skin color than about my racial heritage. This country’s focus is and always has been the issue of racial purity.

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\(^\text{29}\) See Langdon v. Langdon, 183 N.E. 400 (Ind. 1932). The Indiana Supreme Court quotes Burns Ann. Stat. R.S. (1926), § 9862: “The following marriages are declared void: . . . Second. When one of the parties is a white person and the other possessed of one-eighth or more of negro blood . . .” Langdon, 183 N.E. at 402-03. Indiana, like most states, defined race by statute and accepted without written reservation the action of the legislature. But in some instances the practical difficulty and in fact absurdity of trying to classify persons by “blood” generated judicial comment. In an early Ohio Supreme Court case, the court expressed annoyance at having to apply a statute that prohibited blacks or mulattos from testifying in a trial where a white was party. “The statute is one which a court is called upon to execute with reluctance, yet where a case is presented, the court has no alternative but to yield to the expression of the legislative will.” See Gray v. Ohio, 4 Ohio 353, 354 (1831). The court executed the statute by creating a plus-50% rule, whereby anyone more white than a Mulatto (defined as “begotten between a white and a black” Id. at 353.) might testify and enjoy the other privileges of being white. The decision ended with an interestingly sophisticated comment on the difficulty of defining race:

We are of opinion that a party of such a blood is entitled to the privileges of whites, partly because we are unwilling to extend the disabilities of the statute further than its letter requires, and partly from the difficulty of defining and of ascertaining the degree of duskiness which renders a person liable to such disabilities.

Id. at 354.

\(^\text{30}\) Williams, supra note 26, at 33.
At the age of ten, I was dropped into the middle of a racial classification system of which I knew little, but I quickly learned I represented an enormous threat to those who sought to keep society divided. Although I was an impoverished boy of ten who happened to be both black and white, my mere existence challenged a classification system developed and honed over three hundred years.\(^{31}\) I did not fit neatly into any acceptable category. Though nothing about me changed on that cold, winter bus ride from Virginia to Indiana, I came to experience the kind of anger and hatred in my new surrounding that I had only watched from afar in Virginia. My father’s words, “People will treat you differently” were prophetic.

It was as if on that fateful bus trip I was transformed. I skipped up the steps in Washington, D.C. a white boy and stepped down from the bus in Muncie, Indiana a black boy. My life was never the same again. The actuality of my transforming experience was validated by my new white Muncie school mates. When my ancestry was discovered by classmates and teachers, America’s “one drop”\(^{32}\) law and custom prevailed. I was treated differently. At first I resented my exclusion from white society. I thought I had as much right as the other white kids to be white. I looked white and in fact I had been classified and categorized as white in Virginia’s segregated society. It was soon apparent to me that despite the conditions of my former life, I could never be white enough in Indiana. At the age of ten, I learned one of the hardest lessons of my life: I was on the wrong side of America’s rigid color line. I remember what gave me strength to face the divided and hostile world of my youth. It was my father’s encouragement and his belief that, in spite of the racial division in my home town, the future would be different.

I remember his words, as we stood on the railroad tracks in front of my grandmother’s shack, “If America is to survive it will have to be different and I want you ready to take your place in it.” He wistfully added, “Years from now you’ll be the successful lawyer I always wanted to be. When you tell people you lived at 602½ Railroad Street, and in a town that barred you from most of its restaurants and swimming pools because of your black ancestry, they won’t believe you.”

My father’s words sparked a glimmer of hope. Thoughts of a different America and life as a lawyer were dim, but I wanted it so much. That dream meant salvation and escape from blinding poverty and racism. I would give almost anything for a life of comfort and security as a lawyer. I wondered whether it was really possible. My father was a master at drawing tantalizing visions which never materialized. Although only ten years old, I was skeptical about the grandiose claim he made as we stood in front of my black grandmother’s tar paper shack. But I chose the dream even though the odds of my walking off those railroad tracks and changing the circumstances of my life were absolutely staggering.

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31. See generally JAMES DAVIS, WHO IS BLACK? (1989) (discussing the historical, social, legal and theoretical explanations for how an individual is defined as black in the United States).

32. Id. at 4, 5 and 113-117. The “one-drop” rule was also known as the “hypo-descent” rule. “In the South, it became known as the ‘one-drop rule,’ meaning that a single drop of ‘black blood’ makes a person black. Anthropologists call it the ‘hypo-descent rule’ meaning that racially mixed persons are assigned the status of the subordinate group.” Id. at 5.
VI. MAKING A DREAM REALITY

I was able to make my dream a reality because there were some people who were willing to battle the racism, prejudice, and poverty of my youth. One person who stood beside my brother and me in 1954 was a 52-year-old black woman from Grady, Arkansas, with an eighth-grade education. You will not read about her in the history books. You will not hear her name called when the roll of prominent African Americans is mentioned. She never made a lot of money so she will never be listed among black American capitalists. In fact, she never made more than twenty-five dollars a week as a maid working well into her sixties. She first cast her eyes on my brother and me when we were two little raggedy-pants boys, bewildered and alone, sitting on a plank bench at 602 1/2 Railroad Street. My father and grandmother were passed out on the dirt covered yard, drunk and unconscious, defeated. With no thought of reward or recognition, she took us into her home and made us her sons. There were no legal formalities, adoption, custody, or guardianship proceedings. Those words were foreign to her, though they are part of my profession as a lawyer. All she saw were two little boys in need. She gave us a home, love, and affection. Her name was Dora Weekly-Terry. We called her “Miss Dora” and she taught me that sometimes, despite the opposition, despite the difficulty, you just have to take a risk and offer a helping hand. From the day we walked away from Railroad Street at her side, our hands intertwined with hers, we were her boys! Our struggle had become her struggle.

There were laws that might have helped Miss Dora as she rescued us. There were laws that might have protected us from the harshness of life in the black housing projects. But in our new found world in Indiana, the law was irrelevant. We had no way to learn what the law was, and few lawyers were available or willing to help. Miss Dora always tried to do the best she could. But we quickly learned that many doors previously opened to my brother and me as white boys were slammed shut when we became black boys. Although I do not know for sure, I now suspect that if Miss Dora had been our legal guardian, she could have received help from welfare officials with her nearly impossible job of raising two teenage boys on her twenty-five dollars per week salary. A lawyer might have arranged a guardianship for Miss Dora. This would have been a simple thing that would have changed our lives considerably. When I wanted to be admitted to honors courses in high school, the school officials would not recognize a request from Miss Dora to place me in those classes. Although she was in every real sense my mother, the school officials said she had no legal relationship with me that they were obliged to acknowledge. Instead, I had to find my father, sober him up, and hope that I could drag him to school to make the request.

VII. EFFECTS OF LIVING ON THE COLOR LINE

As an adult, I returned to my hometown to look over my school records. I saw that school officials had noted that I needed glasses even as an elementary school student. The lack of welfare benefits meant that I did not have glasses until I reached adulthood. We had no lawyers to challenge practices that I later learned were illegal. City swimming pools were de facto segregated. The local YMCA allowed blacks to attend camp two segregated weeks of the summer. The local skating rink admitted
blacks only one night a week. Even star high school athletes who were cheered on
Friday night were not permitted to eat in downtown restaurants Saturday night, if
they were black. In fact, my black grandmother worked for over a decade in a
restaurant where she could never be served other than at the carry-out counter.

It was well-known that residents of the black housing projects of my youth had no
access to lawyers. Broken cars and refrigerators were patched up for sale by
unscrupulous merchants who cheated us with impunity. There was no recourse when
they broke only minutes after reaching home. I remember Miss Dora scraped long
and hard to pay for repairs to the roof of our modest home. The faulty job lasted only
days and she could not credibly threaten suit against the dishonest repairman. He
simply pocketed the money and the roof continued to leak.

Laws only matter for those with the ability to enforce them. For us it was as if
there were no laws. Imagine my surprise in law school when I learned for the first
time about the illegality of many of the practices that created such despair and pain
for me and others about whom I cared during those years in Muncie. I sat in my law
school classes, wondering whether access to lawyers could have saved some of my
friends whose lives were claimed by the misery of the housing projects, who went to
prison, who overdosed on heroin, and who opted out of society. I wondered whether
it might have saved my own brother who dropped out of school, was shot in a bar,
and blinded.

It has given me great pride to know that over the forty-plus years since I was cast
like Jonah into the belly of the whale\textsuperscript{33} of racism in Indiana, we have also battled and
opened many doors of opportunity. Now there are those who call for a halt to efforts
to make the American dream available to everyone. There are those who call for a
halt when many are still without means to obtain the protections that laws provide
against a hostile environment. There is a call for a halt when many Americans remain
isolated and alone. Our nation cannot have citizens closed out of society. As Dr. King
said eloquently so many years ago: “There is nothing more dangerous than to build
a society with a large segment of people in that society who feel they have no stake
in it; who feel that they have nothing to lose.”\textsuperscript{34}

Those childhood experiences in Muncie changed my outlook on life. I went from
the white boy in Virginia, who took everything for granted, to the black boy in
Muncie who learned few doors would open for me. I wish I could say that the
poverty, discrimination, violence, and frustration I faced as a child is nothing more
than a historical footnote. While some choose to close their eyes to the harsh reality
of our world today, racial discrimination remains a daily fact of life to many in this
nation. And if that is not enough, today in addition to the toll that discrimination,
poverty, and hunger wreaks on those who seek to create opportunities for themselves
through higher education, there are artificially created barriers to achievement.

\textsuperscript{33} \textit{Jonah} 1:17 (King James).
\textsuperscript{34} JANET CHEATHAM BELL, FAMOUS BLACK QUOTATIONS 60 (1995).
VIII. PRESENT OBSTACLES

A. Qualified or unqualified?

Today virtually no matter the intelligence or educational background of minority students or job seekers, they are labeled as “unqualified.” Of course, that charge is not new. In my college student days, it was much less subtle and much more direct. If you were black, Hispanic, or Native American, you were simply told you “didn’t belong in higher education—you didn’t have the ability to meet the classroom challenge.” In all honesty, that assault did have some effect on me. As a college student, I wondered if those detractors were right. I often doubted I was smart enough to compete with the white students who questioned my presence among them.

Today’s constant chant of the term “unqualified” worries me greatly. It is common knowledge that the label “unqualified” is not even a subtle substitute for “minority.” No one truly cognizant of the social discussions of the day can truly doubt that underrepresented racial and ethnic minorities are the target of attack. The assault is having an impact. Minority student college applications and enrollments are slowing down, especially in the professional schools. In Texas, which is reeling under the Hopwood decision, applications from black and Hispanic students have dropped

35. Karen W. Arenson, College Minority Enrollment Slowed in 1995, N.Y. TIMES, May 19, 1997 at B8. After several years of continual rapid growth in college enrollment, 1995 proved to “[g]ive way to a more subdued growth . . . according to a report . . . by the American Council on Education in Washington.” Id. The report showed a 2.9% increase in overall minority enrollment for 1995, compared to a 4.6% increase for 1994 and a 7.1% increase in 1993. See id. See also Rene Sanchez & Sue Anne Pressley, Minority Admissions Fall With Preferences Ban, WASH. POST, May 19, 1997 at A1. The American Council on Education reports that even with affirmative action minority enrollment on college campuses is not growing as fast as it was in the early 1990’s. See id.

36. See Kim Strosnider, Minority Admissions Plummet at Berkeley’s Law School, (visited May 15, 1997) <http://www.chronicle.com/che-data/news/dir/dailarch/dir9705/dir97051501.htm>. At the University of California Berkeley in 1996, 9.2% of the admission offers were to black applicants. This year, only 1.8% of the admission offers were to black applicants. See Chris Klein, California’s Ban on Preferences Short-Circuits Minorities at Boalt, NAT’L L.J., May 26, 1997 at A16. Additionally, this was the first year that Boalt Hall did not consider race or ethnicity in admission decisions. Id. The only minorities to increase its admission percentage were Asian-Americans and Pacific Islanders. In 1996, they comprised 15.5% of those admitted at Boalt. In 1997, this figure rose to 18.8%. Whites also made gains from 57.3% to 67.9%. See id. None of the 14 black students admitted to Boalt has decided to enroll, due to the ripple effect of the ban on affirmative action. The new class will have one black student, an individual who was accepted last year, but who had deferred admission for one year. See Amy Wallace, U.C. Law School Class May Have Only 1 Black, L.A. TIMES, June 27, 1997, at A1; Kim Strosnider, Only One Black Student Agrees to Enroll at Berkeley’s Law School This Fall, (visited June 30, 1997) <http://www.chronicle.com/che-data/news/dir/dailarch/dir9706/dir97063004.htm>. Of the 196 black student applicants to the University of California at San Diego’s School of Medicine, none were admitted. Officials fault the new policy that prohibits the consideration of race or gender in admissions decisions. See Jeffrey Selingo, No Black Applicants are Admitted to U. of Cal. Medical School, CHRON. HIGHER EDUC., Aug. 8, 1997, at A32.

37. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996). In a split decision, a three-judge panel of the Fifth Circuit concluded that race could not be taken into account in admissions decisions in order to achieve diversity. The use of racial preferences in the University of Texas School of Law admission program was considered violative of the equal protection provisions of the United States Constitution. See id. But cf. Kim Strosnider, U.S. Will Allow to Continue Race-Based Tuition Waivers, With Changes, CHRON. HIGHER EDUC. June 6, 1997. In June 1997, a settlement was reached between the Oregon state higher-education system and the United States Education Department’s Office for Civil Rights that will allow state colleges and universities in Oregon to continue to offer race-based tuition waivers but under tighter restrictions. The tighter restrictions include the requirement that public four-year institutions in Oregon must start considering additional factors, such as background and experiences rather than relying solely on race or national origin. Oregon’s Minority Achievement Scholarship Program will no longer be able to make decisions based uniquely on applicants’ race or national origin. See id.
24% and 22% respectively. One study found that the number of minorities enrolled in the California system's five medical schools has fallen 24%.\textsuperscript{39} The number of blacks who applied to the medical schools has fallen 25% and the number of Hispanics 33%.\textsuperscript{40} Even California undergraduate enrollments, which are not affected for another year, have seen a decline of 8% in black applicants and 6% in Hispanic applicants.\textsuperscript{41} The University of Texas School of Law, with an average first year class of 468, is expected to have 4 black students in its entering class for the fall of 1997.\textsuperscript{42} Some argue that this plunge in minority enrollment is solely attributable to the change in admission procedures.\textsuperscript{4}3 They seem to ignore the impact of the far from subtle messages of division and exclusion.

From California\textsuperscript{44} and Texas\textsuperscript{45} we see an assault on programs that have opened doors of opportunity that have been closed in the past. Supporters of the so-called "California Civil Rights Initiative" speak of their objective to ensure "true equality."\textsuperscript{46} In fact, one of the drafters is from my home state of Indiana. When questioned two years ago about what he wanted the ballot initiative to accomplish, he indicated a desire to re-create the time of his youth, Indiana in the 1950s, where everyone was treated the same.\textsuperscript{47}

I was in Indiana in the 1950s and it is not a place to which I seek to return. Everyone was not treated the same in the Indiana of my youth. There was no equality of opportunity. If you were black, Hispanic, or Asian American, doors were closed. Opportunities were not available. In the Indiana of my youth the so-called level playing field was more like a hill with minorities at the bottom, dodging rocks, holes and boulders on the way up. As expected, many of us did not make it to the top. Some did not take advantage of opportunities. Others did all they could, and still

\textsuperscript{38} Karla Haworth, \textit{Number of Minority Students Admitted to U. of Texas Plummet}s, CHRON. HIGHER EDUC. Apr. 11, 1997.
\textsuperscript{40} Universities Heading Back to Segregation, Researchers Warn, COLUMBUS DISPATCH, Apr. 13, 1997, at 3D, 1997 WL 7357077.
\textsuperscript{41} See id.
\textsuperscript{42} Conversation with University of Texas School of Law Admission Office (Sept. 2, 1997). University of California at Berkeley's Boalt Hall law school ended up suffering a "81 percent drop in the number of admission offers to African Americans." See Ethan Walters, Ward Connerly Won the Battle Now He's Facing the War, Mother Jones, Nov./Dec. 1997, at 71.
\textsuperscript{43} See Karla Haworth, \textit{Only One Black Student Has Accepted Admission to U. of Texas Law School}, CHRON. HIGHER EDUC. May 22, 1997; Patrick Healy, Texas Will Require Its Colleges to Admit Students in Top 10% of High-School Classes, May 23, 1997 CHRON. HIGHER EDUC.: see also Rene Sanchez and Sue Anne Pressley, \textit{Minority Admissions Fall With Preferences Ban}, WASHINGTON POST, May 19, 1997.
\textsuperscript{44} See Stephen Martin, \textit{U. of Cal. Told it Can Keep Diversity by Helping Poor to Prepare for College} (visited May 21, 1997) <http://www.chronicle.com/che-data/news/dir/dailarch/dir/9705/dir/97052103.htm>. After the Board of Regents prohibited the use of preferences based on race, ethnicity and gender in 1995, a panel of educators and business leaders was created to generate ideas concerning the progress of equal education. The panel recently outlined a three-part plan for connecting with students who have not received proper instruction prior to college. Ward Connerly, who supported the racial preference ban, indicated that he was supportive of the panel's findings.
\textsuperscript{45} See Douglas Lederman, Sole Black Student in Entering Class at U. of Texas Law School Withdraws (visited May 23, 1997) <http://www.chronicle.com/che-data/news/dir/dailarch/dir/9705/dir/97052301.htm>. Typically, the University of Texas Law School has admitted 30 to 40 black students a year in an average class of 500.
\textsuperscript{47} Nicholas Lamann, \textit{Taking Affirmative Action Apart}, N.Y. TIMES, June 11, 1995, § 6 (Magazine), at 36.
were unable to open the doors closed by racism and discrimination. That is not a world I seek to replicate.

Today there is a selective amnesia about this recent history of closed doors. Instead of admitting that rigid racial lines limited the opportunity to pursue higher education well into the 1960s, we are stuck with hand-wringing about the so-called lack of qualified women and minorities. The familiar refrain is, “I believe in opportunity for everyone. But I just can’t find qualified people.”

The plea that only the “qualified” need apply has a familiar ring for me. After my family disintegrated in Virginia and we landed in Indiana, my father was hired as a speech writer for a local political party. He spent most of one summer drafting and redrafting position papers. I remember him proudly showing me those glossy brochures of his handiwork. The party officials lavished praise on him, called him “Shakespeare” and touted his intellect. When the party successfully prevailed, he too stepped forward to partake of the political spoils he helped secure. His reward was a job at city hall, as a janitor, for $50.50 a week. In the heat of the campaign he was “qualified.” When his usefulness was over, he was “unqualified.” This man, who amassed a near fortune in Virginia when passing as white, was worth fifty dollars a week as a black man in Indiana. Still, there was a family to feed, and he recognized his responsibility. He swallowed his pride and took the job.

I remember the days he worked as a janitor in Muncie’s City Hall. My brother and I were often there with him. We raced up and down the city hall steps with rags and mops in our hand to wash windows and polish the staircase. We spoke in hushed tones when we passed city administrators’ offices—their doors closed in confidential meetings. Those offices were filled with the very persons for whom my father had written speeches and position papers in the heat of the campaign. He would stand outside those doors dressed in the simple gray uniform of a janitor, mop in hand, and say, “Greg, one of these days I want you in that room.” At that time I had no idea what he meant. But those memories have stayed with me over the years. Just last winter they flooded my mind again. Out of 37,000 lawyers in the state of Ohio, I was fortunate to be chosen part of a small group of approximately twenty lawyers selected to give direction to the entire organized bar. We sat in an elaborately furnished room at a fifty-foot-long table. Finally coming to the full realization of the meaning of my father’s words some forty years earlier, I said to myself, “Daddy, I’m in the room!” Yet I was overcome with great sadness because I knew, at that point, my father should have been in that room.

In the past I have talked about the doors that were closed to my father. People have dismissed his life as that self-indulgent alcoholic who deserved little sympathy. My father was an alcoholic, but I believe that his alcoholism was exacerbated by the frustration he felt when he faced the closed doors of our society. He was barely forty years old when we returned to Indiana. Though he lived until age sixty-one, he was
only a shell of the man that had taken the Virginia business world by storm through his ambition, wit, skill, and cunning ways. In Indiana he hit the color bar. His almost-white skin in Virginia made him "qualified." His black heritage in Indiana labeled him "unqualified."

**B. Affirmative Action?**

Today those who oppose affirmative action say they are defending civil rights by opposing so-called “positive discrimination.” But what minorities hear is, “We do not want you among us. You do not belong in higher education institutions.” What about the merits of the anti-affirmative action talk? Frequently worshipped as the holy grail in the criticism of affirmative action in professional school is the guileful plea for the creation of a so-called “true meritocracy.” The argument goes that an admissions process based on a “true meritocracy” would rely exclusively on grades and test scores.

**C. True Meritocracy?**

Those who seek refuge in grades and test scores in the law school world are in for a shock.49 Twenty years ago, here at the University of New Mexico School of Law, I learned that law school admission tests (LSATs) and undergraduate grade point averages (UGPAs) are important. But I also learned they are not the *sine qua non* of achievement and success. Even using multiple-regression analysis, a combination of UGPA and LSAT—the two most effective predictors—can explain only a small part of the first-year law student predicted grades.50 Nonetheless there are those who tenaciously cling to the numerical indicators of grades and test scores. Dr. Linda Wightman, formerly of the Law School Admission Counsel (LSAC) has done an empirical analysis of the consequences of abandoning race as a factor in law school admission decisions.51 She found that an admission model that relied exclusively on LSAT and UGPA would “result in a law school student body that mirror[s] the [almost exclusively white] ethnic makeup of law schools of thirty years ago.”52 Only 23% of black applicants and 40% of Mexican American applicants would be admitted under those criteria.53

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49. See Patrick Healy, *Texas Will Require Its Colleges to Admit Students in Top 10% of High-School Classes*, CHRON. HIGHER EDUC., May 23, 1997, at A29. The Texas legislature approved a bill to require public universities to automatically admit students in the top 10% of their high school class regardless of their standardized test scores or extracurricular activities. The legislation is designed to combat the decline of minority applications that followed the *Hopwood* decision.

50. For the 1996 LSAT Correlation Studies, 170 Law School Admission Counsel (LSAC) member law schools participated fully and were included in the summary statistics. For most schools, the 1996 Correlation Studies were based on students in the 1993, 1994 and 1995 entering classes. The correlation coefficients ranged from a low of .11 to a high of .68, with a median of .49. E-mail from Robert Carr, Law School Admission Council, to Nancy Rapoport, Associate Dean, The Ohio State University College of Law (Aug. 1997) (on file with the Law School Admission Council). If the median $r$ is .49, then the percent of variance explained by this predictor is only .24. That leaves 76% of what predicts first-year grades a mystery (unexplained variance—attributable to variables other than UGPAs and LSATs).


52. Id. at 50.

53. See id. at 20-22. The percentage figures are listed in Table 5 under the “predicted Law School Grid Model” column. See id at 22.
Unfortunately, there are those who would seek to rely exclusively on the law school admission test for entry into the profession in spite of the fact that the test as indicated above is only designed to predict first-year grades. The Wightman study found that law school admission decisions predicted from LSAT and UGPA are statistically independent of law school graduation for every ethnic group. The Wightman study also discovered that the bar passage rate across all ethnic groups ranged from 72.5% to 93.3% for those students who were predicted not to be admitted to law school.

The Wightman study suggests "little to no difference in the likelihood of passing the bar examination between students predicted to be admitted to law school and those predicted not to be admitted by a model that depends only on LSAT score and UGPA." It is clear that those who advocate that the LSAT and UGPA be the exclusive gatekeepers to the legal profession would close the door to many minority students who clearly have the ability to become practicing lawyers qualified to make a difference in their communities. In fact, students of all races are admitted on bases other than LSAT scores and UGPA. During the period of the Wightman survey, more than 6,000 white students were admitted who wouldn't have been admitted if committees relied solely on LSAT/UGPA scores.

Numbers alone cannot create the meritocracy that some among us seek so assiduously. A true meritocracy looks to the contribution that a person can make to society. Grades and test scores are important. But so are life experiences, background, persistence, and dedication to goals. These are important factors in developing the best in our society. That in fact is the law of the land. Regents of the University of California v. Bakke recognized that in 1978 when it endorsed a

54. See id. at 29.
55. See id. at 52.
56. See id. at 38.
57. Id. at 39 (emphasis in original).
58. See Lani Guinier, The Real Bias in Higher Education, N.Y TIMES, June 24, 1997, at 4. "Putting less emphasis on test scores doesn't mean giving up excellence. One alternative is for schools to set a minimum test score as acceptable and then hold what is in effect a lottery for admission among the applicants who meet the minimum standard." Id. at 4.
59. See Wightman, supra note 51, at 16. The numerical figure is listed in Table 2 under the "Number Predicted by Combined" column. See id.
60. 438 U.S. 265 (1978). (writing for a divided court, Justice Powell held that the Medical School of the University of California at Davis may use race as a factor to be considered in the admissions process); see generally Gabriel J. Chin, Bakke to the Wall: The Crisis of Bakkean Diversity, 4 WM. & MARY BILL RTS. J. 881 (1996) (critiquing Justice Powell's opinion). See also Douglas Lederman, Supreme Court Will Hear Case on Affirmative Action at N.J. School (visited June 30, 1997) <http://www.chronicle.com/che-data/news.dir/dalarch.dir/9606.dir/96063003.htm>. The Supreme Court will hear Piscataway Township Board of Education v. Taxman in the 1997-1998 term. The issue involved is whether a New Jersey school board acted appropriately when it laid off a white teacher in order to preserve faculty diversity.

Many supporters of affirmative action fear that the Court will use the Piscataway case to re-examine and alter its 1978 ruling in Regents of the University of California v. Bakke, in which the Justices declared that colleges could consider race as one factor in admissions to insure diversity among their students.

Id. But cf. Ronald J. Ostrow, Fired White Teacher's Case Gets Support From Clinton Supreme Court, L.A. TIMES, Aug. 23, 1997, at A1, 1997 WL 2240466. (Clinton administration asked the Supreme Court to uphold a ruling awarding damages to the laid off white teacher despite the efforts of the school board to enhance racial diversity by retaining a black teacher with equivalent qualifications). "At the same time, however, the administration continued to endorse the general principle of affirmative action in employment decisions. It urged the justices not to use the
pluralistic admissions process.\textsuperscript{61}

IX. THE ROLE OF LAW SCHOOLS TODAY: OPENING DOORS

The assault on affirmative action we face today is not only on the law school’s role in declaring the importance of access to justice and opening its doors to the powerless. The assault gains power because law schools have not risen to the challenge of teaching about discrimination and the role of the law in its reduction. It is true that America is not the same place it was twenty and thirty years ago. America is different and it is better. It is better because doors of opportunity have begun to open. Yet we are now faced with the strong likelihood doors just recently opened will close once again.

I have had the opportunity to travel across the nation to talk about the youthful fight against poverty and racism. I detailed this fight in my memoir, \textit{Life on the Color Line}. During my travels, it has become very clear to me that there is a strong reluctance to learn from the past and assess the extent to which racial barriers exist today. Many who have read my book and heard my story often approach me to ask whether all is well with me now. They mention, as if to reassure me, that I have a good job, a wonderful family, a comfortable home, and, perhaps noticing a little middle-age spread, plenty to eat. I think that they are truly sympathetic to the pain of the young boy in Muncie who simply wanted to enjoy his teenage years. They want to set aside my book with the feeling that the ending is happy.

Sometimes, though, I believe that this search for reassurance reflects more than a sincere interest in me. For all of us, it is easier if we can believe that the worst has passed, that life is better now. It seems that if we can believe problems have been solved, we need not work so hard to address the divisions in our society. If we can believe the problems of racism have been solved, we are “off the hook.” One way we can feel “off the hook” is if we tell ourselves we have suffered more than any other group.

After a book reading a year ago, a man in a wheelchair approached me to chronicle the difficult struggles stemming from his disabilities. He asked whether I thought that his life had been more difficult than mine. Afterwards I wondered why was it important for this man to hear me, a total stranger, acknowledge that his life may have been more difficult than mine. Is it because we each need to feel that our own struggle has been the most difficult, the hardest-fought battle? Do we need to minimize another’s pain in order to feel entitled to raise our own concerns? Is it not enough for us to try to determine when another’s dream cannot be fully realized and to struggle to open doors for everyone? If we are anxious to feel “off the hook,” then it is a race to be the most worthy victim. It is a race away from commitment. Then we can develop amnesia and blindness about the racial exclusions that continue to exist. But law schools can combat this amnesia. They can teach the facts about our history.

\textsuperscript{61} See \textit{id}.
of discrimination and the role that the law plays in helping create a society of equal opportunity.

X. LAWYERS: BRIDGING DIVISIONS AND CONFLICT

Finally, I want to discuss yet another role that law schools play. Law schools must produce graduates who grow from the diversity in our midst and learn to bridge division as lawyers. Some say our students appear to be diverse only if we seat them in alphabetical order. In social settings, our students separate. They remain divided, even in this diverse setting. As law schools, we have to move our students beyond anger and beyond fear of those different from us, of those who we feel have harmed us in some way.

I remember the hostility my brother and I faced from my black grandmother when we landed at the door of her shack, broke and penniless in January 1954. She had been snubbed by my family. My brother and I were elected by her to pay the debt of humiliation she felt she had suffered. I remember my white grandmother who refused to cross Muncie’s racial dividing line to reach out and comfort her own flesh and blood. She denied our existence, fearful perhaps, that some would learn she had two mixed-race grandchildren.

In all of this, I saw one humble woman rise to the challenge. It was Miss Dora who was willing to take the barbs and insults that came from whites and blacks alike because she was reaching out to my brother and me to give us shelter and love. Though she only made twenty-five dollars a week, she was willing to share everything she had. Her goal was simple: make life easier for the two little boys that trudged along behind her. One person can in fact make a difference. One law school can likewise make a difference.

Law schools in the past began to build the bridge for us as lawyers and law students. Now it is our turn to build the bridge for others. Once again we are fighting the conventional wisdom. The conventional wisdom that says equality means numerical credentials, and belittles access to justice as political rhetoric. Conventional wisdom charges that teaching about discrimination is politically correct and ridicules the lawyer’s role as one who bridges division in society. We can either retreat or continue to carry on the public role of law schools in giving power to the powerless.

Let me close with one final thought. I said that I would not be here if Miss Dora had not literally picked my brother and me up from the railroad tracks of Muncie, Indiana. There were many others along the way who extended a helping hand when it would have been easier to walk away. After law school I knew I wanted to be a law teacher. I was not at the top of my law school class. I was not on law review and I did not have a prestigious clerkship. I simply had been a deputy sheriff who worked his way full-time through undergraduate college and a high school teacher who worked his way through law school. After being turned down by at least two dozen other universities, I applied to the University of Iowa College of Law for a job. It was Bill Hines, Dean of the Iowa Law School, who persuaded the faculty that if it were truly interested in bringing in diverse backgrounds and experiences into the profession, there had to be more than the traditional avenue of law review and judicial clerkship to law teaching. Here at the University of New Mexico, the personal commitment of
Fred Hart in helping provide the impetus for the establishment of the American Indian Law Center stands out as a singular achievement. Fred Hart, like Bill Hines, built the bridge that many of us have crossed. An American Indian Law Center may not have been created without the help and assistance of Fred Hart. Most likely I would never have been a law professor without the intervention of Bill Hines. We need more bridge-builders like Bill Hines and Fred Hart.

According to the conventional wisdom of the sociologists, psychologists, and criminologists, I was not supposed to be a law professor. Who would have ever thought that the boy from Muncie, Indiana, who had a grandmother who signed her name with an X, would one day sign his name as Dean of The Ohio State University College of Law? Many of us teaching law today overcame great odds to reach this coveted place. But we achieved our goals because others believed in our abilities and felt we deserved the opportunity to show we merited the term “qualified.” Now it is our obligation to make sure that those who come behind us have the same opportunity to prove that they too can meet the challenges of today.

62. See generally Deloria, supra note 6, at 285.

63. See Douglas Lederman, Backers of Affirmative Action Struggle to Find Research That Will Help in Court, CHRON. HIGHER EDUC., May 23, 1997, at A28. Three conferences have been held at Harvard since March 1996. The first meeting that occurred in May 1996 was aimed at defining affirmative action in academe. The second meeting dealt with the effects created by colleges’ inability to use race in admissions. Conclusions of this meeting indicated that the ramifications of bans on affirmative action will be enormous and that there is no equivalent substitute for race as a diversity factor. In May 1997, 150 academics, lawyers, and civil rights advocates met at Harvard University for a day-long conference sponsored by Harvard University’s Civil Rights Project, in an attempt to discover a method of persuading judges and politicians about the importance of affirmative action in education. Participants discussed the supportive arguments of affirmative action in all possible settings and evaluated the current methods of social science research as well as studies that may be helpful in the future.