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Fran Ansley

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Frances L Ansley

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# CLASSIFYING RACE, RACIALIZING CLASS

FRAN ANSLEY *

In Professor Malamud's helpful and thought provoking article,[1] she challenges us to consider a number of thorny issues related to affirmative action. In this brief response, I want to praise what I consider to be several of the most illuminating and salutary points of Malamud's thesis, and then question others.

ADMIRATION

First, let me join wholeheartedly Professor Malamud's warnings about the danger and shortsightedness of restricting our own arguments "to ones that are currently acceptable to the Court as permissible rationales."[2] I agree with her reminder that doing so would represent a failure of professional competence—a sort of lapse into pre-Realist naivete about the nature of adjudication generally and of constitutional adjudication in particular.[3] Those of us who oppose the drift of the current Court's affirmative action jurisprudence should find ways to press what we believe to be our best and most principled points with both ordinary people and policymakers, large and small, in all the varied social locations where this important question is being debated. We should do so in part because such public dialogue is important in its own right and in part because the climate of public opinion has profound effects on legislative and judicial decisionmakers. Further, in framing arguments directly to courts, we should recall that "[a] judge will be more likely to read precedent as permitting a broader range of action if the judge is personally convinced there are good reasons to do so,"[4] even if these good reasons are ones that remain unstated in judicial opinions.[5] This is astute

* Professor of Law, University of Tennessee College of Law, and Faculty Director, University of Tennessee Community Partnership Center. B.A., Harvard/Radcliffe, 1969; J.D., University of Tennessee College of Law, 1979; LL.M., Harvard Law School, 1988.

1. Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939 (1997).

2. *Id.* at 947.

3. *See id.* at 946-47.

4. *Id.* at 946.

5. Having said it is important not to be constrained in our thinking and

advice, particularly apt for law school administrators and other leaders who are called upon to explain or discuss law school practices with various members of the public.[6]

A second aspect of Professor Malamud's article that I find particularly helpful is her examination of the situation of the black middle class.[7] Precisely how to define that group—or any other American class for that matter—is an important question Malamud does not address.[8] Nevertheless, her treatment of this issue represents an exciting move because it productively explores the elusive, slippery, and refractory subjects of race and class by focusing upon a particular, concrete social formation that implicates both.[9] In the emergent vocabulary of critical race theory, Malamud's analysis in this instance is "intersectional."[10]

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advocacy by the strictures of Supreme Court doctrine, I must nevertheless remind my readers that those strictures are stiff indeed. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995); Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

6. *See* LAW SCHOOL ADMISSION COUNCIL, PRESERVING AFFIRMATIVE ACTION PROGRAMS IN THE LATE 90S (1996). This booklet, designed for decisionmakers in legal education, takes a cautious approach to the evolving law and suggests that leaders in legal education should do likewise. The dean of St. Mary's University School of Law takes a livelier and less acquiescent view of recent trends. *See* Barbara Bader Aldave, Hopwood v. Texas: *A Victory for "Equality" That Denies Reality—An Afterword*, 28 ST. MARY'S L.J. 147 (1996). Another article, older but still timely in several important ways, is Howard Lesnick, *What Does* Bakke *Require of Law Schools?*, 128 U. PA. L. REV. 141 (1979).

7. *See* Malamud, *supra* note 1, at 967-88.

8. One instance where I find myself wanting further clarification and analysis is Professor Malamud's juxtaposition of the "black middle class" with the "white working class." *See* Malamud, *supra* note 1, at 993-95. How does she intend readers to understand these terms, and why should readers accept her assumption that they are categories that merit comparison and contrast? I should note that Malamud's earlier work suggests that she is not unsophisticated about the difficulty and complexity of class categories. Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996). I hope we will see more work from her and others on this problem as it relates to affirmative action.

9. The race/class relationship in America is notoriously deep and controversial. *See, e.g.*, ERIC ARNESON, WATERFRONT WORKERS OF NEW ORLEANS: RACE, CLASS, AND POLITICS 1863-1923 (1991); RAYMOND S. FRANKLIN, SHADOWS OF RACE & CLASS (1991); DAVID ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991). For some earlier struggles of my own to untangle the knot see Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989). Angela Harris has recently suggested that the time may be ripe for critical race theorists to approach this subject in a more concentrated way. *See* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 777 (1994).

10. Kimberle Crenshaw set out a well-known demonstration of the importance of intersectionality in her article, *Demarginalizing the Intersection of Race and Sex:*

She looks at a social location where two significant axes of identity intersect. In the process, she questions and, in turn, enriches our normal, "non-intersectional" understanding of each axis as it is conceived in isolation.[11]

Intersectional analysis points out the obvious—that actual identity categories never exist in isolation. For instance, every person belongs to a certain socioeconomic class, but in a highly racialized economy like our own, that class is always "raced." It does not stand alone. Similarly, each person has a racial identity within this society (even if it is a hybrid or otherwise complex or contested one), but that person's race is always "gendered."

The more powerful the intersecting social category, of course, the more powerful its effect in reciprocally altering the nature of other categories that it intersects. There is no such thing as pure womanhood that can exist apart from, say, white womanhood or black womanhood. The very way that a man is *male* is profoundly influenced by whether he is a white male or a male of color. The very way that a black person is *black* is profoundly influenced by whether that person is a man or a woman. The intersectional approach cautions us to bring these relationships to light and to consciously interrogate relevant intersections. We should do this not only to learn what the intersections' particular relational energies may have to teach us about the respective categories in question, but also to ensure that we have not falsely deduced sameness when two categories share one axis of commonality. Such a deduction can be particularly dangerous when an axis of commonality spans a social distance between other categories as potent as, say, class, race, or gender is in U.S. society today.

Malamud's paper is a contribution to intersectional thinking in that she highlights specific ways in which a "middle-class" person's situation is likely to be significantly affected by the

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*A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. She observed, for instance, that at the intersection of race and gender, women of color (the subordinate pole of both operative categories) are often erased. *See id.* at 150-52. Unconscious assumptions that all the women are white and all the people of color are males can lead—even in the midst of antidiscrimination efforts—to the creation of legal doctrines that reinscribe hierarchy within each of the intersecting categories. *See id.* at 139, 160 (citing ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE (Gloria T. Hull et al. eds., 1982))

11. *See* Malamud, *supra* note 1, at 967-88.

person's race.[12] Using concrete markers developed in the social science literature, Malamud shows us that the "white middle class" and the "black middle class" are not in fact the same—even in "class" terms.[13] She then argues—quite appropriately, I believe—that this difference provides one important justification for affirmative action programs that purposefully benefit members of the black middle class. This difference challenges the idea that awarding a law school place to the proverbial black neurosurgeon's child is, on its face, illegitimate. In fact, it is neither a perversion of the equality aims of affirmative action, nor a cause for embarrassment to the administrators of affirmative action programs, nor a reason for the recipient of such a slot to feel shame or guilt about an "undeserved" benefit having been conferred upon him at the expense of another equally or more worthy applicant.

## APPREHENSION

Having praised these important virtues of Professor Malamud's paper, however, I turn now to some criticisms. The things that worry me most about Professor Malamud's remarks lie somewhat below the surface, so I may be reading them inaccurately. In any event, I think they are worth a second look.

## WHO IS THE AUDIENCE?

First, I want to object to Professor Malamud's implicit claim of representing "those who must be convinced" about the value of affirmative action programs based upon race. In the concluding portion of her article she states, "I sense that I am fairly representative of the portion of liberal and moderate America on whose court the battle for affirmative action in America must be fought."[14] She goes on to draw an implicit contrast between her group and a shadowy set of others, others who are apparently well-intentioned but wed to affirmative action in ways that Malamud sees as problematic for their own best aims. This implied contrast suggests a strong dichotomy between policy

12. *See id.* at 966-69. For a related point, see Martin Carnoy & Richard Rothstein, *Are Black Diplomas Worth Less?*, AM. PROSPECT, Jan—Feb. 1997, at 42.
13. *See* Malamud, *supra* note 1, at 969-88.
14. *Id.* at 997.

argument and personal identity, reason and passion, mind and body:

> We [those on whose court the battle must be fought] are people for whom the issue of affirmative action is important but not to the point of being constitutive of our political and moral identity. I once confessed to a colleague . . . that I tend not to participate in legal debates on abortion because the "me" that is having the debate could not have been having the debate if abortion rights had not been secure when I needed them. I know what it means to have a core belief that is not amenable to the ordinary techniques of political and intellectual persuasion. But on the issue of affirmative action, I am part of a large and politically important group of people of all races in this country for whom the issue is *not* presently constitutive in this sense. We are people in need of good arguments . . . .
>
> I view both the need for and the justice of race-based affirmative action on behalf of the black middle class as legitimately contestable. This means that I must identify the weaknesses in what currently pass as the "best" arguments and seek to make better ones with the hope they can persuade those of my kind who have not yet crossed over to a moral and political space in which arguments no longer matter.[15]

It is not entirely clear to me what Malamud is suggesting in this passage. She may be saying that she and the group she invokes represent an assemblage of cool heads who are admirably dispassionate and therefore should prevail. Alternatively, she may be saying that she and the group she invokes represent an assemblage of social power that *must* be reckoned with because it *will* prevail. In either event, I take exception.

I agree that the social position from which Professor Malamud speaks—that of a white professional, an intellectual, a teacher at an elite university—is an important one insofar as molding and expressing American public opinion and developing American social policy are concerned. Further, she is no doubt correct in implying that there are many people with important influence in the polity who, like her, are not entirely certain what they think about affirmative action. I concur in the judgment that less ambivalent proponents of affirmative action should engage such persons in a respectful dialogue. Their decisions on affirmative action may ultimately make a difference.

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15. *Id.*

But I also believe that her approach wrongly demands a lion's share of the intellectual and political attention of affirmative action proponents, and wrongly advises them as to whose perspective should be presumed to fill the judgment seat. In my own view, a more pressing and difficult imperative for affirmative action advocates who conceive of their goal as racial justice is to look to those "on the bottom" for our most important potential partners. Doing so will require us to seek beyond close and comfortable circles of presently left-leaning and color-embracing friends; I suspect that this point was one of Professor Malamud's intended messages, and it is one well-taken. But such a move will also entail looking beyond Malamud's audience of distanced reasoners, with its hint of academia, its self-announced centrism, and its implicit claim to a status above the messy fray.

As an initial matter, I dispute her claim of distance from the fray. For instance, the debate over affirmative action is inextricably bound to questions about the system of standardized testing that defines merit within the educational system and within many parts of the labor market. No American academic can, with a straight face, claim to enjoy a safe distance from the current system of standardized testing and other academic examination, from this all-powerful sorting mechanism for "meritocracy" as it presently exists. It is precisely my impression that many beneficiaries of standardized tests and examination procedures believe in the value and objectivity of such tests with a conviction that is "constitutive" of their vocational and personal identities, a conviction "that is not amenable to the ordinary techniques of political and intellectual persuasion."[16] Failing to recognize that relative winners in the current so-called merit system have a thoroughly established stake in the rules that reward them for their combined effort and unearned privilege will hardly lead to a clear understanding of these issues.[17]

16. *Id.*

17. In recent years, assorted groups and individuals have begun to articulate a long-overdue critical analysis of the regnant "testocracy." *See, e.g.*, Lani Guinier & Susan Sturm, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996); Michael Selmi, *Testing for Equality: Merit, Efficiency and the Affirmative Action Debate*, 42 UCLA L. REV. 1251 (1995). But they have yet to develop a blueprint for alternative ways of discerning and enhancing relevant potential, achievement, and progress, all of which are important tasks.

I agree with Professor Malamud's concern that in the face of a demonstrable gap between the performance of blacks and whites on traditional merit criteria, it is

Second, I dispute the notion that racial justice can best be attained through a focus on reasoning with those in positions of social privilege and on persuading them to share that privilege more equitably through appeal to good arguments. Do not misunderstand me: I believe in the struggle to find and to widely communicate "good" arguments. I am an inveterate modernist in this respect.[18] But I also believe in the wisdom of Frederick Douglass's famous admonition that power concedes nothing without a struggle.[19] Therefore, I conclude that it behooves

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wrong "to treat the gap as normal or natural, as something to be expected." Malamud, *supra* note 1, at 955. Instead, I believe the persistent gap suggests two sorts of conclusions.

First, persistent racial disparities on standardized tests should warn us to distrust the tests themselves. In my view, such disparities indicate three things. (1) There are racial defects in the ability of such tests to accurately measure aptitude. These defects should be strictly and creatively analyzed. *See, e.g.*, Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121 (1993). (2) There are racial dangers in overrelying on such tests. These dangers should be anticipated and guarded against by responsible decisionmakers. *See* LAW SCHOOL ADMISSION COUNCIL, CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES (1996). (3) There are problems of general fairness and efficacy associated with such tests that can work to exclude many individuals of all races from opportunities they deserve. These problems hurt the larger community by constructing an educational system that regularly overlooks and excludes people with capacities that are crucial to problem-solving and to leadership, and therefore to the civic health and well-being of society as a whole. For a table displaying the striking correspondence between SAT scores and family income, see RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 99 (1996).

Second, however, persistent racial disparities indicate that many of those who do poorly on the tests are carrying a burden of educational deprivation and mis-education. Malamud is right that affirmative action proponents should not lose sight of this sorry fact in their efforts to challenge the effectiveness and legitimacy of current indicators of "merit." Malamud, *supra* note 1, at 955-56. Sorting out the salient lesson for each situation is no small challenge.

18. On the modernism point, see Harris, *supra* note 9, at 750-54.

19. Douglass made this remark in a speech delivered at an event commemorating the twenty-third anniversary of emancipation in the West Indies, several months after the Supreme Court issued its decision in *Dred Scott*. The surrounding passage is as follows:

> The whole history of the progress of human liberty shows that all concessions yet made to her august claims, have been born of earnest struggle. . . . If there is no struggle there is no progress. Those who profess to favor freedom and yet depreciate agitation, are men who want crops without plowing up the ground, they want rain without thunder and lightning. They want the ocean without the awful roar of its many waters.
>
> This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will. Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon

affirmative action proponents seeking racial justice to develop good arguments and then to discuss and debate them, not only in the halls of privilege and power but also and especially with strategic allies who share a stake in a more just, open, and life-sustaining system of education and employment.[20] Those most likely to be effective strategic allies for the democratization of education and for more equitable access to livelihood for those who have traditionally been shut out will be found among the disenfranchised. They will represent all races, despite the certainty of multi-class white resistance to racial change and fractures among and between communities of color. They will be divided and confused. They will have much to teach academics who venture forth to find them. They, like the academics, will have bodies and feelings in addition to heads and reasons, and although Malamud hints otherwise, neither they nor we academics should take our embodiment as a disability or a reason for recusal from the dialogue.

In my own work, I have been striving to find or to help create arenas where people who are most directly affected by policy decisions can come face-to-face with each other and can move to intervene in corporate and government policy as well. For instance, I am interested in learning from and with the Appalachian coal miners who seem to sympathetically litter academic and media conversations when the topic is race-conscious affirmative action, but who virtually disappear when the topic is labor law reform, cuts in subsidized housing, capital flight, or Pell grants. Similarly, I have been searching for venues where

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> them, and these will continue till they are resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress.

Frederick Douglass, *West India Emancipation*, *in* 2 LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE, 1850-1860, at 426, 437 (Philip S. Foner ed., 1950) (speech delivered at Canadaigua, New York, Aug. 4, 1857).

20. A recent effort that laudably addresses itself to an audience beyond academic and legal circles is CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997). This eloquent and moving book combines analytic and narrative argument, communicated from the heart and in the authors' "own" voices. It makes complex and nuanced points while remaining open and accessible to a wide readership. Of course, even a work of this kind will by definition be restricted in its reach to readers of books. For a call to critical race scholars to become more involved in change-oriented litigation and community lawyering, see Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997).

Appalachian factory workers can meet their new neighbors from Mexico and Guatemala, or collaborate with African American fellow citizens in nearby cities, for venues where these players can learn from each other about mixed histories of race and class, of cultural and economic injustice, and of strategies for resistance and survival.[21]

I hardly need to make explicit that these efforts are but a start, that they face significant obstacles and countercurrents, that a powerful cross-race, bottom-up coalition for education and employment equity is not on the immediate horizon. But I urge readers to think twice before they accept what I hear to be Professor Malamud's assumption—perhaps an assumption she herself would be willing to qualify—about what audiences, informants, scholars, and advocates should be holding uppermost in their minds as they frame and deliver their arguments,[22]

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21. Some traces of this work are discernable in Fran Ansley, *The Gulf of Mexico, the Academy, and Me*, 78 SOUNDINGS 68 (1995); Frances Lee Ansley, *North American Free Trade Agreement: The Public Debate*, 22 GA. J. INT'L & COMP. L. 329 (1992); Frances Lee Ansley, *U.S.-Mexico Free Trade from the Bottom: A Postcard from the Border*, 1 TEX. J. WOMEN & L. 193 (1992); Fran Ansley et al., *An Interview with Tom Lowry*, 1 SOUTHERN EXPOSURE, Winter 1974, at 137; Fran Ansley & Brenda Bell, *Davidson-Wilder 1932: Strikes in the Coal Camps*, 1 SOUTHERN EXPOSURE, Winter 1974, at 113; Fran Ansley & Brenda Bell, *Miners Insurrections/Convict Labor*, 1 SOUTHERN EXPOSURE, Winter 1974, at 144 (based, in part, on oral testimony of coal miners gathered by Jim Dombrowski in Tennessee in the 1930s); Fran Ansley & John Gaventa, *Researching for Democracy and Democratizing Research*, CHANGE, Jan.—Feb. 1997, at 46 (part of a symposium issue on "Higher Education and Rebuilding Civic Life"); Fran Ansley & Susan Williams, *Southern Women and Southern Borders on the Move: Tennessee Workers Explore the New International Division of Labor*, *in* CHAINS OF IRON, CHAINS OF GOLD: WOMEN AND THE SOUTHERN EXPERIENCE (Barbara Smith ed., forthcoming); Jim Sessions & Fran Ansley, *Singing Across Dark Spaces: The Union/Community Takeover of Pittston's Moss 3 Plant*, *in* Fighting Back in Appalachia: Traditions of Resistance & Change 195 (Stephen L. Fisher ed., 1992), *reprinted in* NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY (Staughton Lynd & Alice Lynd eds., rev. ed., 1995).

22. Legal scholars committed to social justice should explore non-academic venues for dialogue and argument, places where they can reach and be reached by a constituency that lacks the social privilege that characterizes most of our readership and too many of our classrooms. These might include op-ed articles in mainstream and community newspapers; interviews for local television and radio; speeches at conferences, rallies and demonstrations; writing and producing leaflets, brochures, slide shows, comic books, films, and videos. Such work might include teaching and curriculum development in educational programs put on by labor unions, legal services groups, churches or community organizations, or in K-12 classes, citizenship schools, or adult basic education settings such as literacy and high school equivalency programs, or courses in English for Speakers of a Second Language. Tenure and promotion committees should look for this type of democracy-building, anti-elitist scholarship in the tenure and promotion files of faculty

assemble their evidence, search for collaborators,[23] check their perspectives, and develop sources they deem to be trustworthy and well-informed. I urge all of us to think twice before we presume we know where the power to bring change actually resides.[24]

WHAT ARE THE RATIONALES?

My second criticism of Professor Malamud's remarks relates more directly to the substance of her argument, particularly the choice it poses between justice and diversity goals. Professor Malamud organizes her article around a discussion of two different rationales for affirmative action. One she refers to as the "economic inequality" rationale,[25] the "economic case,"[26] or sometimes as one based on "social justice."[27] The other she refers to as the "diversity" rationale.[28] She presents these two as a

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candidates and should reward excellence in these spheres as they do in narrower and more elite ones.

23. The search for non-academic collaborators can be a rewarding one. In recent years, scholars, teachers, community developers, and activists around the country have begun to create some space for cross-race and cross-class collaboration between institutions of higher education and their neighboring communities. This fledgling collaboration has attendant difficulties, however, given the often troubled histories of distrust and exploitation that too frequently exist between university-based experts and "locals." Nevertheless, some guidance as to the best practices has begun to emerge. *See, e.g.*, BUILDING COMMUNITY: SOCIAL SCIENCE IN ACTION (Philip Nyden et al. eds., 1997); Ken Reardon & Thomas P. Shields, *Here They Come Again! Campus/Community Partnerships in the 90s*, PLANNERS NETWORK, Mar. 1996, at 1.

24. Some sources that have recently reinforced my conviction that change toward greater democracy must (and can) come from below include: ACTION AND KNOWLEDGE: BREAKING THE MONOPOLY WITH PARTICIPATORY ACTION RESEARCH (Orlando Fals-Borda & Muhammad Anisur Rahman eds., 1991); HENRY J. FRUNDT, REFRESHING PAUSES: COCA-COLA AND HUMAN RIGHTS IN GUATEMALA (1987); MARY ANN HINSDALE ET AL., IT COMES FROM THE PEOPLE: COMMUNITY DEVELOPMENT AND LOCAL THEOLOGY (1995); MYLES HORTON, THE LONG HAUL (1990); MYLES HORTON & PAULO FREIRE, WE MAKE THE ROAD BY WALKING: CONVERSATIONS ON EDUCATION AND SOCIAL CHANGE (John Gaventa et al. eds., 1991); READY FROM WITHIN: SEPTIMA CLARK AND THE CIVIL RIGHTS MOVEMENT: A FIRST PERSON NARRATIVE (Cynthia Stokes Brown ed., 1990); VOICES OF CHANGE: PARTICIPATORY RESEARCH IN THE UNITED STATES AND CANADA (Peter Park et al. eds., 1993); "WE ARE ALL LEADERS": THE ALTERNATIVE UNIONISM OF THE EARLY 1930S (Staughton Lynd ed., 1996).

25. *See* Malamud, *supra* note 1, at 939-40, 966, 990.

26. *Id.* at 988.

27. *See id.* at 966.

28. *See id.* at 941 and *passim*. At several junctures, Malamud also refers to the diversity rationale as a "utility" argument. *See id.* at 953, 958, 996.

polarity, associating the social justice rationale with "redress"[29] for past and present wrongs in contrast to the diversity rationale, which, she says, "is not by its terms based on the existence of discrimination."[30] Further, she asserts that proponents of affirmative action have endorsed diversity and all but abandoned social justice as a rationale for affirmative action. ("Supporters of race-based affirmative action, particularly in the sphere of education, [claim] (implicitly or explicitly) that economic inequality is not, in fact, the reason for race-based affirmative action.... Instead they embrace *diversity* as affirmative action's central goal . . . ."[31]) She then goes on to argue that the socioeconomic justification for affirmative action is superior to the diversity justification or at least that diversity, standing alone, is an insufficient justification for affirmative action programs on their present scale.

Malamud's dichotomy between "social justice" and diversity is helpful in some ways, but in the final analysis, it overstates the case. First, the two rationales are not so clearly opposed as she suggests; in practice, the diversity rationale is often closely intertwined with concerns about socioeconomic inequality and social justice. Second, she poses these alternatives as if they alone occupy the field, when, in reality, a number of other important justifications often accompany affirmative action policy, either explicitly or implicitly. An analysis that ignores these justifications may well fail to account for other equally important aims and values at work in this area of law and social policy, including aims and values that might help us think about affirmative action and the black middle class.

Certainly Malamud is right to point out the relative weakness of any "pure" diversity rationale—its inability to explain why race should be, as it is at least in some institutions, the "only diversification goal,"[32] or even why it should be treated as demonstrably among the most important of such goals. Diversity as an abstract concept is vulnerable to a kind of emptiness; it can be drained of all content related to substantive justice, so Malamud is right to point out that affirmative action proponents

29. *See id.* at 940 ("redress"), and 941 ("remedying of past or present societal discrimination").
30. *Id.* at 953-54.
31. *Id.* at 939.
32. *Id.* at 960.

who embrace too easily or too exclusively a thin version of diversity will leave themselves on shaky ground.

In practice, however, the two approaches are not as diametrically opposed as Malamud would have it. Actual affirmative action programs around the country—despite the fact that they are almost always couched in terms of diversity—also show unmistakable evidence of concern over redress of past wrongs and reduction of present racial disparities.

While it is true that a more racially heterogeneous student body, teacher corps, or workforce benefits all members of the relevant institutions and even society at large, the benefit results largely *because* the history and continued legacy and regular renewal of injustice makes race such a salient category in America. Accordingly, Professor Malamud may be setting up something of a strawman in the way she frames her argument.

On rare occasions, someone does invoke a "sole" or "pure" diversity rationale divorced from any roots in past or present injustice. For instance, once or twice a colleague has pointed out to me that he perceives a contradiction in my alleged devotion to diversity because I do not expend great energy trying to recruit a rich and varied assortment of conservative students or scholars into legal academia. I have conceded readily enough the lack of effort, but I have reminded such critics that I also refrain from expending great (or any) effort to achieve diverse faculty eye color or shoe size, or to seek out speakers of Hungarian for our administrative staff, or to expand the number of different birthdays represented by the members of the faculty or student body, or to recruit someone in an irreversible coma to teach bankruptcy next year.

Of course, diversity of political views on a law faculty or in a law school student body is more important than shoe size or speaking Hungarian at the University of Tennessee; thus, it merits some faculty attention and support. But I do not believe that recruiting more faculty with a sharper or more idiosyncratic edge to their conservatism should be accorded anything remotely like the priority we should give to desegregating professional education in this country. My conviction on this score is, of course, rooted in my sense of the country's social history and present needs. No hiring or admissions choice can be coherently or honestly defended or resolved with reference to a purely formal diversity ideal because gatekeepers with finite resources will always be choosing among various kinds of diversity.

To the extent that proponents of affirmative action or those responsible for administering affirmative action programs have allowed themselves to rely on easy diversity formalism, they have done a disservice, and Professor Malamud is right to point out the inadequacy of such approaches. Nevertheless, the bipolar framework that she suggests underestimates the variety and strength of the values bundled into the current diversity movement.

Actual diversity *practice* in educational institutions and workplaces around the country suggests that most practitioners pay more attention to race and other categories associated with strong histories of exclusion and inequality than they do to other sorts of categories, despite the controversy that color-conscious programs tend to produce. The marks of an understanding that race matters more than most other kinds of diversity are manifest. In my view, this is precisely as it should be: widespread racial disparities in wealth and power and access to the legal system should be both a motivation for and a target of affirmative action programs. Racial diversity should be one of the most important of the several kinds of diversity that we work to achieve. Thus, my point is not to criticize, but simply to highlight the undeniable priority accorded to race in most affirmative action programs, however ill-designed and weakly defended that priority may be. This recurrent priority suggests that "pure diversity" divorced from social justice is not in fact the salient operative category.

I think that a tacit understanding is pervasive among those of all stripes who advocate both weak and strong diversity programs. No matter how saccharin or happy-faced the diversity pronouncements, no matter how cloying the rainbow tunes, if you look at diversity programs in action, it is perfectly clear that their proponents believe that some kinds of diversity are more important than others and that, like it or not, race is at or near the top of the list.

I do not mean to suggest that most institutions publicly evidence this understanding or volunteer to defend it. For a number of reasons—frequently including, as Malamud points out, an understandable desire to stay safely within the confines of Supreme Court doctrine[33]—many institutions studiously avoid

33. *See id.* at 946-47.

any overt discussion of taking race any more seriously than other categories of difference.[34] But I believe that many existing affirmative action programs give race a priority because those who shape these programs have a strong sense that past and present socioeconomic discrimination is real, that this past and present discrimination makes racial diversity particularly salient, and that the situation calls for action. To that extent, I believe it is inaccurate to describe current practice as having abandoned discrimination-related goals for diversity ones. Of course, affirmative action practitioners can and do differ sharply about the appropriate response to past and present discrimination. Some such practitioners are probably more accurately described as seeking peace than seeking justice. Nevertheless, existing practices indicate that the poles of Professor Malamud's suggested polarity are not so distinct.

Further, race is sometimes given a priority in such programs for reasons that are not adequately captured by either pole of Malamud's proffered choice. Framing the contest in terms of diversity versus socioeconomic equality fails to help us unpack and assess the policies and value choices that are actually at work in many affirmative action initiatives.

In the section that follows, I discuss some of the substantive aims and values that have animated the theory and practice of existing affirmative action programs. I take up Professor Malamud's suggestion that "it is better to bring the social justice norms underlying the debate to the surface,"[35] but I add a second goal of surfacing other norms that may be at work as well. Not all defenders or practitioners of affirmative action endorse all of the following norms and values, as will no doubt be apparent. But all of these values are at least often enough at work that they merit examination.

1. *Compensating for Past Wrongs.* Whether tacitly or openly, this value is often at work in affirmative action practice. Some participants in the conversation heartily endorse this value.[36]

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34. *See generally* LAW SCHOOL ADMISSION COUNCIL, *supra* note 6.

35. Malamud, *supra* note 1, at 964.

36. *See, e.g.*, LAWRENCE & MATSUDA, *supra* note 20, at 231-44. In a similarly history-conscious vein, T. Alexander Aleinikoff writes:

> When a city council attempts to overcome some of its city's history, to move toward erasing the gross disparity in grant awards by directing funds towards a group singled out and subordinated because of its race for almost four hundred years, to provide the means by which African-

Others deny that it is an appropriate or helpful priority.[37] The history of the United States certainly makes the compensation rationale a hard one to escape entirely, even for those who are hostile to it. We are, after all, a nation born of violent colonization, one where the great bulk of the land was expropriated by force from indigenous peoples,[38] where chattel slavery once was widespread and critical to the national economy,[39] where legally tolerated (sometimes even legally enforced) racial inequality has often been the norm in such basic areas of life as education,[40] shelter,[41] transportation,[42] citizenship,[43] immigration,[44] law enforcement,[45] literacy,[46] the franchise,[47] employment,[48] and

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> Americans can begin the economic development promised but denied during Reconstruction, to say to blacks that the city recognizes the harms inflicted on blacks as blacks by white supremacy and white economic and political power, how should race discrimination law respond?

T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1075 (1991).

37. *See, e.g.*, DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY (1995); Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993 (1993).

38. *See, e.g.*, Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989); Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986).

39. *See, e.g.*, CHARLES W. BERGQUIST, LABOR AND THE COURSE OF AMERICAN DEMOCRACY: U.S. HISTORY IN LATIN AMERICAN PERSPECTIVE (1996).

40. *See, e.g.*, Brown v. Board of Educ., 349 U.S. 294 (1955); RICHARD KLUGER, SIMPLE JUSTICE (1976).

41. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948); Buchanon v. Warley, 245 U.S. 60 (1917).

42. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896). For news of a contemporary challenge to the racialized character of the transportation system in today's Los Angeles, see, ERIC MANN, A NEW VISION FOR URBAN TRANSPORTATION: THE BUS RIDERS UNION MAKES HISTORY AT THE INTERSECTION OF MASS TRANSIT, CIVIL RIGHTS, AND THE ENVIRONMENT (1996) (available from the Labor/Community Strategy Center, Los Angeles); David Bloom, *MTA Endorses Settlement in Civil Rights Suit: Deal Would Aid Transit Dependent*, L.A. DAILY NEWS, Sept. 26, 1996, at N4.

43. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1856); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

44. *See, e.g.*, Law of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943) (Chinese Exclusion Act); Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952) (Japanese Exclusion Act).

45. *See, e.g.*, Robert J. Cottroll, *Outlawing Outcasts: Comparative Perspectives on the Differing Functions of the Criminal Law of Slavery in the Americas*, 18 CARDOZO L. REV. 717 (1996). *See generally* Symposium, *Criminal Law, Criminal Justice, and Race*, 67 TUL. L. REV. 1725 (1993).

46. *See, e.g.*, KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE

otherwise.[49] These aspects of our past are often repressed or elided. Nevertheless, the memory of a legally and extra-legally racialized past endures in many instances, and its memory informs and motivates affirmative action practice.[50]

The problem with the often tacit compensatory rationale at work in affirmative action practice is not its absence, but its lack of self-confidence whenever it ventures beyond the bounds of an individualist approach to remediation. Affirmative action doctrine has for the most part been unable to overcome the strong individualist bent of our legal culture and, therefore, has been unable to provide frank, thoughtful, and enthusiastic support for group remedies to compensate for the infliction of group wrongs.[51]

Although racial caste systems obviously have a huge effect on individuals, they also work in profoundly important ways upon and through racial groups. Wrongs inflicted on persons of color have a way of spilling over from one individual to another, as stereotyped assumptions about all group members work their way into majority decisions and judgments. Moreover, just as the effects of racial deprivation and racial privilege are transmitted within families across generations, they are also amplified within the boundaries of racialized neighborhoods. For instance, children born into racial minority groups experience the cumulative effects of macro- and micro-level discrimination[52] before they

ANTE-BELLUM SOUTH 208 (1975).

47. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM (1995); LEON F. LITWACK, NORTH OF SLAVERY 74-79 (1961).

48. *See, e.g.*, HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM (1977); Jerome McCristal Culp, Jr., *Small Numbers, Big Problems, Black Men, and the Supreme Court: A Reform Program for Title VII After* Hicks, 23 CAP. U. L. REV. 241 (1994).

49. *See generally* DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW (2d ed., 1980); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978); ARNOLD KRUPAT, ETHNOCRITICISM: ETHNOGRAPHY, HISTORY, LITERATURE (1992).

50. This memory may, of course, be conscious or repressed, and may produce the acceptance or denial of responsibility for change. *See* STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY 156-175 (1995).

51. I do not mean to imply that some proponents of affirmative action have not tried—eloquently—to highlight the group aspect of both the original wrong and the rightful remedy. *See, e.g.*, Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990); *see also* Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984).

52. Professor Davis has written tellingly about the concept of racial "micro-

are even in a position to have an interaction likely to fit into any category of easily cognizable individual legal harm. Concomitantly, children born (as I was) into whiteness experience the cumulative effect of racial privilege, often in ways they are not even in a position to see.[53]

To be sure, in a narrow line of cases, racial wrongs have been coherently and effectively traced and attributed to individual perpetrators by individual victims. By identifying the perpetrators, victims can in some instances convincingly demonstrate their resulting entitlement to individual compensation for the resulting harm.[54] But this approach cannot even reveal, much

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aggression." *See* Peggy C. Davis, *Law as Microagression*, 98 YALE L.J. 1559 (1989).

53. *See* PEGGY MCINTOSH, WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES THROUGH WORK IN WOMEN'S STUDIES (Wellesley College Center for Research on Women Working Paper No. 189, 1988); Barbara J. Flagg, *"Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993). For a review of some recent literature on the problem of unconscious discriminatory attitudes and beliefs in America, see David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 946-958 (1996).

54. From my law school days in the mid-1970s, I recall a series of labor law and discrimination cases where courts ordered awards to individuals who had been personally turned away by hiring officers during an era of explicit exclusion. These indisputable victims were awarded constructive seniority that dated back to the time of their wrongful exclusion, an award whose goal was to restore them to the place they would have been "but for" the wrongful discrimination. These plaintiffs had been individually wronged in an interaction where racial exclusion was overt, the corporate perpetrator was still alive and well and doing business in the victim's hometown, and it was quite feasible and neat to make the plaintiffs individually whole, at least on some important parameters, through an award of back pay and constructive seniority.

Similarly, we saw cases where previously separate seniority lists for black and white jobs were ordered by courts to be dovetailed, thus allowing black employees to use their time in formerly black positions to bid successfully on jobs that had previously been reserved for whites only. Since they had been working for the same employer all along, their seniority did not even have to be "constructed." It had only to be integrated with the white lists. The white incumbent employees may not have been happy, since they were being subjected to competition not faced before, but the individual wrong and the individual benefit were satisfyingly linked.

Today, of course, it is increasingly difficult to find cases where this sort of individual moment of illegitimate exclusion can be proven and pinpointed in time, and where institutional structures exist that could support make-whole remedies. I question the present efficacy of the remedies granted to the individual plaintiffs in these old lawsuits. I now wonder what happened to the factories in these cases: Did they institute standardized testing to determine who was worthy of promotion? Did they spin off the dirty jobs to sub-contractors, thus splitting the seniority lists once more? Does seniority even continue to function as a criterion if a union no longer represents their workforce? Did they close down altogether? Did they start hiring their low-skill workers through a temporary agency? Did they automate many

less remedy, most of the practices that actually carry forward the existing structures and distributions of racial caste in our society.

If the legal system were to take a more conscious and attentive account of the group nature of many of the harms of racial caste, then it could more coherently and confidently insist upon the appropriateness of compensatory affirmative action remedies that promise to effectively compensate minority groups. Of course, such an approach would not rule out affirmative action remedies aimed at compensating those individual racial wrongs that could be documented and proven. At least some persons who have suffered personally targeted racial discrimination could still, through individual remedies, be given opportunities that would likely have been theirs but for racial discrimination.

However, the approach I am suggesting would do more. It might, for instance, seek out and train persons with a strong interest in providing services to communities of color that are presently underserved as a result of past and present racial conditions. Or it might make special efforts to attract and nurture researchers, writers, and artists dedicated to anti-racist scholarly and creative production.[55] Or it might recruit persons with a demonstrated capacity to mobilize various kinds of efforts directed against racial caste structures that carry forward and reproduce the effects of past racial wrongs. The rationale for such remedies would still be justice-related, as Professor Malamud counsels it should be, but the rationale would put primary emphasis on compensating the wronged community, rather than solely searching for compensation-worthy individuals.[56] Single

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functions and then lay off half the workforce, keeping mostly those who were trained to operate computers? Did they move the labor-intensive product lines off shore?

55. *See* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705. *But see* Richard A. Posner, *Comment: Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157.

56. Professor Malamud does not take up this question in a focused way, but I suspect she would be concerned about the impact on individuals of an affirmative action remedy that would in some sense burden its individual recipients with a responsibility to carry out an important part of the scheme of redress. I note, for instance, her worry over the reinforcement of racially identifiable service-related occupational niches, *see* Malamud *supra* note 1, at 962-63, her characterization of the anti-academic pull of racial solidarity upon African American students as a "temptation," *see id.* at 980, her view that "[a]ll things being equal, members of minority groups would far prefer to be hired for their general abilities, rather than for their particular ability to be a member of a minority group," *id.* at 964. The tension reflected in these concerns is, of course, always potentially present. Groupness poses a threat that may be finally irreducible. So does isolation.

recipients of such redistributive benefits, for instance, might be persons of color or they might be white. They might be poor or they might be affluent. They might have encountered and been able to document discrete instances of overt discrimination that inflicted demonstrable socioeconomic harm upon them as individuals, or they might not. While their status as victims of socioeconomic or other racial wrongs would be relevant, its relevance would reside in important part in the ways that status might or might not strengthen their effectiveness for the compensatory task at hand.[57]

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57. I am certain that some people would argue that an important part of remedying past racial wrongs in education would be simply to "let racial minorities be." Their instructions to affirmative action practitioners might go something like this: "Let your admittees be normal! Let them be shy. Let them be apolitical. Let them get rich on Wall Street if they can. Let them not care about racism if they don't want to. Respect their own path whatever that may be. And certainly don't use minority students to gratify your own instrumentalist urges." Some argue that this approach is a good one not only because it eliminates coercion of the individuals involved, but also because it actually advances utilitarian goals as well: the simple presence of individuals of color among the educated or otherwise privileged and competent will have a tonic effect upon everyone else's stereotypes and thereby redound to the benefit of other people of color and society as a whole.

I am certainly open to these arguments. No matter what the criteria for admission to law school, for instance, students, once admitted, will and must be allowed to grow and change. And as Professor Malamud cogently observes, institutions that hire people of color should avoid silently tacking onto each such person's job description or performance goals an unexamined and often uncompensated "additional job of specializing in white-minority relations." Malamud, *supra* note 1, at 962. But the notion that we can count upon substantial racial justice or even a significant reduction in prejudice to trickle down or radiate outward from the accomplishments of individuals of color is an insult to multiple generations of extraordinary non-white achievers in our country's past. Further, the idea that affirmative action is or should be nothing more than an engine of individual upward mobility into the existing system is a short-sighted degradation of more far-reaching goals that helped give birth to affirmative action in the first place.

Schools and organizations working to desegregate must respect individual aspirations and should avoid institutionalizing new orthodoxies of career path or belief to be imposed upon students or employees of color. But a straightforward and direct effort aimed at healing and restoring injured communities is a more ethically defensible and practically effective approach to current inequities and past wrongs than one that aims only at changing the colors of the faces in existing structures in the hope that racial justice will somehow arise as a natural by-product of such an effort.

Further, the argument that race-conscious affirmative action programs can meaningfully respond to the realities that brought them into being if they simply assure a more diverse blend of colors and ethnicities and then "let them be" is naive. Existing institutions are not neutral. Teacher populations, advising systems, and management teams; curricula and reading lists; labor markets and referral networks; patterns of delivery of professional and other services; and access to

Whatever the strength or weakness of justice rationales in affirmative action doctrine and practice, and whatever the degree of explicitness about the role they play, there are a number of other justifications at work as well. The following sections briefly highlight some of these other themes and thereby complicate the polarity offered by Professor Malamud in her article.

2. *Adjusting to Counteract Present Bias.* Many times affirmative action programs are justified as a corrective for the continued bias that can be demonstrated almost at will in most domestic markets by any reasonably capable and well-funded empiricist interested in the task.[58] It is true that there is widespread denial among white people about the continued prevalence of racial bias. I also believe that, paradoxically, there is widespread recognition that racial bias continues. Both the forces of denial and the forces of uncomfortable certainty are strong.[59] Both make themselves felt in affirmative action policy and discourse.

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capital are all thoroughly affected by race and tend to carry forward existing racial distributions and ways of doing business. People of color admitted or hired into schools and workplaces will not be racially "left alone" in any case. Nor will whites.

58. A widely recognized article describing this phenomenon in the retail automobile market is Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991). *See also* Oppenheimer, *supra* note 53, at 958-996.

59. Recently, an article appeared in my hometown newspaper displaying a particularly intense eruption of "recognition-denial syndrome":

> Angry calls inundated a Knoxville television station and restaurant Thursday after a racial slur was uttered during a live broadcast at the eatery.
>
> "Alive at Five" hosts . . . apologized twice on the air after the slur . . . .
>
> [The] co-owner of the restaurant . . . also apologized repeatedly for the comment made on the air by his mother, . . . who is white. The racial epithet was made by the . . . woman to [the newscaster], who is white, during a discussion about food preparations.
>
> "I'm embarrassed and shocked," [the co-owner] said. "We don't talk like that. I extend my sincerest apologies to anybody who heard it or heard of it because it is offensive."

Don Jacobs, *Racial Slur During TV Broadcast Stirs Calls*, KNOXVILLE NEWS-SENTINEL, Mar. 21, 1997, at A3.

3. *Equitably Distributing Resources Vital to Survival and Participation.* In an earlier version of Professor Malamud's article she set up the competing polar rationales for affirmative action as "compensation" versus "diversity." In her current usage, I take it that she means to include in the "social justice" or "socioeconomic inequality" rationale both compensatory and presently redistributive justifications.[60] I agree that wrongs and disparities of both past and present are important justifications for affirmative action. I separate them here because in the current debate over the legitimacy of affirmative action, I have found it advances clarity to give independent attention to both compensatory and egalitarian rationales, although in practice they are often closely intertwined.

Some proponents and practitioners of affirmative action adhere to a strong version of egalitarianism. They are interested in equality of conditions and actual life chances, not simply equality of abstract or nominal opportunity. For them, relevant inquiries do not end with compensation for past wrongs nor are they resolved by the adoption of facially neutral policies that reproduce caste relations. On this view, inequalities in present distribution have fairness implications in their own right, and affirmative action is one way to alter these inequalities in a progressive direction. The egalitarian impulse in affirmative action is, of course, hardly supported by current Supreme Court doctrine, which seldom sees distributional inequalities of race or class as intrinsically problematic.[61] Further, such an approach exists only in serious tension with familiar talk of affirmative action as a "temporary" evil, and with the frequent usages that suggest affirmative action to be a sort of one-time, dangerous, regrettably necessary, exceptional adjustment to a system that otherwise functions in a healthy way. But much of the actual support for affirmative action flows from and is refreshed by egalitarian traditions that see color-conscious programs as a welcome aid to greater fairness now and in most imaginable futures. These traditions seek a long-term commitment to distributive equity, not simply a one-time, ostensibly curative

60. *See, e.g.,* Malamud, *supra* note 1, at 940 ("past and present race-based economic inequality"), at 941 ("present and past 'societal discrimination'"), at 997 ("remediation of persistent race-based economic inequalities").

61. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). *But see,* Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547 (1990).

spasm after a discrete recognized wrong.[62] These egalitarian traditions call for education and employment to be more widely accessible irrespective of the reasons for present disparities. These traditions stress the importance of access to resources like shelter, food, employment, education, transportation, medical care, and information, both because of the importance of these resources for individual survival and well-being, and because of their impact on people's ability to participate meaningfully in civic and political life.

4. *Preventing Social Disintegration and Strife*. There are two strands of this affirmative action value: one utopian and the other authoritarian. The utopian strand sees affirmative action as one tool to help achieve a society where people feel themselves to be members of a more or less cohesive, mutual community. In such a community the social distance between people of different races, classes, regions, genders, religions, ethnicities, sexual orientations, languages, tax brackets, ages, and so on is relatively small, and the possibilities for empathy, cooperation, and common purpose are, therefore, relatively great. Aside from any unfairness to individuals that is associated with large social disparities in wealth and power, this utopian strand emphasizes the harm to society as a whole that results from allowing social divisions to grow too large, and it stresses the benefits that could flow to everyone from decisions and actions that diminish gross inequalities. At least for some, these kinds of arguments take on added urgency in the face of growing disparities in wealth and income in the United States.[63]

A second strand of the social stability value is more authoritarian than utopian. It is less concerned with the characteristics of and requirements for a good society and more concerned with preserving the existing order, whatever it might be. Fears about

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62. Note, by way of contrast, that one seldom hears the progressive income tax described as a temporary evil that can and should be abandoned after one corrective round. Although one could hardly describe our tax system as highly redistributive, the income tax does contain some basically progressive structures. In this context, we seem to have little trouble recognizing that power and resources tend to reconcentrate themselves and that they will require regular, on-going adjustments and redistributions against the "natural" drift that would occur without them.

63. *See* SHELDON DANZIGER & PETER GOTTSCHALK, UNEVEN TIDES: RISING INEQUALITY IN AMERICA (1993); EDWARD N. WOLFF, TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA (1995); U.S. CENSUS BUREAU, A BRIEF LOOK AT POSTWAR U.S. INCOME INEQUALITY (1996).

possible black and brown rebellion have been a much more important motivating factor in the widespread adoption of affirmative action plans than many of us are comfortable remembering. Race is given the importance it receives as an affirmative action category at least in part because racial tension threatens such serious disruption. For instance, I once heard Professor Derrick Bell tell the story of how he came to take a tenure-track position at Harvard Law School. As I remember, he reported that decades ago, despite having had a successful experience as a visiting teacher at Harvard, several inquiries he made to the school about the possibility of gaining a permanent position there were politely rebuffed. That is, they were politely rebuffed until the assassination of Martin Luther King, Jr. Within days of that event, he received a call from Harvard and was urged to accept an offer to join the faculty.[64] Professor Bell goes on to voice his firm conviction that political pressure from students of color was a crucial element in his eventual winning of tenure, that it affected official decisions at every key point.[65] Professor Bell offered this story at a time of controversy over affirmative action in hiring. I suppose you could say it was his own contribution to what Professor Malamud and some others call "the radical critique of merit."[66]

At my own law school, I once had an opportunity to witness an appeal to the authoritarian strand of the social stability value. One year, I served on our Admissions Committee. Two student

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64. Some might say I am being too harsh or cynical in reading Harvard's offer as an instance of the authoritarian strain, a step taken primarily with the aim of maintaining order. I have no knowledge of the conversations that preceded the offer. I do vividly recall that King's death made many white people and white institutions highly anxious about the possibility that social unrest would be uncontainable. On the other hand, his assassination genuinely saddened, alarmed, and outraged many white people and white institutions as well, and the energy released by the event spurred important reforms at myriad levels. His death changed the lives of many individuals, both black and white.

65. Professor Derrick Bell, Jr., Remarks to Law Student Rally Protesting the Lethargic Practice of Minority Faculty Hiring at Harvard Law School, Cambridge, Mass. (Fall 1987). Bell has since left Harvard in protest over its continuing failure to hire a single black woman to the faculty.

66. *See* Malamud, *supra* note 1, at 951. Malamud attributes her usage to Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995). *See* Malamud, *supra* note 1, at 951 n.37. I should note here that I count myself a radical critic of merit as it is currently constructed by most institutions of higher learning. However, I do not recognize much of my analysis in the characterizations of Farber and Sherry nor in the descriptions of Professor Malamud. (For Malamud's description, see *supra* note 1, at 951-64.)

members were strongly opposed to affirmative action and viewed their service on the committee as importantly dedicated to fighting what they saw as a pernicious institutional practice. In one memorable conversation about the topic, a faculty colleague of mine spiritedly explained to these two that they simply lacked the perspective to appreciate the wisdom of our efforts, and that the program had been adopted as a salutary move in the important national project of preventing black revolution.

These stories are relevant for all of the beneficiaries of affirmative action, a category which I take to encompass at least all of us in legal education, including young white males and white women like myself. These stories should remind us of the debt we owe to the civil rights movement in all its restraint and dignity and in all its ragged edges—to the praying clergy, singing grandmothers, and fiery youth, to the brilliant strategists (sung and unsung, male and female, high and low), to the ruly and unruly brothers and sisters in the streets and in the jails, all of whom raised the stakes in ways that could not be ignored.

Without them, for instance, we would not be witnessing the exciting nascence of new and challenging legal scholarship about matters of race, some of which is represented here in this symposium. Without them, white faculty and white students in colleges and universities and professional schools around the country would not be presented with the rich if underused opportunities for cross-race relationships and cross-race learning that we now enjoy. Without them, substantially fewer attorneys of color would now be representing clients or participating in the solution of community problems, substantially fewer judges of color would be deciding cases or educating their fellow jurists, substantially fewer students at predominantly white colleges would ever have the opportunity to study under a professor of color, and substantially fewer physicians of color would be treating patients, making hospital policy, or consulting on research protocols.[67] As we enjoy these benefits, we might remind ourselves of the agitation and unrest that made them possible, the signs that an impulse toward containment of social conflict is one of the roots of affirmative action.[68]

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67. On the medical profession, see Miriam Komaromy et al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 NEW ENG. J. MED. 1305 (1996).

68. *See* LAWRENCE & MATSUDA, *supra* note 20, at 11-32.

5. *Achieving Institutional Goals.* Practitioners and promoters of affirmative action often justify these programs by showing their value for the achievement of other institutional goals. For instance, businesses often see affirmative action as helping them attract a cosmopolitan customer base; police departments may see affirmative action as helping them fight crime and improve the image of the department in urban areas; and undergraduate institutions see affirmative action as helping them to educate white college students to work more competently in multicultural environments. In legal education, of course, we are particularly concerned with our job of educating future lawyers, constructing the future bar, and producing legal scholarship. All of these aims depend, in part, on our achieving a diverse faculty and student body.

As Malamud points out, this justification has a disquietingly instrumental flavor in some instances.[69] This disquiet should suggest caution to those concerned about racial justice. On the other hand, the benefits of diversity for institutions can be substantial, and reminders of these benefits can sometimes be an important counterweight to the notion that affirmative action is a zero sum handout to people of color at the expense of whites. Setting out to build race-conscious affirmative action programs oriented solely or primarily to the needs and interests of whites is surely indefensible.[70] But it would also be myopic to fail to recognize the ways in which race-conscious affirmative action programs well-designed to meet the needs of communities of color could also provide substantial and important benefits to white people and to historically white institutions.[71]

6. *Bestowing Charity upon the Non-threatening Poor.* Although seldom explicitly articulated in the official descriptions of

69. *See, e.g.*, Malamud, *supra* note 1, at 953 ("Individuals have no entitlements, they have only uses.").

70. Nonetheless, some have said that the dominance of white interests in such contexts is inevitable. *See, e.g.*, Derrick A. Bell, Jr., *The Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

71. The statement in the text is only part of the story, of course. Benefits of well-built and well-administered race-conscious affirmative action programs flow among and between groups of color as well, just as benefits of well-built and well-administered gender-conscious affirmative action programs flow to men as well as to women. *See, e.g.*, GABRIEL CHIN ET AL., BEYOND SELF-INTEREST: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE, A POLICY ANALYSIS OF AFFIRMATIVE ACTION 2 (no date) *available in* http://www.sscnet.ucla.edu/aasc/policy/txtonly/index.html (visited Aug. 11, 1997); Yamamoto, *supra* note 20.

affirmative action and its rationales, some of the discourse surrounding affirmative action seems to presume that charitable help for the humblest is the aim. This value fuels reactions against the legendary child of the black neurosurgeon. It surfaces, too, when voices are raised against academic support programs that enable black students to improve their class standing in ways that distribute them more evenly across the student body rather than simply keeping them in school, albeit clinging heavily at the bottom of the class. Some people feel comfortable with programs that stress inclusion of the less fortunate because that emphasis resonates with charitable values, but they are uncomfortable with programs that seek to advance students of color into the ranks of white students at a level that produces new competition for resources that are perceived as increasingly scarce.

This charity value resonates with many of the proposals for affirmative action programs that are designed to benefit the victims of "socioeconomic disadvantage." Holders of this value are disturbed by hard-to-refute demonstrations that affirmative action often works for the benefit of the "elite" within each category of affirmative action recipients, rather than for the benefit of those members of the category who have the greatest need. Although some calls for class-based affirmative action programs appeal to compensatory or redistributive goals, I believe that most such calls have invoked the charitable impulse.[72]

It is probably to be expected that in this country charity will outweigh entitlement when matters of class are involved. The U.S. legal system is notoriously anemic with regard to economic, social, and cultural rights,[73] and there is precious little law suggesting that the disadvantages of class should be viewed as compensable or avoidable wrongs rather than as personal

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72. People involved with public and private American poverty programs have not always been motivated or informed by notions of charity. Sometimes it is quite the contrary. *See, e.g.*, MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973 (1993). Nevertheless, when Professor Malamud observes that some arguments for class-based affirmative action presume that affirmative action is an "anti-poverty program" rather than a compensatory one I think she puts her finger on evidence of the charity value at work in affirmative action discourse. *See* Malamud, *supra* note 1, at 948.

73. For instance, we have never ratified the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1976, 993 U.N.T.S. 3. *See* Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HASTINGS L. J. 79 (1992).

misfortunes or even salutary, character-building challenges to individual mettle. Further, the labor movement and other movements representing the poor are in such a weak position at present that they trigger little apprehension that class-based affirmative action might "get out of hand." Although concern for inclusion and uplift of the poor and victimized is in some instances relevant for affirmative action, advocates should be wary of its influence in affirmative action debates for several reasons. First, although paternalistic measures are in some contexts appropriate, a signature danger of paternalism is that it will recognize in the objects of its bounty their need for support, but will fail to perceive and respect their capacities, talents, and rights. This danger may pose a particular threat in the context of efforts to desegregate schools and skilled jobs, because that context is one where embedded white ideas about black intellectual inferiority have regularly surfaced and have played a potent and destructive part in confounding change.

Giving up strong reliance on the charitable impulse as a justification for affirmative action may not constitute much of a sacrifice in any event. As an openly espoused value that might influence the allocation of substantial resources, public charity in today's political climate appears to be approaching the vanishing point.

Further, real suspicion is in order when those who say they want to reform affirmative action because it unfairly disadvantages the poor and downtrodden are the same people who are busy working to achieve and justify the destruction of the welfare state.

The foregoing list of aims and values is undoubtedly incomplete. I offer it not to exhaust the field, but to suggest a more complex set of choices that lie behind the development of affirmative action programs than Malamud's proposed polarity of "economic inequality" versus "diversity" would imply. Each of these values may have some relevance for her proposal regarding affirmative action for middle-class African Americans. In another context, it might be valuable to consider each in turn and its implications for her thesis, but for now I leave that to readers, in order to turn to a third and final criticism of Professor Malamud's analysis.

WHO SHOULD HAVE ACCESS TO EDUCATION AND LIVELIHOOD?

Embedded in Professor Malamud's recommendation is an uncontested norm of class hierarchy in higher education (and perhaps in our highly segmented labor market as well). It may be that Malamud is simply accepting that hierarchy as a given for purposes of her argument here, aware that it may merit criticism on another day or in another context, and forgoing comment until that time. But before affirmative action proponents uncritically embrace Malamud's argument, I believe they should examine the assumptions that accompany it.

Malamud begins her essay by arguing that economic inequality offers a justification for affirmative action that is superior to that of diversity.[74] It is no doubt obvious by now that I too embrace the overcoming of economic inequality as a value, and I too believe it remains a highly relevant indicator for assessing both race-conscious and ostensibly race-blind distributions in our society. I also agree that a compensatory rationale supports the continued extension of the benefits of affirmative action to middle-class black people who, whatever the class position of their parents, have suffered racial harms. Some concept of just desert and some reminder of past and enduring wrongs are moral and political necessities for a right defense of affirmative action.

What disturbs me about Professor Malamud's move is not what it says. In fact, some of her argument offers an excellent corrective to recent attacks on race-conscious affirmative action. Her analysis points, for instance, to an important problem with the rhetoric of those calling for class-based affirmative action. Many of these critics have deplored what they characterize as the unfairness of extending privileges to relatively well-off black applicants at the expense of the less fortunate,[75] the latter often represented in these arguments by iconographic figures such as

74. *See* Malamud, *supra* note 1, at 939-40.

75. For instance, one well-known critic of race-based affirmative action remarked:

> I think we need social policies that are committed to two goals: the educational and economic development of disadvantaged people, regardless of race, and the eradication from our society . . . of racial, ethnic, or gender discrimination. Preferences will not deliver us to either of these goals, since they tend to benefit those who are not disadvantaged—middle-class white women and middle-class blacks— and attack one form of discrimination with another.

SHELBY STEELE, THE CONTENT OF OUR CHARACTER 124 (1990).

the Appalachian coal miner's child, or an inner-city or barrio youth.[76] Malamud points out with admirable clarity the comparison that is at work in such calls. Middle-class blacks are compared with poor people of color or with poor whites. In this portrayal, middle-class blacks occupy the pole of relative privilege, at least in socioeconomic terms. The implication is that they are relatively less worthy of reward or help, and that any privileges extended to them represent a moral failing of affirmative action.[77] Malamud argues that this contrast is the wrong one to be making, that "the relevant economic comparison is between the black middle class and the white middle class, rather than between the black middle class and either the white or the black poor."[78] Malamud's argument brings the white middle class back into the picture and forces us to compare its position and privilege with that of its counterpart. In this second representation, of course, the black middle class occupies the pole of relative deprivation.

It is a nice move. At the moment of reading this passage, I had the feeling of a curtain being drawn back, the truth of the matter being revealed. It *is* unfair to cast middle-class blacks as plunderers of those beneath them when their class position is much more precarious and less privileged than their occupational status or annual income might suggest to one familiar with class patterns among white Americans. And it is unfair for relatively

76. When Clarence Thomas' appointment to the Supreme Court was in doubt, one of his supporters, Senator Charles Robb, reported that "Judge Thomas has told me that he supports certain types of affirmative action but that he doesn't believe that his own son deserves preferential treatment over at a poor white child from Appalachia. I find his views on the need to move to class-based remedies to help the disadvantaged of all races intriguing and thoughtful." 137 CONG. REC. S14,669-01, S14,688 (remarks of Sen. Charles S. Robb during Senate debate on nomination of Judge Thomas).

Thomas himself, during his confirmation hearings, spoke approvingly about the program that got him into Yale, pointing out that "[the program was aimed at] socioeconomic disadvantage . . . the kid could be a white kid from Appalachia, could be a Cajun from Louisiana, or could be a black kid or a Hispanic kid from the inner cities or from the barrios." *Senate Judiciary Committee Hearing on the Supreme Court Nomination of Judge Clarence Thomas*, Fed. News Service, Sept. 10-13, 1991, *available in* LEXIS, Legis Library, Fednew File. (I should point out that the accuracy of this description of Yale's program has been questioned. *See* Stuart Taylor, Jr., *The Road Beyond Racial Preferences*, AM. LAW., Sept. 20, 1991, at 25.)

77. Note that the logic of the critics in this regard appears to be either that (1) economic inequality entails compensable wrongs, or (2) affirmative action is about bestowing charity on those most needy.

78. Malamud, *supra* note 1, at 949.

privileged whites to distract attention from their own privilege under the rhetoric of high-minded sympathy and concern for the poor. Malamud's insistence that we compare apples to apples and oranges to oranges feels tonic and reorienting at this juncture in her argument, and I applaud her for it.

Yet, upon further reflection, it is this very turn that gives me pause. Malamud's logic could be read to suggest that racial justice has been achieved if every stratum of white society has a corresponding and equivalently endowed stratum in communities of color, if across racial lines, each class grouping enjoys like privileges and benefits. It could be read to suggest that the proper aim of affirmative action is to lift each respective class sector within communities of color to the point where that sector is as privileged (or as deprived or oppressed) as its white counterpart. This reading is reinforced when Malamud declares, "I continue to support race-based affirmative action for what it is: a program that benefits the black middle class."[79]

Affirmative action proponents should avoid promoting such a template as an adequate vision of race or class justice. The current crisis in affirmative action, precipitated in part by judicial actions and inactions[80] and, in part, by the deteriorating racial climate in the country,[81] should propel us to press on with more and different questions about the fairness of the educational system, the efficacy and social consequences of the existing testocracy, the life chances of Appalachian coal miners, of inner-city and barrio youth, of welfare mothers now being pushed into the lowest rungs of waged labor, and of the many different sorts of Cheryl Hopwoods and Cipriana Herreras now struggling to survive and prosper in our current political economy. We should be seeking ways of establishing common cause with these people, talking with them about the sorts of lawyers and lawyering they

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79. *Id.* at 996. This characterization of the benefits of affirmative action is limited in the extreme, and inaccurately so.

80. *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

81. *See, e.g.*, DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY (1995); Peter Applebome, *Schools See Re-Emergence of "Separate but Equal": Desegregation Efforts Ending, Study Finds*, N.Y. TIMES, Apr. 8, 1997, at A10; Center for Democratic Renewal, Black Church Burnings in the South: Report of a Six Month Preliminary Investigation (June 10, 1996) (available from the Center for Democratic Renewal, Atlanta, Ga.).

need, the sorts of doctors and doctoring they need, the nature of the work they have and do not have, the kinds of education our colleges and universities are providing, and for whom, and to what ends.

None of these exhortations to a broader and more populist defense of affirmative action are inconsistent with taking to heart the good work that Malamud has done in describing the thoroughly racialized situation of the black middle class. None of it denies that there is a special sort of equality rationale that applies to that class in relation to its white counterpart. But it suggests that there is a much bigger picture that should be illuminated as well, a picture that includes a deeper set of harms to the black middle class than those captured by comparing its socioeconomic status to that of the white middle class, and a picture that includes a wider group of people beyond the black middle class who have a serious stake in a more democratic and accessible work and educational environment.

Access to quality education and decent livelihood is scandalously limited and maldistributed in America, and is increasingly difficult to achieve for those who are in the lower reaches of our bifurcating labor force. A movement (or even an analysis) that attempts to defend affirmative action while failing to raise this point loudly and expansively lacks the moral authority, as well as the much-needed allies, that a more generous vision could make possible.

Accordingly, the strategy I believe we need is one that questions not only the fairness of the treatment accorded the black middle class in comparison with the treatment accorded the white middle class. It is a strategy that calls for more probing questions about the nature of the present educational establishment, and the proper aims of schooling in today's rapidly polarizing economy and polity. In the context of legal education, such a strategy would strive to knit more affirmative action beneficiaries with people "below" and "beside" them, rather than working to bind them ever more inextricably and powerlessly to predominant professional patterns, markets, and arrangements as they now exist. It is a strategy that would seek to expand existing curricula and pedagogy so that the education we offer could better equip more affirmative action beneficiaries to bring changes to their (race and class) communities of origin and affinity, and could better equip all interested students to play a role in remedying the harms of past exclusions and disadvantages, racial

and otherwise.

The insights and experiences of affirmative action pioneers have played a crucial role in revealing the exclusionary and privilege-reproducing nature of much legal education in the United States. Susan Sturm and Lani Guinier recently characterized people of color and women in professional education as serving a function similar to that of the "miners' canary," whose demonstrable early distress in toxic air once provided crucial warning to workers that the atmosphere underground was growing dangerous for all.[82] They argue that the experiences of affirmative action hires and admits are importantly connected to and illuminating of wider patterns of disadvantage and malfunction that are harmful to many other individuals and to legal education as a whole. In other words, rather than referring back to an existing unexamined norm by which to measure black middle-class well-being, Sturm's and Guinier's analysis would suggest that the lessons of affirmative action instruct us to searchingly examine and question the norm itself.[83] Through this

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82. Lani Guinier & Susan Sturm, The Miners' Canary (unpublished manuscript) (on file with author). The authors note:

> The impact of the testocracy on people of color tells more than a history of racial exclusion. It also functions like a miners' canary, the bird miners brought into the mine to signal the shift from fresh air to poisonous gas. The canary is alerting us to a much larger problem in the distribution of opportunity in higher education.

*Id.* at 1; *see also* Guinier & Sturm, *supra* note 17.

83. Extending this metaphor, Sturm and Guinier argue:

> The solution . . . is not merely to fix the canary's respiratory system, to fit the canary with a pint-sized gas mask, or to plead for special canary rights but to clean the atmosphere that is poisoning us all.
>
> The fresh air will begin to flow when we recognize that our current testocracy creates a social oligarchy that stigmatizes those with less privilege while it credentializes those with more. . . .
>
> We need to ask an entirely different set of questions that focus on what we know about merit as a functional quality, not merely as a testable quantity. . . .
>
> . . . .
>
> The Supreme Court's nonaction [in the *Hopwood* case] can enable a long overdue conversation about higher education and democracy. In this conversation affirmative action is not a backdoor but becomes instead a window that allows us to see clearly the procession of social privilege now strutting through the front door as if it were theirs by right. In this conversation, we may discern uncomfortable similarities between the contemporary testocracy and the past use of poll taxes, wealth preferences or literacy tests. But as history has seen current, more egalitarian notions of suffrage evolve, so may access to the front door of higher education eventually be based on a commitment to functional merit and democracy too.

Guinier & Sturm, *The Miners' Canary*, *supra* note 82, at 1-2.

analysis they also point us toward strategic allies who have their own stake in more widely accessible and useful educational opportunities.

I welcome Professor Malamud's suggestive ideas for scrutinizing the intersectional characteristics of the black middle class. I affirm her rejection of formal diversity as an adequate justification for affirmative action. But people who are interested in preserving and moving beyond the important gains of this century's civil rights movement should not settle for a type of affirmative action that leaves class privilege and oppression intact except when differences between white and non-white class equivalents can be demonstrated. Such a calculus, standing alone, is ill-suited even to detect the full spectrum of relevant race and class relations. It is also likely to founder on difference in the same way that previous antidiscrimination efforts keyed to white or male norms have done.

Finally, such an approach is ill-suited for the building of a broader movement for a more equitable distribution of educational and vocational opportunity, and such a movement is sorely needed. A wide range of people in America have a stake in preserving and strengthening democratic access to these important social sites, and affirmative action proponents should be finding ways to talk to and move with greater numbers of them.