

THE CHALLENGE TO DIVERSITY IN LEGAL EDUCATION

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INTRODUCTION: FROM SEGREGATION TO AFFIRMATIVE ACTION

I would like to address the challenge of maintaining diversity in legal education. For a few law schools, including my own, recent decisions and legislation in this area have resulted in a struggle to maintain diversity without using race or ethnicity as criteria for admission. I do not offer here a paper on the constitutionality of affirmative action. Instead, I will speak in somewhat personal terms, because I believe that all of us must examine our own beliefs, feelings, and experiences about these matters before we can understand and communicate our views to each other.

I was born in South Carolina in 1934 and, except for a brief stint in Texas, spent my childhood there. In South Carolina I lived in a segregated society and attended first grade in an all-white school. The churches where my father served as minister had no black members. My mother, a third-grade school teacher, had no black students in her class. My earliest impression of the black people who lived in my rural community was that they worked as servants, tenant farmers, or in other low-income jobs. Except for the black ministers who sometimes met with my father, I do not remember ever having seen a black man wearing a suit and tie.

Although I did not realize it at the time, the South Carolina of my childhood also offered few options to white women. My mother had been a grammar school teacher when she and my father married. After taking a few years off following my birth, she resumed teaching when I was about three—a rare occurrence for white women with young children in those days. When my sixth grade Civics teacher suggested that I go to law school (after a class debate in which I successfully argued the negative of the question, “Resolved, The South Should Have Won the Civil War”), my mother did not encourage the idea. She told me in no uncertain terms that women could not support themselves in the practice of law and that I would be better off with a teacher’s credential.

I graduated from high school in 1952 and left South Carolina, never to return. I entered college at SMU where, out of deference to my mother, I enrolled in elementary education courses, but soon changed my major to the more challenging subject of English Literature, with a minor in Philosophy. At SMU, for the first time, I had black and a few Asian and Mexican-American classmates. *Brown v. Board of Education*¹ was decided in 1954 as I was finishing my sophomore year. Reflecting on discussions of that landmark case and its consequences, I came to see the segregated South of my childhood as a society that was unfair and unjust. I was even more determined to realize my goal of

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1. 347 U.S. 483 (1954).

attending law school so that I could help change things for the better. In my innocence, I did not yet realize that I might encounter obstacles to my plans because I was a woman.

When I started law school in 1956 at the University of Chicago, I was particularly interested in the civil rights cases we studied in Constitutional Law and in the legal interpretation of the most fundamental concept of our nation's vision of itself: the concept boldly proclaimed in 1776 in the Declaration of Independence that "all men are created equal." I learned that less than 100 years after those words were included in the Declaration of Independence, the Supreme Court held that they did not apply to black men because, as Chief Justice Taney observed in *Dred Scott v. Sandford*,² public opinion in 1776 would have been that members of the black race "had no rights which the white man was bound to respect."³

Dred Scott interpreted the words of the Declaration of Independence too narrowly to encompass the fundamental principle of equality they had appeared to enshrine. Less than ten years after the decision was announced, the true meaning of those words was tested on the battlefield. As President Abraham Lincoln said in the opening sentences of his Gettysburg Address on November 19, 1863:

Fourscore and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation, so conceived and so dedicated, can long endure.⁴

After the Civil War had been fought, the South defeated, and slavery abolished by the Thirteenth Amendment,⁵ a new guarantee of equal protection was enshrined in the Fourteenth Amendment,⁶ and the Supreme Court was again called upon to consider the legal concept of racial equality. Once more, the

2. 60 U.S. 393 (1856) (rejecting the claim of a Negro slave that he had been freed when his master took him from a slave state into a free state and holding that petitioner was not a citizen of the United States who was competent to sue in the federal courts).

3. *Id.* at 407. See Pauline Maier, *The Strange History of "All Men Are Created Equal,"* 56 WASH. & LEE L. REV. 873 (1999) (discussing the contemporary understanding of the text).

4. J.W. FESLER, LINCOLN'S GETTYSBURG ADDRESS (Nov. 19, 1943) (a paper read before the Indianapolis Literary Club on the eightieth anniversary of the delivery of the Gettysburg Address), in *Indiana Magazine of History*, XL, No. 3, Sept. 1944.

5. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

6. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

Court failed to rise to the occasion. In *Plessy v. Ferguson*,⁷ a majority held that the equal protection clause did not invalidate a Louisiana statute which required black and white citizens to travel in separate railroad carriages.⁸ Justice Brown wrote:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. . . . If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.⁹

Based on my own experience growing up in rural South Carolina, I did not agree that plaintiff's argument was fallacious. I had seen first hand the countless indignities imposed on black people: the separate bathrooms, the "black balcony" in movie theaters, the separate lunch counters, even the separate drinking fountains. All these so-called "separate but equal" facilities added up to an unmistakable message: white and black must be kept separate because black is inferior. Even before I encountered the phrase "badge of servitude"¹⁰ in Justice Harlan's dissenting opinion, I recognized the weight of its daily oppression. The majority opinion in *Plessy* seemed to me to be a repudiation of the great principle for which the Civil War had been fought.

The *Plessy* Court's flawed interpretation of the Fourteenth Amendment was finally corrected by the case that was decided while I was in college, *Brown v. Board of Education*,¹¹ which repudiated *Plessy*'s "separate but equal" doctrine.¹² In this opinion, Chief Justice Warren examined the effect of segregation on public education. He drew on the finding of a Kansas court that:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly)

7. 163 U.S. 537 (1896).

8. *See id.* at 552.

9. *Id.* at 551-52.

10. *See id.* at 555 (Harlan, J., dissenting). I agree entirely with Professor Jed Rubenfeld's reading of the paradigm racial separation equal protection cases from *Plessey* to *Brown* and beyond. The system they scrutinized, and ultimately invalidated, was a caste system purposefully designed to make African-Americans a class of untouchables. *See* Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 455-61 (1997).

11. 347 U.S. 483 (1954).

12. *Id.* at 494-95.

integrated school system.¹³

I am able to confirm this analysis based on my own experience of segregated schools. Living in a society where children my own age were sent to different schools felt very strange to me. It seemed that their world was closed to me just as mine was closed to them. Looking back, I believe I was deprived of the benefits of association in an educational setting with the black children who were my contemporaries. Had I not been denied that opportunity, I might have come to understand much earlier the injustice of the society in which I lived and studied.

In its subsequent opinion in *Brown II*, the Court ordered that its ruling be implemented “with all deliberate speed.”¹⁴ This order was resisted, however, both in the courtroom and at the ballot box, for ten long years. Professor Walter E. Dellinger, III, recalls being in a seventh grade classroom in North Carolina on the day *Brown* was decided and hearing his teacher declare in solemn tones, “Children . . . the Supreme Court has ruled. Next year you will go to school with colored children.”¹⁵ Dellinger, who was thirteen at the time, went on to recount his personal experience of the meaning of “all deliberate speed”:

Our teacher’s assumption about the effect of *Brown v. Board of Education* on the racial composition of our public school turned out to be erroneous. We did not “go to school with colored children” the next year as he had naturally assumed. Or the year thereafter. In fact, I finished junior high and graduated from a still all-white high school in 1959 without ever having attended school with a black child. By the time I finished four years at the state university, the public schools of North Carolina remained almost entirely segregated; more than 99 percent of the state’s black children attended all-black schools. It was not until the 1972-73 school year (I had by then been through law school, clerked, and become a law professor) that there was finally a meaningful end to the *de jure* segregation of the public schools of the rural and small-town South.¹⁶

While the rural South persisted in opposing desegregation in the public schools, law school faculties were leading the way toward proactive measures designed to increase diversity in legal education and, as a consequence, in the legal profession. Terrance Sandalow recalls that “[d]uring the academic year 1965-66, at the height of the civil rights movement, the University of Michigan Law School faculty looked around and saw not a single African-American

13. *Id.* at 494 (citations omitted).

14. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

15. Walter Dellinger, *A Southern White Recalls a Moral Revolution*, WASH. POST, May 15, 1994, at C1.

16. *Id.* See also Richard E. Jones, *Brown v. Board of Education: Concluding Unfinished Business*, 39 WASHBURN L.J. 184, 195 (2000) (pointing out that *Brown* was not finally implemented in the Topeka, Kansas, school district until the fall of 1996).

student.”¹⁷ At Berkeley, where Dean Henry Ramsey remembers having been the only African-American in the entering class of 1960,¹⁸ the assassination of Reverend Martin Luther King, Jr. on April 4, 1968 shocked the faculty into action. Shortly thereafter, both schools initiated programs designed to increase their minority enrollment. At Michigan, “the faculty directed its admission officer to recruit black applicants and, if necessary to achieve a reasonable number of blacks in the student body, to admit black applicants who seemed likely to complete the School’s program whether or not they satisfied the admission standards required of other applicants.”¹⁹ At Berkeley, the faculty decided to give “special consideration” to minority applicants, with the result that the percentage of minority students (chiefly African-Americans, Chicanos and other Hispanics) grew from seven percent of the entering class in 1968 to thirty-three percent in 1972.²⁰

It bears emphasizing that these practices were adopted before the Congressional mandate of non-discrimination in employment, Title VII of the Civil Rights Act of 1964,²¹ was extended to higher education in 1972,²² or even before either the American Bar Association (ABA)²³ or the Association of American Law Schools (AALS)²⁴ required law schools to undertake efforts to

17. Terrance Sandalow, *Identity and Equality: Minority Preferences Reconsidered*, 99 MICH. L. REV. 1874, 1874 (1999) (reviewing WILLIAM J. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998)).

18. See Henry Ramsey, Jr., *Closing the Door on Tomorrow's Leaders*, WASH. POST, Aug. 13, 1997, at A21.

19. Sandalow, *supra* note 17, at 1874.

20. See Feature, *The History of Affirmative Action at Boalt*, BOALT HALL TRANSCRIPT, Spring 1995, at 21, 22.

21. 42 U.S.C. §§ 2000e-15 (1999).

22. See Higher Education Amendments Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972).

23. See ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 211 (1999) (adopted in 1980 as Standard 212).

Equal Opportunity Effort. Consistent with sound legal education policy and the Standards, a law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms. This commitment typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and a program that assists in meeting the unusual financial needs of many of these students, but a law school is not obligated to apply standards for the award of financial assistance different from those applied to other students.

Id.

24. See ASSOCIATION OF AMERICAN LAW SCHOOLS, 1999 HANDBOOK, Bylaw 6-4(c) (1999) [hereinafter AALS 1999 HANDBOOK]. “Diversity: Non-Discrimination and Affirmative Action. . . . A member school shall seek to have a faculty, staff, and student body which are diverse with

provide equal opportunity for students of all races. As Berkeley Professor Jan Vetter, who served on the school's first affirmative action committee, put the matter in 1995, "[w]e thought it was a good idea. We still do."²⁵

Of course, not everyone agreed. Professor Lino A. Graglia of the University of Texas Law School was an early and prominent opponent of race-conscious admission programs.²⁶ By the early 1970s, when Dellinger felt the mandate of *Brown II* had finally ended segregation in public grade and high schools even in the rural South,²⁷ legal education, along with other professional schools and many undergraduate programs had adopted affirmative action admission programs to ensure integration in higher education.²⁸

The law schools did not attempt to disguise or misrepresent the nature of these programs. Thus it is surprising that Professor Stephan Thernstrom has tried to suggest otherwise by quoting out of context a statement I made about affirmative action in hiring on the *McNeil-Lehrer Newshour*. He quotes me as saying that affirmative action is a matter of having "to choose between two equally qualified persons."²⁹ This part of the quote is accurate, but its context is distorted. Thernstrom applies it to admissions decisions, and characterizes it as a misrepresentation of the relative qualifications of white and minority law school applicants.³⁰ This characterization, however, conflates my answers to two

respect to race, color, and sex. A member school may pursue additional affirmative action objectives." *Id.*

25. Feature, *supra* note 20, at 21. Thus, contrary to Professor Richard Epstein's assertion that the AALS imposed a requirement of diversity on its member schools, see Richard A. Epstein, *Affirmative Action For The Next Millennium*, 43 LOY. L. REV. 503, 520 (1998), the policy favoring diversity in legal education began in the law schools and was adopted as AALS policy by a vote of the representatives of all member law schools. See AALS 1999 HANDBOOK, *supra* note 24. To be sure, as Epstein charges, once AALS Bylaw 6-4 (c) was adopted, "[d]iversity ceases to be an option and has become a command." Epstein, *supra*. But Epstein, as a self-proclaimed libertarian, surely realizes that a law school's membership in the AALS is voluntary.

26. See Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351 (1970); cf. Derrick A. Bell, Jr., *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 119 U. PA. L. REV. 364 (1970).

27. See Dellinger, *supra* note 15, at C1.

28. See Sandalow, *supra* note 17, at 1874.

29. Stephan Thernstrom, *Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's "The Threat to Diversity in Legal Education,"* 15 CONST. COMMENT. 11, 20 (1998).

30. See *id.* Professor Thernstrom recounts my appearance with the following:

Dean Herma Hill Kay of Boalt Hall was asked on the McNeil-Lehrer Newshour in April 1995 why there was a "widespread perception that the minorities who are admitted with those special considerations are the result of standards being lowered?" Dean Kay answered, "Well, I don't think that it applies to the universe that I know best, which is the law school." There was no lowering of standards, she maintained. "When you have to choose between two equally qualified persons," it was appropriate to pick the "person of color" in order to "do something about the really fundamental problem of racial

separate questions, quoted below,³¹ the first dealing with admissions, and the second—in which the quoted phrase appears—dealing with the very different matter of hiring. In hiring decisions, individuals are often compared to each other, for only one will get the job, and the differences between them may be quite small. In the admissions context, however, each applicant is measured

prejudice in this society.”

Such references to “equally qualified” candidates conveyed the impression that the minority students who were being admitted to the most prestigious and selective law schools as a result of affirmative action had exceptional academic records, but could only boast of 3.75 rather than 3.78 grade averages, perhaps, and LSAT scores in the 94th rather than the 96th percentile.

Id. See also Stephan Thernstrom, *The Scandal of the Law Schools*, COMMENT., Dec. 1, 1997, at 27 (beginning the article with a reference to this same quoted phrase, and connecting it to admissions policies).

31. See Transcript of McNeil-Lehrer Newshour, Series -Affirmative Action 9, 10-11 (Apr. 24, 1995) (on file with author).

Ms. Hunter-Gault: Well, why is it that there seems to be a widespread perception that the minorities who are admitted with those special considerations are the result of standards being lowered?

Dean Herma Hill Kay: Well, I don't think it applies to the universe that I know best, which is to law schools. We have a very low academic disqualification rate here, and it stands to reason if you're so selective, applying [enrolling] only 270 out of over 5,000, you really have a choice, a wide choice, and we don't admit anyone that we think will not be academically successful. Now there has, of course, been grade inflation over the past several years, and white students who were admitted here 10 years ago probably wouldn't be admitted in the competition of this class today.

Ms. Hunter-Gault: Well, do you understand at all the argument of the so-called angry white male? I mean, do you have any sympathy for that?

Dean Herma Hill Kay: I do have sympathy for it. I think that people feel that they are not themselves prejudiced, that they are being asked to pay for a social obligation that the burden of this falls on them. When the voluntary affirmative action programs were begun, the economy was expanding, and it seemed possible to make way for all persons. The Supreme Court in its opinion in the *Weber* [sic] case [United Steelworkers of America v. Weber, 443 U.S. 193 (1979)] pointed out that minority hires were not displacing majority hires, and as we're getting into the shrinking economy, that's no longer possible. And when you have to choose between two equally qualified persons and it's always the white person who gets de-selected, obviously, people to whom that happens feel that it's unfair. And yet, if you are going to continue to try and do something about the really fundamental problem of racial prejudice in this society, there's no turning back, at least until we've made further advances.

Id.

against the entire pool, and the range of qualifications is much broader. Following Thernstrom's inaccurate portrayal of my statement, another commentator cited it as an example of a "disingenuous" description by an academic administrator regarding "the extent of the preference accorded minorities under race-sensitive admission policies, suggesting that race serves only as a tie-breaker or, at most, to overcome small differences among candidates."³² This description, too, is inaccurate. As shown below, I stated quite clearly in my testimony to the University of California (UC) Board of Regents in May 1995 that one result of ending affirmative action in law school admissions would be a dramatic decline in the number of minority students in the entering class of my school.³³

I. THE ATTACK ON AFFIRMATIVE ACTION IN THE MID-1990S

Little did I know when, as a law student at Chicago, I read the words of Chief Justice Warren in the *Brown* case, that one day I would be given the opportunity to serve as Dean of his law school, UC-Berkeley (Boalt Hall), and to do so at the very moment when its program of educational diversity was dismantled. For nearly twenty years, Justice Powell's opinion in *Regents of the University of California v. Bakke*,³⁴ had been the constitutional basis for achieving educational diversity in higher education. Responding to a reverse discrimination challenge by an unsuccessful white male applicant to the UC-Davis Medical School, Justice Powell used a strict scrutiny standard to test the school's special admissions program, which set aside sixteen out of 100 seats for minority students.³⁵ Powell found the program defective under that standard and suggested that a race-conscious program designed to produce educational diversity such as the one in use at Harvard College, would meet the strict scrutiny standard.³⁶ Thus, the Boalt Hall faculty restructured its special admissions program in light of Justice Powell's opinion to conform to its guidelines for achieving educational diversity consistent with constitutional standards and set a target range of twenty-three percent to twenty-seven percent of the entering class for whom race and ethnicity would count as factors in the admission process.³⁷ After I became Dean, the faculty once again examined the basis for its affirmative action policies with the help of a Task Force on Admissions Policy chaired by Professor Rachel Moran and comprised of faculty, students, and alumni.³⁸ The Task Force recommended,

32. Sandalow, *supra* note 17, at 1902 & n.67.

33. See Herma Hill Kay, Presentation to the Board of Regents on Law School Admission (May 18, 1995) (on file with author).

34. 438 U.S. 265 (1978).

35. See *id.* at 290-91.

36. See *id.* at 316-18.

37. See Feature, *supra* note 20, at 22.

38. The Task Force was appointed as part of a conciliation agreement entered into between Boalt Hall and the Office for Civil Rights of the U.S. Department of Education on September 25, 1992, resulting from a compliance review that began in 1989.

and the faculty adopted on May 6, 1993, a pedagogical theory of critical mass as the core element of a diverse educational experience.³⁹

A. The UC Regents' Resolutions: SP-1 and SP-2

Boalt's 1993 admissions policy was in effect when the Board of Regents of UC began its re-examination of the University's affirmative action policies in 1994. The Board acted in response to the complaints of a family whose son had been denied admission to the UC-San Diego Medical School.⁴⁰ During 1994-95, the Board heard testimony concerning the admissions practices of the colleges as well as graduate and professional programs of the University. I was asked to present testimony before the Board at its May 1995 meeting concerning the admissions policies of the three UC campus-based Law Schools: Boalt, UCLA, and Davis. Accordingly, I described Boalt's revised policies and procedures, and pointed out that these practices had first been applied to the entering class of

39. See *Faculty Policy Governing Admission to Boalt Hall*, REPORT OF THE ADMISSIONS POLICY TASK FORCE 1993 (Boalt Hall, Berkeley, Cal.), Aug. 31, 1993, at 3, 6-7 [hereinafter *Faculty Policy*].

The Law School is proud of its past success in training academically excellent, diverse student bodies and seeks to build on this experience in achieving its present pedagogical objectives. Therefore, it is the policy of the School to admit a class with diverse characteristics, in a manner that takes into account past admissions experience, pedagogical considerations pertaining to the dynamics of critical mass, and annual fluctuations in qualified applicant pools. Given the dynamics of critical mass, the Law School sets as a goal the admission of an entering class that includes roughly 8-10% African Americans, 8-10% Chicanos/Latinos, 8-10% Asian-Americans/Pacific Islander Americans, has a significant presence of Native Americans, and continues, as in recent years, to have meaningful numbers of disabled and older students and a rough parity of men and women, as annual fluctuations in qualified applicant pools allow. The class as a whole should be diverse with respect to regional background, life experience, and academic training; and internally within racial and cultural background. To achieve these goals, diversity factors are to be given weight in admissions decisions if it appears that without such weight the desired diversity would not be achieved. Yet, no student can be isolated from competition for any place in the class and this policy does not prescribe fixed maximum or minimum numbers of applicants to be admitted from any particular group. Rather, the Admissions Director and the Admissions Committee should weigh numerical and non-numerical evidence of qualifications for each applicant against the combined qualifications of competing applicants. No applicant will be admitted unless he or she appears capable of completing the Law School's course of instruction without falling into serious academic difficulty.

Id.

40. See WARD CONNERLY, *CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES* 117-26 (2000) (describing his meeting with Mr. and Mrs. Cook and the November 1994 meeting of the Board of Regents where their charges were first discussed); John E. Morris, *Boalt Hall's Affirmative Action Dilemma*, AM. LAW., Nov. 1997, at 4, 5.

1994.⁴¹ In that year, Boalt had an applicant pool of 5249 candidates, of whom fewer than one in six were admitted, and a class of 269 students was enrolled. Women constituted forty-eight percent of the class, while fifty-two percent were men. The class included twelve percent African-Americans, thirteen percent Hispanic/Latinos, fourteen percent Asians, one percent Native Americans, and sixty percent Caucasians and others (including those who declined to state such information). I pointed out that if we were to admit students only by reference to their index numbers (a combination of UGPA and LSAT scores)—which we at Boalt had never done for any of our students—the number of non-Asian minority students would have dropped in the 1994 entering class from sixty-six to nine, and the total percent of minority students (including Asians) would have been reduced from forty percent to fourteen percent. It is obvious that these numbers would be insufficient to create a critical mass of minority students who could help sustain the robust exchange of ideas necessary for a diverse education in law. I urged the Regents to allow the Law School's admission policy to be continued.

On July 20, 1995, the Regents adopted two Resolutions: SP-1, dealing with admissions, and SP-2, dealing with employment and contracting. The critical language of SP-1 is found in Section 2, which provides that: "Effective January 1, 1997, the University of California shall not use race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study."⁴²

In response to this Resolution, the Boalt faculty removed the target goals established in its 1993 Statement on Admissions Policy,⁴³ and adopted a new Statement of Policy on April 22, 1996 which, as amended in December 1997, currently reads in part as follows:

In making admission decisions, the School gives substantial weight [changed from "greatest weight"] to numerical indicators (*i.e.*, undergraduate grade point averages and Law School Admission Test scores). Yet numbers alone are not dispositive. The Law School considers other factors as well for all applicants. For example, substantial consideration is given to letters of recommendation, graduate training, special academic distinctions or honors, difficulty of the academic program successfully completed, work experience, and significant achievement in non-academic activities or public service. If it appears that an applicant has experienced disadvantages, this will be considered in . . . assessing the applicant's potential to distinguish himself or herself in the study and practice of law and to contribute to the educational process and the profession.⁴⁴

41. See Kay, *supra* note 33.

42. University of California Regents Resolutions SP-1 and SP-2 (July 20, 1995). See CONNERLY, *supra* note 40, at 147-58 (describing the Regents meeting of July 20, 1995).

43. See *Faculty Policy*, *supra* note 39.

44. *Faculty Statement on Admissions Policy*, BOALT HALL CATALOGUE & APPLICATION

We also expanded the personal statement our applicants are asked to submit from two pages to four pages and invited them to “separately discuss how [their] interests, backgrounds, life experiences and perspectives would contribute to the diversity of the entering class.”⁴⁵ This admissions policy and its accompanying revised procedures were used to admit the entering class of 1997, the first that was admitted to Boalt Hall under the Regents’ resolution of 1995.

Anyone who read a newspaper or watched TV during the late summer and early fall of 1997 was aware that the impact of SP-1 on the entering class of 1997 was even more drastic than I had predicted in my 1995 testimony to the Regents. We enrolled an entering class of 268 students that contained only one African-American (a student who was admitted in 1996, but deferred enrollment until this year), no Native Americans, fourteen Chicano/Latino students, and thirty-eight Asians, for a total of twenty percent people of color—down from thirty-three percent in 1996. Even these numbers, however, mask the full impact of SP-1 on the entering class of 1997. If we exclude all of the twenty-five students who had been admitted in prior years but who deferred their enrollment until 1997, and look only at applicants admitted for the first time in 1997 who chose to accept our offer, our class had exactly seven non-Asian minority students: three Chicanos and four Latinos. (I had predicted nine.) Our admit/offer numbers were much higher—we admitted fifteen African-Americans, twenty-four Chicanos, fourteen Latinos, two Native Americans, and 113 Asians—but our yield was extremely disappointing. Nor was that outcome very surprising. The competition for these students is fierce. We know, for example, that of the fifteen African-Americans, four went to Harvard, two each went to Yale and Stanford, and one each went to Columbia, Duke, and UCLA, while one chose Business School over Law School.⁴⁶ The three UC campus-based law schools’ responses to SP-1 are discussed in Part II.⁴⁷

B. The Center for Individual Rights Leads the Attack on Affirmative Action in the Courts

1. *The Hopwood Litigation in Texas.*—On September 29, 1992, four days after Boalt Hall signed its conciliation agreement with the Department of Education, a white woman named Cheryl Hopwood and three white men filed a reverse discrimination suit challenging their denial of admission to the University of Texas Law School on the ground that the Law School’s policy of favoring Black and Mexican-American applicants violated the Equal Protection Clause

1999-2000 (Boalt Hall, Berkeley, Cal.), 1999, at 74 (This statement was revised in December 1997 to delete the phrase “that adversely affected his or her past performance” following the word “disadvantages” and to add the concluding phrase “and to contribute to the educational process and the profession.”).

45. *Personal Statement*, 1997-98 ADMISSIONS CATALOGUE (Boalt Hall, Berkeley, Cal.), 1997, at 56.

46. *See Morris*, *supra* note 40, at 7-8.

47. *See infra* Part II.

and Title VI of the Civil Rights Act.⁴⁸ The plaintiffs were represented by the Center for Individual Rights (CIR), a public interest advocacy organization headquartered in Washington, D.C.⁴⁹ *Hopwood* was the first of three lawsuits filed by CIR against public universities in Texas, Washington, and Michigan.⁵⁰ The legal and public relations strategy in all three cases was strikingly similar. The named plaintiff was a white woman; her co-plaintiffs were white men. All had been denied admission to the law school named as defendant. Typically, plaintiffs seek declaratory and injunctive relief, admission to the law school, damages and attorneys' fees. They are prepared for lengthy litigation.⁵¹

In *Hopwood*, Federal District Court Judge Sam Sparks rejected plaintiffs' constitutional argument, on the ground that it was too simplistic:

The plaintiffs have contended that any preferential treatment to a group based on race violates the Fourteenth Amendment and, therefore, is unconstitutional. However, such a simplistic application of the Fourteenth Amendment would ignore the long history of pervasive racial discrimination in our society that the Fourteenth Amendment was adopted to remedy and the complexities of achieving the societal goal of overcoming the past effects of that discrimination.⁵²

As it turned out, however, plaintiffs' argument was not too "simplistic" to be accepted by a three-judge panel of the Fifth Circuit, which reversed the judgment and filed an opinion, authored by Judge Jerry Smith and joined by Judge Harold DeMoss, questioning the continued viability of the Supreme Court's decision in *Bakke*.⁵³ Judge Jacques Weiner, Jr., in his dissent, argued that the majority had exceeded its authority.⁵⁴ The United States Supreme Court denied certiorari, with Justices Ruth Bader Ginsburg and David Souter pointing out the central importance of the issue, but noting that since Texas did not defend the

48. *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), *on remand*, 999 F. Supp. 872 (1998).

49. See Ethan Bronner, *Conservatives Open Drive Against Affirmative Action*, N.Y. TIMES, Jan. 26, 1999, at A10 (discussing CIR's campaign to encourage college students to challenge the race-conscious admission practices of their schools); see also Jennifer L. Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997, 1028-29 (1998) (describing the litigators of CIR and a similar organization, the Institute for Justice, as "a small group of ideologically driven, energetic young men (mostly) in nonprofit law firms funded by foundations, out to change the United States for the better by requiring its institutions to live up to the Constitution as they understand it"); *Beachhead for Conservatism*, NAT'L L.J., Dec. 27, 1999, at A11 (profiling the co-founders of CIR, Michael Greve and Michael McDonald).

50. See Hochschild, *supra* note 49, at 1028.

51. See *Beachhead for Conservatism*, *supra* note 49, at A11.

52. *Hopwood*, 861 F. Supp. at 553.

53. See *Hopwood v. Texas*, 78 F.3d 932, 944-45 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), *on remand*, 999 F. Supp. 872 (1998).

54. See *id.* at 963 (Weiner, J., concurring) ("[I]f *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.").

admissions policy used to deny admission to the plaintiffs, the case was not ripe for review.⁵⁵

Texas Attorney General Dan Morales ruled that the *Hopwood* injunction applied to financial aid as well as admissions.⁵⁶ Thus the law school at the University of Texas, like those at UC, was forced to admit its entering class in 1997 without the use of affirmative action. The impact of *Hopwood* on the racial and ethnic composition of that class was very similar to the impact of SP-1 at Berkeley: of 468 enrolled students, only four were African-American and twenty-six were Mexican-Americans.⁵⁷

Dean Barbara Aldave of St. Mary's Law School courageously spoke out to declare that *Hopwood* had not overruled *Bakke*, and to promise that

[u]nless and until my superiors order me to stop, we at St. Mary's University School of Law are going to ignore the *Hopwood* decision and adhere to the guidelines of *Bakke*. . . . At least as long as I am the dean, St. Mary's University School of Law will continue to turn out highly qualified lawyers, judges, legislators and public servants, and they will continue to come from all of the diverse racial and ethnic groups that make up our society.⁵⁸

Not all private schools in Texas were willing to follow Dean Aldave's lead. As she noted, despite the fact that the Fourteenth Amendment applies only to public institutions, both Rice and Baylor suspended their admissions programs in the wake of *Hopwood*.⁵⁹

Hopwood, on remand, went to trial again in March and early April 1997.

55. See *Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (“[W]e must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition.”).

56. See Op. Tex. Att’y Gen. No. 97-001 at 18 (Feb. 5, 1997). “Although, as always, individual conclusions regarding specific programs are dependent upon their particular facts, *Hopwood*’s restrictions would generally apply to all internal institutional policies, including admissions, financial aid, scholarships, fellowships, recruitment and retention, among others.” *Id.* Attorney General John Cornyn withdrew Letter Opinion No. 97-001 insofar as it affected “matters other than admissions” on September 3, 1999. Op. Tex. Att’y Gen. No. JC-0107 at 1 (Sept. 3, 1999). In doing so, however, he cautioned “state universities in Texas to await a resolution of *Hopwood* in the United States Court of Appeals for the Fifth Circuit or the United States Supreme Court before restructuring or adopting new procedures for their financial aid programs.” *Id.*

57. See Memorandum from Shelli Soto, Assistant Dean for Admissions to Dean M. Michael Sharlot re 1995-1999 Statistics (Feb. 2, 2000) (on file with author). The last admissions cycle that was completely free of *Hopwood* was the entering class of 1995. In that year, of 512 enrolled students, thirty-eight were African-American and sixty-four were Mexican-American.

58. Barbara Bader Aldave, *Hopwood v. Texas: Much Ado About Nothing? The 5th Circuit’s Famous Opinions Should Not Be the Death Knell for Race-Based Admissions Programs*, TEX. LAW., Nov. 11, 1996, at 43. In 1998, the President of St. Mary’s University declined to renew Professor Aldave’s appointment as Dean. See SAN ANTONIO EXPRESS-NEWS, Oct. 25, 1997, at 1B.

59. See Aldave, *supra* note 58, at 43.

Judge Sparks found that the four plaintiffs would not have been admitted at Texas even "under a constitutional admissions system."⁶⁰ The school's petition for hearing en banc was denied by the Fifth Circuit on January 31, 2000.⁶¹

2. *The Smith Litigation in Washington.*—On March 5, 1997, the University of Washington Law School was named defendant in the second of three reverse discrimination suits filed by CIR.⁶² As in *Hopwood*, the named plaintiff, Katuria Smith, was a white woman who had been denied admission to the law school.⁶³ Fifteen months after the suit was filed, Tyson Marsh and twelve other current and prospective students at Washington moved to intervene to defend the law school's affirmative action program.⁶⁴ Their motion was denied as untimely by District Court Judge Thomas S. Zilly, and his judgment was affirmed on appeal.⁶⁵ On November 3, 1998, however, litigation on the merits in *Smith v. University of Washington Law School* was cut short by the passage of Initiative 200.⁶⁶ An appeal is pending on the matter of damages and the admission to Washington of the certified class representative, Michael Pyle.⁶⁷

3. *The Grutter Legislation in Michigan.*—In Fall 1997, the CIR set its sights on the University of Michigan. It filed a reverse discrimination lawsuit on December 3, 1997 against the Michigan School of Law.⁶⁸ As in *Hopwood* and *Smith*, the named plaintiff was a white woman, Barbara Grutter, who had been denied admission to the law school.⁶⁹ Her complaint alleged, among other things, that the law school "did not merely use race as a 'plus' factor or as one of many factors to attain a diverse student body. Rather, race was one of the predominant factors (along with scores on the Law School Admissions Test and undergraduate grade point averages) used for determining admission."⁷⁰ In response, the law

60. *Hopwood v. Texas*, 999 F. Supp. 872, 879 (W.D. Tex. 1998).

61. See E-mail from M. Michael Sharlot, Dean, to Herma Hill Kay, Dean, University of California-Berkeley, Boalt Hall School of Law (Feb. 1, 2000) (on file with author). Dean Sharlot added that the case will be heard by a Fifth Circuit panel on the issues of damages and attorney fees for the plaintiffs and that the school intends "to seek rehearing en banc of the panel decision, and, if unsuccessful on the basic issue of the constitutionality of affirmative action, a la *Bakke*, for legal education." *Id.* See Janet Elliott, *Hopwood Won't Be Heard En Banc*, TEX. LAW., Feb. 7, 2000, at 1.

62. See *Smith v. Univ. of Wash. Law School*, 2 F. Supp. 2d 1324 (W.D. Wash. 1998).

63. See *id.* at 1328.

64. See *Smith v. Marsh*, 194 F.3d 1045, 1047 (9th Cir. 1999).

65. See *id.* at 1053.

66. See *infra* text accompanying notes 89-91.

67. See *Smith*, 194 F.3d at 1049 n.3.

68. See *Grutter v. Bollinger*, 16 F. Supp. 2d 797 (E.D. Mich. 1998). Earlier, CIR had filed a similar suit against the Michigan undergraduate admissions program. See *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998).

69. See *Grutter*, 16 F. Supp. 2d at 799.

70. Plaintiff's Complaint, *Grutter v. Bollinger*, 16 F. Supp. 2d (E.D. Mich. 1998) (No. 97-75928), available at University of Michigan Law School Web Site, <http://www.umich.edu/~urel/admissions/legal/grutter/grutter.html> (Dec. 3, 1997).

school denied that its admissions policies led to the plaintiff being treated unequally, and stated its "current intention to continue using race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."⁷¹

As in *Hopwood* and *Smith*, affirmative action proponents moved to intervene in *Grutter* as parties to the litigation.⁷² District Court Judge Bernard A. Friedman denied the motion on July 6, 1998 on the ground that the proponents had failed to show that the defendant would not adequately defend their interests.⁷³ Similar motions had been denied in *Hopwood*⁷⁴ and *Smith*.⁷⁵ On appeal, however, the Sixth Circuit in *Grutter* reversed, with Judge Martha Craig Daughtrey basing her reasoning in part on the lessons learned elsewhere:

There is little room for doubt that access to the University for African-American and Latino/a students will be impaired to some extent and that a substantial decline in the enrollment of these students may well result if the University is precluded from considering race as a factor in admissions. Recent experiences in California and Texas suggest such an outcome. The probability of similar effects in Michigan is more than sufficient to meet the minimal requirements of the impairment element.⁷⁶

Following this ruling, the trial date in *Grutter* was postponed and recently set for January 15, 2001.⁷⁷ Meanwhile, Dean Jeffrey S. Lehman has made clear his belief that the law school's admission policy satisfies the *Bakke* standard.⁷⁸

71. Defendant's Answer, *Grutter v. Bollinger*, 16 F. Supp. 2d (E.D. Mich. 1998) (No. 97-75928), available at University of Michigan Law School Web Site, <http://www.umich.edu/~urel/admissions/legal/grutter/answer2.html> (Dec. 3, 1997).

72. The group seeking intervention in *Hopwood* was the Thurgood Marshall Legal Society, a student organization at Texas. In *Smith*, they were current and prospective Washington students. See *Smith*, 194 F.3d at 1047. In *Grutter*, the intervenors were seventeen African-American and Latino/a individuals who had applied or stated their intention to apply for admission at Michigan, and a group calling itself Citizens for Affirmative Action's Preservation (CAAP). See *Grutter v. Bollinger*, 188 F.3d 394, 397 (6th Cir. 1999).

73. See *Grutter*, 188 F.3d at 397.

74. *Hopwood v. Texas*, No. A-92-CA-563-SS, 1994 WL 242362, at *1 (W.D. Tex. Jan. 20, 1994), *aff'd*, 21 F.3d 603 (5th Cir. 1994), *cert. denied sub nom.*, *Thurgood Marshall Legal Soc'y v. Hopwood*, 518 U.S. 1033 (1996).

75. *Smith v. Marsh*, 194 F.3d 1045, 1053 (9th Cir. 1999).

76. *Grutter*, 188 F.3d at 400.

77. See Briefs, *Trial of Admissions Suit Delayed Until January 2001*, L. QUADRANGLE NOTES, Summer 2000, at 5; *Law School Admissions Suit Trial Delayed*, UNIV. RECORD, at University of Michigan Web Site, http://www.umich.edu/~urecord/9900/Apr10_00/12.htm (Apr. 20, 2000).

78. See Jeffrey S. Lehman, *A Statement from the Dean*, L. QUADRANGLE NOTES, Summer 1999, at 51, 52.

C. The Voters Speak: Proposition 209 in California and Initiative 200 in Washington

1. *Proposition 209*.—In 1994, Glynn Custred, then a California State University-Hayward professor, and Tom Wood, a white man claiming to have been denied a teaching job in favor of a less-qualified minority woman, undertook the task of putting an anti-affirmative action measure on the ballot in California.⁷⁹ The measure they co-authored, entitled “The California Civil Rights Initiative” (CCRI), qualified for the ballot during the Fall 1996 election.⁸⁰ The campaign to pass CCRI, which had been languishing, took on an increased vigor when UC Regent Ward Connerly, who along with Governor Pete Wilson had been the driving force behind SP-1 and SP-2, decided to lead the effort.⁸¹ On November 5, 1996, California voters approved the measure as an amendment to the state constitution by a margin of 4,736,180 (fifty-four percent) to 3,986,196 (forty-six percent).⁸²

The operative language of CCRI reads as follows: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”⁸³ As applied to the three campus-based UC law schools, Proposition 209 went beyond the Regents’ Resolution SP-1 in only two respects: (1) financial aid and (2) outreach and recruitment programs. By its terms, CCRI was effective immediately. On

79. See Edward W. Lempinen & Pamela Burdman, *Measure to Cut Back Affirmative Action Wins*, S.F. CHRON., Nov. 6, 1996, at A1; see also CONNERLY, *supra* note 40, at 161 (noting that Wood “had never landed a full-time university appointment despite receiving a Ph.D. in Philosophy from U.C. Berkeley in the mid-seventies”).

80. See Lempinen & Burdman, *supra* note 79, at A1.

81. See CONNERLY, *supra* note 40, at 165-67 (explaining that he agreed to chair the effort to put CCRI on the ballot in order to preserve the victory against preferences represented by SP-1 and SP-2).

If CCRI didn’t even have enough support to get on the ballot, it might legitimately be concluded that the people of California had spoken—if only by their silence—on the issue of preferences and, in effect, repudiated what we had done. If they revisited and overturned the vote, the principles we had fought for would be defeated, and the old system of preferences would be reestablished as official university policy, more strongly entrenched than ever.

Id. at 165-66.

82. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1495 (N.D. Cal. 1996), *vacated*, 122 F.3d 692 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997); see also Benjamin A. Doherty, Comment, *Creative Advocacy in Defense of Affirmative Action: A Comparative Institutional Analysis of Proposition 209*, 1999 WIS. L. REV. 91, 102-07 (describing the campaign for Proposition 209 and citing exit polls showing that sixty-one percent of males and sixty-three percent of whites favored Proposition 209).

83. CAL. CONST. of 1879, art. I, § 31(a) (1996).

November 27, 1996, however, U.S. District Court Chief Judge Thelton Henderson granted the motion of plaintiff Coalition for Economic Equity for a temporary restraining order barring Governor Wilson and Attorney General Lungren from enforcing Proposition 209.⁸⁴ Further, on December 23, 1996, Chief Judge Henderson granted a preliminary injunction enjoining defendants from enforcing and implementing Proposition 209 pending trial or final judgment.⁸⁵ On appeal, this judgment was reversed by a three-judge panel of the Ninth Circuit, which vacated the preliminary injunction.⁸⁶ The United States Supreme Court denied review,⁸⁷ and Proposition 209 became fully effective on August 28, 1997, ten days after the fall semester had begun at Boalt Hall.

2. *Initiative 200 in Washington.*—Washington's Initiative 200 contained the identical language as Proposition 209, but, unlike Proposition 209, it was a statutory enactment rather than a constitutional amendment. It qualified for the ballot during the 1998 election, and was approved by the voters on November 3, 1998 by a margin of 58.22 % to 41.78%.⁸⁸ Once again, UC Regent Ward Connerly was active in the campaign to win voter approval of Initiative 200.⁸⁹

In February 1999, after Initiative 200 was approved, Judge Zilly granted the Washington Law School's motion in the pending *Smith* case to dismiss the injunctive and declaratory claims as moot, decertified the class, denied the cross-motions for summary judgment, and stayed trial pending further order.⁹⁰ Because Washington is within the jurisdiction of the Ninth Circuit, that court's decision upholding the constitutionality of Proposition 209 meant that a similar challenge to Initiative 200 would be to no avail.⁹¹

3. *Is Florida Next?*—Florida became the site of a third attempt to enact a state-wide ballot measure patterned after Proposition 209 and Initiative 200 and spearheaded by Regent Connerly.⁹² The initiative, slated for the November 2000

84. See *Wilson*, 946 F. Supp. at 1495.

85. See *id.* at 1520-21.

86. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 711 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997).

87. See *Coalition for Econ. Equity v. Wilson*, 522 U.S. 963 (1997).

88. See State of Washington Office of the Secretary of State, 1998 Washington State General Election Results, at <http://www.secstate.wa.gov/elections/gen98.htm> (last modified Dec. 3, 1998) [hereinafter 1998 Washington State General Election Results]. For an analysis of Initiative 200, see also Robert H. Kelley, *The Washington Civil Rights Initiative: The Need for a Meaningful Dialogue*, 34 GONZ. L. REV. 81 (1998-99).

89. See CONNERLY, *supra* note 40, at 205, 219-31, 242-45 (describing his decision to remain active in the battle to end preferences as necessary to protect the victories achieved in California, "[o]nce you embark on a cause like the one we'd undertaken, you have to keep advancing, if only to protect the ground you've already won," and describing the campaign for Initiative 200).

90. See *Smith v. Marsh*, 194 F.3d 1045, 1047-48 (9th Cir. 1999) (describing proceedings in the district court).

91. The Ninth Circuit panel that heard *Smith*, included Judge Diarmuid O'Scannlain, who also sat on the panel that heard the challenge to Proposition 209.

92. See CONNERLY, *supra* note 40, at 247-49; Rick Bragg, *Fighting an Uphill Battle*, N.Y.

ballot, was held up by the Florida Supreme Court's review of whether it violated the "single subject" requirement.⁹³ In November 1999, Florida Governor Jeb Bush sought to preempt support for the initiative by issuing an Executive Order that created a program, called One Florida, which abolished affirmative action in public contracting and college admissions.⁹⁴ The admissions provisions of the One Florida program are modeled after the Texas 10 percent plan⁹⁵ and would guarantee admission to one of the ten state universities to all high school students who graduate in the top twenty percent of their class.⁹⁶

II. A POST-AFFIRMATIVE ACTION ENVIRONMENT

A. *The California Law Schools' Efforts to Maintain Diversity*

To date, the University of Texas continues to defend its affirmative action admissions program, in the hope that the United States Supreme Court will reverse *Hopwood* and reaffirm or strengthen *Bakke*.⁹⁷ Moreover, Michigan is preparing to defend its admissions policies at trial in mid-January 2001.⁹⁸ In California, however, *Bakke* remains off limits to the public law schools because of the 1995 action taken by the UC Board of Regents in adopting SP-1.⁹⁹ In both

TIMES, June 7, 1999, at A16.

93. See Peter T. Kilborn, *Jeb Bush Roils Florida on Affirmative Action*, N.Y. TIMES, Feb. 4, 2000, at A1, A23; see also Hochschild, *supra* note 49, at 1005-27 (presenting data to support her conclusion that California and Washington are "anomalies" and that there is "no reason to expect a wave of successful efforts to abolish affirmative action through the electoral system"). The Florida Supreme Court is reviewing the measure to determine whether it complies with the "single subject" requirement. See CONNERLY, *supra* note 40, at 260-61 (indicating that if the Florida CRI does not qualify for the ballot in 2000, he and his supporters will try again in 2002).

94. See Kilborn, *supra* note 93, at A23.

95. For an analysis of the Texas plan, see Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245 (1999); David Orentlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181 (1998) (arguing that regardless of the effectiveness of these plans on maintaining a measure of diversity in the state colleges and universities of Texas, they will have no impact on law school enrollment).

96. See Rick Bragg, *Affirmative Action Ban Meets a Wall in Florida*, N.Y. TIMES, June 7, 1999. This part of the program is expected to take effect in March 2000, following approval by the University of Florida systemwide Board of Regents. See Rick Bragg, *Minority Enrollment Rises in Florida College System*, N.Y. TIMES, Aug. 30, 2000, at A18 (reporting that minority enrollment increased by twelve percent in the freshman class of 2000, the first class selected under the One Florida plan).

97. See E-mail from Dean M. Michael Sharlot, *supra* note 61.

98. See Briefs, *Law School Admissions Suit Trial Delayed*, *supra* note 77.

99. See University of California Regents Resolutions SP-1 and SP-2, *supra* note 42; CONNERLY, *supra* note 40. UC Regent William Bagley, a supporter of affirmative action in admissions, indicated in late January 2000 that he was preparing a proposal which would allow the

California and Washington, the electorate has prohibited all state agencies from using "preferential treatment . . . in public education" by enacting Proposition 209 and Initiative 200.¹⁰⁰ The crucial question for public law schools in these two states is what can be done to maintain some measure of diversity within the constraints imposed by state law.

The three UC campus-based law schools have responded differently to SP-1 in their 1997 admissions programs.¹⁰¹ As indicated earlier, Berkeley eliminated its numerical goals for minority admissions, but otherwise adhered to its commitment to diversity by strengthening its discretionary admissions practices.¹⁰² UCLA, on the other hand, created a new admissions program based on socioeconomic factors designed to produce diversity.¹⁰³ The policy at UC-

Board of Regents to reverse SP-1. Acknowledging that such a reversal would have no impact on admission policies as long as Proposition 209 remains the law, Bagley nonetheless pointed to its symbolic value in assuring students and faculty that minorities are welcome at the University. *See also* Tanya Schevitz, *Preferences Ban Faces Battle From UC Regent*, S.F. CHRON., Jan. 29, 2000, at A3. Regent Ward Connerly dismissed the effort, saying "I doubt he'll get a second." Anne Benjaminson, *Regent Proposes Prop. 209 Reversal of 209 to Repair Reputation*, DAILY CALIFORNIAN, Feb. 1, 2000, at 1, 4. The *San Francisco Chronicle* supported Bagley's idea, noting that "[s]tudents and faculty who have a choice between a UC campus and another university that has made clear its commitment to diversity are often eliminating UC because of the regents' policy" and calling upon California Governor Gray Davis and other regents to "support Bagley in his effort to restore an atmosphere of welcome to ethnic minorities." Editorial, S.F. CHRON., Feb. 2, 2000, at A26.

100. *See* CAL. CONST. of 1879, art. I, § 31(a) (1996); 1998 Washington State General Election Results, *supra* note 88; Kelley, *supra* note 88; *see also supra* text accompanying notes 83 and 88.

101. The fourth public law school in California, UC's Hastings College of the Law, is governed by its own Board of Trustees, not by the Regents of UC, and was unaffected by SP-1. It was, however, subject to Proposition 209. Hastings has an admission program that is based on class rather than race and ethnicity, called the Legal Education Opportunity Program (LEOP), which does not rely on *Bakke*. Boalt Hall's 1997 Task Force on Admissions Policy examined the Hastings LEOP, which is used to admit twenty percent of the entering class, but decided that because of differences in the applicant pools and student bodies of the two schools, it would not be successful at Berkeley. *See* Rachel Moran et al., Report of an Ad Hoc Task Force on Diversity in Admissions, 51-54 (Oct. 14, 1997) (unpublished report, on file with author). Nonetheless, the Boalt Hall faculty voted in 1997 to experiment with a pilot program that charged one faculty member to admit up to thirty applicants from a group of 150, selected from regular applicants who submitted a supplemental questionnaire that provided information about their socioeconomic status. Some 4000 questionnaires were mailed, of which 1300 were returned and entered into a computer program. The results of this experiment produced eighteen offers of admission, and yielded eleven enrolled students, who exhibited socioeconomic, but not racial or ethnic, diversity. *See Introduction*, 1998 ANNUAL ADMISSIONS REPORT (Boalt Hall, Berkeley, Cal.), 1998, at 2 (on file with author).

102. *See supra* text accompanying notes 42-44.

103. *See* Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 472-73 (1997).

Davis closely resembled that used by Berkeley.¹⁰⁴

The entering law classes of 1997 showed dramatic declines in non-Asian minority enrollment in both California and Texas, but there were individual variations among the three UC campus-based law schools. Both UCLA and Davis successfully enrolled more African-American students in the class of 1997 than Berkeley, while the enrollment picture at Texas was closer to that of Berkeley than UCLA.¹⁰⁵

In the wake of the 1997 admissions cycle, law schools in California re-examined their practices. At Berkeley, the faculty made the following changes, which were implemented in the 1998 admissions cycle:¹⁰⁶

1. We discontinued the use of a formula used to weigh UGPAs from undergraduate institutions.¹⁰⁷ The Director of Admissions and the Admissions Committee reading teams now evaluate UGPAs based on data provided by the Law School Data Assembly Service (LSDAS) regarding grade inflation and the relative competitiveness of the student body at undergraduate institutions as well as the applicant's program of study.

2. We enlarged the pool of applicants considered by the Admissions Committee.¹⁰⁸ Each year we have around 4000-5000 applicants for the 270 places in our entering class. The Director of Admissions and his staff review all of these files, and the Director admits roughly 500 applicants, while the Admissions Committee admits the balance needed to offer admission to approximately 850 applicants. In 1998, the Committee read nearly 1400 files, up from 1200 in 1997. This increase gave the Committee a broader pool to consider.

3. In order to minimize over-reliance on the LSAT, we began reporting LSAT scores in bands to the Committee, a practice adopted by the Law School Admissions Service in reporting applicants' scores to us.¹⁰⁹

4. In order to focus readers more closely on individual achievements, we stopped grouping applicants' files in ranges labeled "A," "B," "C," or "D"

104. See Bruce Wolk, Presentation to the Regents' Committee on Educational Policy (June 18, 1998) (noting that Davis uses both numerical factors, including UGPA and LSAT scores combined into an index, as well as more subjective factors, such as "extra-curricular activities, community activities and employment experience, advanced degrees or studies, the applicant's personal statement, achievements for oneself or others, despite social, economic, or physical handicap, and unusual accomplishments, abilities, or skills that would be relevant to the study of law").

105. See *infra* Table 2.

106. See Feature, *Admissions Update: The Class of 2001*, BOALT HALL TRANSCRIPT, Fall 1998, at 30.

107. See *id.*

108. See *id.*

109. See *id.* Thus, a score of 159 would be reported as falling within a band of three points lower and three points higher than the mid-point, or 156-162. This way of reporting the score is intended to alert the reader that a one, two, or three point difference between students is not significant.

according to Index Scores.¹¹⁰

5. We paid special attention to applicants whose standardized test scores, such as the SAT, did not accurately predict their academic potential in college as measured by their UGPA.¹¹¹ If such an applicant also had a weak LSAT, but a strong UGPA, we treated the LSAT as a weaker predictor.

We did not expect any single one of these changes to produce a big difference in the make-up of the 1998 entering class. Taken together, however, we think they accomplished several positive results. First, they helped to dispel the negative and false public impression that Boalt Hall is hostile to minority candidates. The publicity surrounding the faculty discussion and adoption of each of these measures showed that we were trying in good faith to find race-neutral ways to maintain diversity.

Second, these measures gave the Director of Admissions wider discretion in admitting applicants than he had in prior years. As he put it in describing our practices to his fellow admissions professionals, these changes facilitated the school's search for the best applicants. In particular, he sought applicants who had both strong academic potential, as measured by their numerical predictors, and who had a potential "voice" to contribute to the classroom dialogue, as indicated by their background and experiences.¹¹²

Finally, these changes allowed the Admissions Committee to focus more closely than it had done in prior years on non-numerical factors as well as numerical indicators. All of the nearly 1400 files they read had been pre-screened by the Director of Admissions, and all were from applicants fully qualified to study law at Boalt Hall. These files were distributed among six reading teams so that each team read approximately 215 files. The individual choices made by the faculty members of these teams were based on the material in the files and their experience as Boalt Hall professors in judging the suitability of applicants. The faculty members of the Admissions Committee are appointed by the Dean and change over time. The procedure we use affords the faculty a significant measure of discretion, and their use of that discretion is the first step in selecting the superbly qualified, intellectually stimulating, creative, and

110. *See id.* An index score at Berkeley is a number resulting from a formula that weights the LSAT and the UGPA equally. Not all schools use an index score in their admissions processes, and those that do use index scores vary the amount of weight given to the two variables that constitute the measure. Thus, the Law School Admission Council (LSAC) which administers the LSAT, reported that for the application year 1997-98, the 179 ABA-approved law schools used the following types of index formulas: 106 (fifty-nine percent) used a formula based on LSAC correlation study results; forty-six (twenty-six percent) used a different formula representing alternative weightings of LSAT and UGPA; and twenty-seven (fifteen percent) used no index formula produced by LSAC. *See* Herma Hill Kay, *Report of the Committee on Diversity in Legal Education*, SYLLABUS, Fall 1998, at 1, 15.

111. *See* Feature, *supra* note 106.

112. *See id.*; *see also* Herma Hill Kay, Testimony Before the Regents' Committee on Educational Policy (June 18, 1998) (quoting Boalt Hall Director of Admissions, Edward Tom) (on file with author).

resourceful students who typically attend our school.

Once the Admissions Committee and the Director of Admissions have admitted the applicants, the second step, that of recruitment, takes priority. Faculty, staff, and administrators made telephone calls and exchanged email correspondence with admitted applicants, urging them to accept our offers of admission. In addition, we received significant help from our alumni, who hosted receptions for our admitted students around the country as well as in the Berkeley-San Francisco Bay Area. Further, although Proposition 209 has limited our ability to use race-targeted scholarships and financial aid to recruit applicants, its terms do not apply to private organizations. Both the Bar Association of San Francisco and the Wiley Manuel Law Foundation were instrumental in raising funds for scholarships and in selecting students admitted to Bay Area law schools to receive the scholarships.¹¹³ Finally, we made and distributed an eight-minute video entitled, "Welcome to Boalt Hall." The video featured Boalt students, faculty, alumni, and the dean. It described Boalt as an attractive and stimulating place to study law and was well received by our admits.¹¹⁴

As a result of the changes in faculty admission policy and the increased recruitment effort, Boalt's 1998 entering class showed a modest increase in diversity over the preceding year,¹¹⁵ but the numbers were roughly half that attained in 1996 with the help of affirmative action.¹¹⁶ In her testimony before the California Senate Select committee on Higher Education in Fall 1997, then Dean Susan Prager of UCLA identified the situation that produces such extreme competition among law schools for the minority students with the highest credentials. She said:

Once affirmative action is no longer a tool, the problem is the small number of applicants who have the highest numerical credentials. The law school applicant pools are very large and the sheer number of white applicants dominates at every level of that pool. For the most competitive of schools, the upper reaches of the pool based on grades

113. See Feature, *supra* note 106, at 31; see also *News from the Bar: United We Stand*, 24 SAN FRAN. ATT'Y 7 (BASF describes how it raised \$350,000 to fund minority scholarships "as a concrete way to increase diversity at northern California law schools.").

114. The video was funded by a private gift of \$10,000 from Sun Microsystems and a one-time recruitment allowance of \$20,000 from the Office of the President of UC.

115. There were 269 students enrolled in the entering class of 1998, of whom eight (three percent) were African-American; twenty-three (nine percent) were Hispanic; two (one percent) were Native American; and forty-eight (eighteen percent) were Asian. See *Table IV: Diversity in the J.D. Program*, 1999 ANNUAL ADMISSIONS REPORT (Boalt Hall, Berkeley, Cal.), 1999 (on file with author) [hereinafter 1999 ANNUAL ADMISSIONS REPORT].

116. There were 263 students enrolled in the entering class of 1996, of whom twenty (eight percent) were African-American; twenty-eight (eleven percent) were Hispanic; four (two percent) were Native American; and thirty-eight (fourteen percent) were Asian. See 1996 ANNUAL ADMISSIONS REPORT (Boalt Hall, Berkeley, Cal.), 1996, at 2 (on file with author).

and LSATs have minuscule numbers of African Americans and Latinos. For example, in the entire nation this year, there were only 103 African American and 224 Latino applicants who had LSATs of 160 or better and had grades of 3.25 or better. Of these, only 16 African Americans and 45 Latinos had LSAT's [sic] above 164 and grades of 3.5 or better. In contrast, there were 2,646 white applicants with these credentials, and 7,715 in the 160 LSAT and 3.25 and above category

When we consider that 18 African Americans enrolled at Yale Law School alone this year, we can predict the demand for the remaining students in the higher qualification cohort. Looking at the above data also makes clear that most, if not all, of the highest quality private law schools are engaging in affirmative action. The recent policy changes in California make it impossible for us to remain competitive when it comes to the national pool of minority students.¹¹⁷

Given this data, Boalt Hall's situation is not difficult to grasp for three reasons. First, Boalt's applicant pool is national in scope, and the majority of our students come from the best research universities. In 1997 our applicant pool came from 458 undergraduate schools, our admits came from 148 of these schools, and the top five schools attended by those who enrolled were Berkeley, UCLA, Stanford, Harvard, and Yale. Second, Boalt is, and has been for many years, recognized as the most selective public law school in the country. Third, our entering class has very high academic indicators. In 1997 the mean UGPA was 3.7, and the mean LSAT was 167 (96th percentile). If we had admitted minority students whose academic indicators were well below those of the class as a whole, our good faith compliance with SP-1 would be open to challenge.

Even with the changes we instituted for the admission of the entering class of 1998, these factors changed very little. In 1998, our pool of 4587 applicants came from 500 undergraduate schools, our admits came from 196 of these schools, and, while their respective order had changed, the top five schools attended by the 269 students who enrolled still included Berkeley, UCLA, Stanford, Harvard, Yale (these latter two schools tied), and Cornell. The mean UGPA of the entering class of 1998 was 3.72 and the mean LSAT was 165 (93rd percentile).¹¹⁸

Boalt Hall did not make any further changes in its admissions policies during the 1999 admissions cycle. With the help of additional funding from the Berkeley campus and the State Legislature, however, we were able to expand our outreach efforts by a significant measure. We hired an Associate Director of Admissions for Outreach and Recruitment, who joined us in August 1998. With his help, we visited more schools and admission workshops during the fall of 1998 in order to encourage prospective students to apply to Boalt. In the winter and spring of 1999, our alumni continued their recruitment efforts with

117. Susan Westerburg Prager, Testimony Before California Senate Committee on Higher Education (Sept. 22, 1997) (on file with author). *See also* Morris, *supra* note 40, at 5-6.

118. *See* 1999 ANNUAL ADMISSIONS REPORT, *supra* note 115, at Table IV.

receptions and dinners for the admits. The faculty, students, and administration continued their interaction with the admits, and the video was distributed once more.

In early September 1999, UC's three campus-based law schools released their admissions statistics for the entering class of 1999. Table 1 shows the results of three years without affirmative action in California.¹¹⁹

Currently, an interdisciplinary committee on New Definitions of Merit chaired by Professor Margarie McGuire Shultz is at work at Boalt, charged with formulating possible redefinitions of merit. It is investigating predictors of success in law school beyond first year grades and, more broadly, predictors of success in the legal profession.

B. The Report of the Diversity Committee of the Section of Legal Education and Admissions to the Bar

In 1996, Dean Rudy Hasl, as Chair of the Section of Legal Education and Admissions to the Bar, charged the Section's Committee on Diversity in Legal Education to consider two matters: (1) law school admission policies in the wake of the Fifth Circuit decision in *Hopwood*, the UC Regents' resolution, and Proposition 209; and (2) the treatment of women students, faculty, staff and administrators in legal education. Chair Beverly Tarpley reappointed the Diversity Committee in 1997 with the same charge. The Committee chose to concentrate during those two years on the first part of its charge, and filed a report that was accepted by the Council at its August 1998 meeting and distributed to all Deans.

With the help of President Philip D. Shelton of the Law School Admission Council (LSAC), the Committee undertook a pilot project to analyze how law schools use the LSAT in their admissions processes and recommended a range of available race-neutral options that schools might use to improve the accuracy of the LSAT and to maximize diversity. In conducting this study, LSAC provided the Committee with data from ten unidentified public law schools, including nine from California and the Fifth Circuit and one outside those areas. The report for each school included descriptive historical data for the applicant/admit pools for application years 1994-95, 1995-96, and 1996-97, and the same information for the number of actual admits in fall 1997 if the school had used as the criteria for admission the index number only, or the LSAT only, or the UGPA only.¹²⁰

Three hypothetical models were constructed (called Alternatives A, B, and C). These models used baseline LSAT scores drawn from each school's actual admit pool for the 1995-96 admission year to identify "qualified" applicants. Alternative A used an LSAT score equal to the score that was actually tenth from the lowest score of all admitted applicants from that school. (The lowest score was not used to avoid outliers.) Alternative B expanded the LSAT range by five

119. See *infra* Table 1.

120. See Kay, *supra* note 112, at 14-16.

points, and Alternative C expanded the range by an additional five points. In each instance, applicants who met the "qualifying" LSAT score were then ranked according to UGPA and a matrix that displayed the characteristics of the students admitted (a number equal to the number of actual admits in the class entering in the fall of 1997).

Each of the above methods for identifying admitted applicants was matched against the following characteristics: gender, ethnic identity, LSAT scores, undergraduate major, graduate degree earned, and resident/nonresident status. After reviewing this data, the Committee focused on an analysis that compared the proportion of admits to total applicants with the proportion of actual minority admits to qualified minority applicants. The purpose of this analysis was to determine whether using the LSAT as a qualifying credential might give schools an opportunity to expand minority admissions. We hypothesized that a school would expand its pool of qualified applicants by using the LSAT as a qualifying credential if the ratio of its actual minority admits to its qualified minority applicants was greater than the proportion of total admits to total applicants.

Given this hypothesis, the Committee expanded its analysis to include thirty-one law schools, public and private, from across the country and across the spectrum of schools, including the original ten. We found that if Alternative A had been used, six schools would have expanded the subset of qualified African-American applicants in their pool; fourteen would have expanded the subset of qualified Chicano/Mexican Americans; and seven each would have expanded the subset of qualified Hispanic/Latino and Asian/Pacific Islanders. The results which could have been obtained by using Alternative B were even larger: nineteen schools would have expanded the subset of qualified African-Americans; eighteen the subset of Chicano/Mexican Americans; twenty the subset of Hispanic/Latinos; and fourteen the subset of Asian/Pacific Islanders. It appears that nearly half the law schools might give themselves a better opportunity to broaden the subset of eligible applicants in their pool and to improve their minority admissions if they utilized Alternative B. The Committee recommended that interested schools should request the data underlying this analysis from the LSAC in order to determine the effect of either Alternative A or B on their own applicant pool.

CONCLUSION: THE SHAPE OF THE FUTURE

At this moment in American society, with race relations becoming more strained than ever before and the basis for trust and respect becoming ever more fragile,¹²¹ it is the numbers that tell the story. Table 2 shows the numbers of

121. See Stephen Reinhardt, *Remarks at UCLA Law School Forum on Affirmative Action: "Where Have You Gone, Jackie Robinson?"*, 43 U.C.L.A. L. REV. 1731, 1732 (1996).

Some of what is happening today, partly as a result of the assault on affirmative action, is heartbreaking. The animosities among minority groups are increasing. There is disunity and disharmony among peoples of color. . . . Sadly, a lot of sincere, well-meaning folks also contribute to the growing separation, isolation, and division by

minority students admitted and enrolled at the three UC campus-based law schools and at the University of Texas School of Law in Austin for the five year admission cycles 1995-1999.¹²²

According to ABA President William Paul, who has chosen diversity as his Presidential Initiative, the crucial number to focus on is the racial divide between the legal profession and the rest of the country. Speaking at the AALS House of Representatives in January 2000, President Paul said that he had discovered, while examining demographic trends in order to predict what the profession might look like in twenty or thirty years,

that this country is 30 percent people of color today and it's moving toward 50 percent people of color. But our profession is still 92½ percent white. Now, I believe that the legal profession must reflect the society which it serves [I]t is essential to the preservation of our free society that the legal profession reflect the society. We are the connecting link between society and the rule of law, and I don't have much confidence in the ability of a profession that's 92½ percent white to remain and continue as the connecting link to a society moving toward 50 percent people of color.¹²³

To political scientist Nathan Glazer, who once opposed affirmative action, the crucial statistic is the dramatic drop in African-American enrollment in leading colleges and universities resulting from the end of affirmative action, and the predictable societal consequences of that drop:

I believe the main reasons we have to continue racial preferences for blacks are, first, because this country has a special obligation to blacks that has not been fully discharged, and second, because strict application of the principle of qualification would send a message of despair to many blacks, a message that the nation is indifferent to their difficulties and problems.¹²⁴

Authors William G. Bowen and Derek Bok, on the other hand, are impressed by positive numbers.¹²⁵ Looking at the outcome of the use of affirmative action

joining with some not-so-well-motivated politicians in sponsoring initiatives, legislation, or lawsuits that tell the minority community just how far our relations have regressed, how little others value *their* welfare, *their* children, *their* very lives. What was once unthinkable is now upon us. We are regressing. Is this country really going to go backwards in a serious way—will we really continue to move toward the resegregation of our society?

Id. (emphasis added).

122. See *infra* Table 2.

123. Remarks of ABA President William Paul Before the AALS House of Representatives, Washington, D.C., in Proceedings of the AALS 2000 Annual Meeting, at 202-03 (Jan. 6, 2000) (on file with author).

124. Nathan Glazer, *In Defense of Preference*, NEW REPUBLIC, Apr. 6, 1998, at 18, 24.

125. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM*

admission policies in colleges and universities, which they were the first to document, Bowen and Bok have shown the crucial role those policies played in providing the means of access to leadership positions in American society by African-Americans.¹²⁶ While their study does not include law school admissions, I have no doubt that a similar study would produce similar results.¹²⁷

Nonetheless, what I find most significant is the change in the numbers over time. In 1965, when affirmative action became official U.S. government policy, the legal profession in the United States consisted almost entirely of white men. Only three out of every 100 lawyers were women; less than one percent were African-American; and the number of other minority lawyers was so small that it was not even tallied in the reporting sources.¹²⁸ The Bureau of Labor Statistics reported in January 1999 that of 912,000 lawyers employed in the United States, 28.5% were women, four percent were African-American, and three percent were Hispanic.¹²⁹ Asians were not reported separately. Although Boalt Hall's special admission policies were not based on sex, the rising application rate of women to law school has been the major success story of the decades after 1960: between 1965 and 1985, the proportion of women J.D. students in ABA-approved schools went from four percent to forty percent of the total.¹³⁰ Today, women constitute fifty-eight percent of the student body at Boalt, and the entering class of 2000 was sixty-four percent female.¹³¹

These numbers say something vitally important about our concept of ourselves as a society. The ideal of American democracy—equal justice under law—ultimately must rest on public confidence that the system of justice is fair and even-handed in its treatment of all people regardless of their status or condition. Thus, it is essential that all of the people in our nation be able to sustain an abiding trust in the fairness of the rule of law. Otherwise, they may not be willing to obey the law. Yet today that trust has been severely tested. The

CONSEQUENCES OF RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1999).

126. *See id.*

127. *See* Deborah Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 32 (2000) (discussing a 1999 survey of students at two leading law schools who reported positive effects of diversity on their educational experience).

128. *See* FRED B. WEIL, THE 1967 LAWYER STATISTICAL REPORT, NATIONAL: DISTRIBUTION OF WOMEN LAWYERS, 1948-1966 (Table 4) (reporting 2.8% women in 1966) (American Bar Foundation, 1968); "Report of the Advisory Committee for the Minority Groups Study," 1967 Annual Meeting, Proceedings, Part One, Section I, at 160 (reporting 1.3% Negro lawyers in the legal profession) (AALS, 1968).

129. U.S. Bureau of Labor Statistics, *Employment and Earnings*, Jan. 1999, Table 11, *Employed Persons by Detailed Occupation, Sex, Race, and Hispanic Origin*, at 178.

130. OFFICIAL ABA GUIDE TO APPROVED LAW SCHOOLS, LEGAL EDUCATION AND BAR ADMISSION STATISTICS, 1963-99, at 450 (2000 Edition) (reporting total J.D. enrollment for 1965-66 as 56,510 and total women J.D. enrollment as 2374 (4.25%); for 1985-86 as 118,700, and as 47,486 (40%)). The most current year reported is 1998-99, when total J.D. enrollment had risen to 125,627, of whom 57,952, or 46% were women. *See id.*

131. *See* 2000 ANNUAL ADMISSIONS REPORT (Boalt Hall, Berkeley, Cal.), 2000, at Table III.

poor, the underprivileged, and various other groups who remain outside the mainstream of our country do not have full confidence that the law treats all persons fairly and with respect. We can help allay this mistrust by making sure that the future lawyers, judges, and law teachers of this country are more representative than they now are of the nation as a whole. The need to diversify the legal profession is not a vague liberal ideal; it is an essential component of the administration of justice. The legal profession must not be the preserve of only one segment of our society. Instead, we must confront the reality that if we are to remain a government under law in a multicultural society, the concept of justice must be one that is shared by all our citizens.

As Justice Ruth Bader Ginsburg observed in her eloquent dissent in *Adarand Constructors, Inc. v. Peña*: “Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.”¹³² As a child, I saw that bias at work, up close and first-hand. I have not forgotten the effect it had on the African-Americans in the rural South who were its intended targets. Nor have I forgotten the mission it awakened in me to do everything within my power to end the legally entrenched injustice on which it was based. Although we as a nation have made great strides in the past forty years since *Brown* was decided, we have not yet come close to achieving true racial equality. Yet without affirmative action, the number of enrolled minority students is likely to be pitifully small in the most prestigious public law schools. As Table 2 shows, aggressive outreach and recruitment efforts in 1998 and 1999 have raised Boalt Hall’s yield well above the low point of 1997.¹³³ However, the number of African-Americans, for example, is still less than half of what it was in 1995 and 1996. Even greater efforts will be needed in future years, and we must accept that those efforts will be required every year for an indefinite period. We cannot afford to give up the struggle now.

132. 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting) (citation omitted).

133. At the undergraduate level, the overall number of African-American, Hispanic, and Native American freshmen who will enter the University of California in Fall 2000 is expected to rise to 7336, slightly higher than the 7236 who enrolled in 1997, the last year of affirmative action for undergraduates. But the numbers continue to drop at the two elite UC campuses, Berkeley and UCLA, where fall enrollment of freshmen will be 1169 and 1449 respectively in 2000, compared to 1778 and 2010 in 1997. See Barbara Whitaker, *Minority Rolls Rebound at University of California, But Disparity Persists at Main Campuses*, N.Y. TIMES, Apr. 5, 2000, at A12. The Fall 2000 entering class at Boalt Hall has 270 students, of whom seventy-seven are people of color, but only twenty-six of these are non-Asians. See 2000 ANNUAL ADMISSIONS REPORT, *supra* note 131, at Table IV.

TABLE 1

		All People of Color	Non-Asian People of Color	Class size
1999	UCB	60	25	269
	UCLA*	88	22	237
	UCD	44	20	161
1998	UCB	81	33	269
	UCLA	76	27	277
	UCD	47	17	183
1997	UCB	62	15	268
	UCLA	132	50	381
	UD	38	14	172

* Does not include 52 1Ls whose ethnic/racial data was mistakenly not counted.

TABLE 2 Minority Law Students Admitted and Enrolled in California and Texas Fall 1995 through Fall 1999								
	Admitted				Enrolled			
Fall 1995	UCB	UCLA	UCD	UT	UCB	UCLA	UCD	UT
African-American	77	82	27	91	21	20	3	38
Hispanic; Mex-Am	79	87	76	92	36	29	21	64
Native American	9	10	9	n/a	5	3	3	n/a
Asian; Pacific Islander	113	180	125	71	36	62	26	28
Fall 1996								
African-American	77	104	27	65	20	19	4	31
Hispanic; Mex-Am	85	108	69	70	28	45	16	42
Native American	10	10	6	n/a	4	5	1	n/a
Asian; Pacific Islander	129	186	162	93	46	48	22	30
Fall 1997								
African-American	18	21	20	11	1	10	5	4
Hispanic; Mex-Am	46	74	50	40	14	39	6	26
Native American	2	5	7	n/a	0	1	3	n/a
Asian; Pacific Islander	149	200	128	108	47	82	24	39

TABLE 2 (cont'd)
Minority Law Students Admitted and Enrolled in California and Texas
Fall 1995 through Fall 1999

	Admitted				Enrolled			
Fall 1998	UCB	UCLA	UCD	UT	UCB	UCLA	UCD	UT
African-American	32	18	18	25	8	8	3	8
Hispanic; Mex-Am	60	47	52	63	23	16	12	30
Native American	4	7	7	n/a	2	3	2	n/a
Asian; Pacific Islander	143	167	185	93	48	49	30	29
Fall 1999								
African-American	29	19*	19	32	7	3*	6	7
Hispanic; Mex-Am	57	58*	62	60	16	18*	14	32
Native American	3	5*	6	n/a	2	1*	0	n/a
Asian; Pacific Islander	117	156*	137	72	35	66*	24	28

* Does not include 52 1Ls whose ethnic/racial data was mistakenly not counted.
 Sources: UC Office of the President, 9/10/99 (<http://www.ucop.edu/acadadv/datamgmt/lawdata>); UT Office of the Law School Dean.

