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Broadening Our World: Citizens and Immigrants of Color in America

Victor C. Romero

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**BROADENING OUR WORLD:
CITIZENS AND IMMIGRANTS OF COLOR IN AMERICA**

VICTOR C. ROMERO*

Your world is as big as you make it.
I know, for I used to abide
In the narrowest nest in a corner,
My wings pressing close to my side.

But I sighted the distant horizon
Where the sky line encircled the sea
And I throbbed with a burning desire
To travel this immensity.

I battered the cordons around me
And cradled my wings on the breeze
Then soared to the uttermost reaches
With rapture, with power, with ease!¹

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* Associate Professor of Law, Penn State, The Dickinson School of Law. B.A., 1987, Swarthmore; J.D., 1992, University of Southern California. This essay grew out of my commentary to the remarks of Chancellor Julius L. Chambers, the 1998 Sullivan Lecturer at the Capital University School of Law. This year, I have presented versions of this piece at lectures at Swarthmore College, Dickinson College's "Conference on Citizenship," and a conference on diversity in Pennsylvania sponsored in part by the Pennsylvania Department of Education. I thank the various participants at these events for their comments and questions that have undoubtedly sharpened my thinking on these issues. In addition, I would like to thank Floyd Weatherspoon and the Capital University Law Review for the opportunity to participate in this Symposium; Bill Dorgan for his excellent research assistance; and most importantly, my wife, Corie, and my family in the Philippines for their constant love and support.

¹ Georgia Douglas Johnson, *Your World*, in *AMERICAN NEGRO POETRY* 23 (Arna Bontemps ed., 1974). I would like to thank my colleague and friend Peter Alexander for sharing this wonderful poem with me. See Peter C. Alexander, *Silent Screams from Within the Academy: Let My People Grow*, 59 *OHIO ST. L.J.* (quoting *Your World*) (forthcoming 1998).

I. EMPOWERING CITIZENS OF COLOR IN AMERICA

Georgia Douglas Johnson's words are about empowerment and hope. As people of color, while it is true that, on average, we do not live as well as our Caucasian brothers and sisters,² we must not accept these deficiencies, but instead strive, as the poet suggests, to better ourselves in all that we do.³

Chancellor Julius Chambers' remarks today echo that challenge. We in higher education are at an important crossroads: lawsuits are being filed left and right to try to roll back affirmative action.⁴ Texas and California are still recouping from the wounds inflicted by the twin menaces of *Hopwood v. Texas*⁵ and Proposition 209,⁶ respectively. Two options

² See, e.g., Editorial, *Black-White Income Inequalities*, N.Y. TIMES, Feb. 17, 1998, at A18 ("[B]lack and Hispanic families are further behind whites today than they were 20 years ago."); *Serious Crime is on a Downward Trend*, HUMAN RTS., Winter 1998, at 13 (citing ABA Report on "State of Criminal Justice" noting that "disproportionate numbers of minorities continue to be victimized by crime.").

³ As the author Richard Bach once wrote, "Argue for your limitations, and sure enough, they're yours." RICHARD BACH, *ILLUSIONS: THE ADVENTURES OF A RELUCTANT MESSIAH* 75 (1977).

⁴ The University of Michigan and the University of Washington School of Law have recently been the targets of anti-affirmative action lawsuits. Both of these actions are being funded by the Center for Individual Rights, a non-profit litigation boutique that also filed the *Hopwood* case. See, e.g., Adam Cohen, *The Next Great Battle Over Affirmative Action*, TIME, Nov. 10, 1997, at 52 (describing recent lawsuit filed challenging University of Michigan's admissions policies); Terry Carter, *On a Roll(back)*, A.B.A.J., Feb. 1998, at 54-58 (describing involvement of the Center for Individual Rights in anti-affirmative action lawsuits).

⁵ 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996). In response to *Hopwood*, the Texas legislature has introduced the so-called "10% Plan" which grants high school graduates in the top ten percent of their classes automatic admission to the state's two most selective public colleges, the University of Texas at Austin and Texas A& M University. Lani Guinier, *An Equal Chance*, N.Y. TIMES, Apr. 23, 1998, at A25.

⁶ See, e.g., Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997); Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335 (1997); 1997 *Symposium on Race and the Law*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (1997); Winkfield F. Twyman, Jr., *A Critique of the California Civil Rights Initiative*, 14 NAT'L BLACK L.J. 181 (1997); L. Darnell Weeden, *Affirmative Action California Style-Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex*, 21 SEATTLE U. L. REV. 281 (1997); *The Meanings of Merit: Affirmative Action and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. number 4 (Summer 1996). Most recently, the people of Washington State passed Initiative 200 which, like California's Proposition 209, bans the consideration of race and gender in dealings with state institutions. See Sam Howe Verhovek, *In a Battle Over Preferences, Race and Gender Are at Odds*, N.Y. TIMES, Oct.

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exist: we can wallow in self-doubt, roll over and die, thereby conceding the demise of affirmative action, or we can pursue effective strategies to convince everyone that affirmative action is important in maintaining a viable 21st century America. I opt for the second path: to develop novel methods of promoting the diversity concept.

The source of these new strategies should begin with the law students—the future leaders of this country. I had the pleasure of witnessing two events that suggested a willingness to affirm affirmative action's place in the academy at the 1998 annual meeting of the Association of American Law Schools in San Francisco, California. The first was a march and rally celebrating affirmative action, which provided a strong, unified voice in opposition to those who would support its downfall. Organized by the Society of American Law Teachers and supported by many other groups,⁷ the march and rally were a celebration of diversity: students chanted "Two, four, six, eight! Educate, don't segregate!";⁸ parents carried signs; San Francisco lawyers marched to show the support of the legal academy; law professors marched in academic regalia—a sea of people of all races banding together to show their commitment to diversity.⁹

I learned of the second event during the first. During the march, several Boalt Hall¹⁰ law students distributed a leaflet entitled "The Equal Educational Opportunity Initiative" ("EEOI"). The leaflet describes how a student organization called "Students for Educational Opportunity" launched a campaign to place its EEOI proposal on the November 1998 ballot in California. The EEOI states that "in order to provide equal

20, 1998, at A1; Sam Howe Verhovek, *From Same-Sex Marriages to Gambling, Voters Speak*, N.Y. TIMES, Oct. 5, 1998, at B1, B10. If there is any consolation in recent memory it is Congress bipartisan decision to vote down a bill that would have cut off federal aid to any public college or university that considered race or gender in admissions. See Anthony Lewis, *Turn of the Tide?*, N.Y. TIMES, May 18, 1998, at A23. Hopefully, the federal government will continue to stand its ground and reaffirm the relevance of affirmative action in today's society.

⁷ The list of endorsers included the American Arab Anti-Discrimination Committee, the American Civil Liberties Union of Northern California, the Asian Law Caucus, the California Women's Center, and Equal Rights Advocates, among others. Society of American Law Teachers, *We Won't Go Back*, C.A.R.E. march, Jan. 8, 1998 (unpublished leaflet on file with author).

⁸ SALT C.A.R.E. march chants (unpublished leaflet on file with author).

⁹ *Marching for Diversity in Legal Education*, S.F. CHRON., Jan. 9, 1998, at A16.

¹⁰ "Boalt Hall" is the building that houses the University of California at Berkeley's law school. See ASSOCIATION OF AMERICAN LAW SCHOOLS, *THE AALS DIRECTORY OF LAW TEACHERS 1997-1998* 36 (West 1997).

opportunity, promote diversity, and combat discrimination, the state may consider the economic background, race, sex, ethnicity, and national origin of qualified individuals."¹¹ If the initiative passes, it will effectively repeal Proposition 209's stance on affirmative action programs in education, allowing such programs to continue.¹² The EEOI impressed me more than the rally because it was created by students concerned about the future of higher education in an American society that is becoming more culturally and racially diverse. As the students eloquently noted in their pamphlet, "In the most diverse state in the country, the people of California are witnessing the homogenization of their public higher education institutions. At the same time that the population of the state is approaching a racial and ethnic plurality, the higher education population is becoming predominantly white."¹³

If education provides the opportunity to exert power and influence, the closing of public institutions to people of color through the repeal of affirmative action means the disempowerment of minorities. For those who want to fly beyond the horizon Georgia Douglas Johnson holds out

¹¹ STUDENTS FOR EDUCATIONAL OPPORTUNITY, THE EQUAL EDUCATIONAL OPPORTUNITY INITIATIVE (unpublished leaflet on file with author) [hereinafter EEOI Leaflet].

¹² Of course, this still leaves out affirmative action in employment in California, but given the difficult political climate surrounding work-based affirmative action programs, see, for example, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that strict scrutiny applies to a benign federal affirmative action program), proceeding piecemeal might be the proper strategy. In addition, as some commentators have argued, *Bakke* is still the law governing education-based affirmative action programs, notwithstanding cases like *Adarand*. See Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745 (1996). As for the growing concern over the precedential value of *Hopwood*, Jack Chin responds that the University of Texas' admissions program in *Hopwood* clearly fails even under the *Bakke* test and therefore should not be seen as a remarkable case. See Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM & MARY BILL RTS. J. 881, 945 (1996) ("Schools that do not follow *Bakke* and are sued can expect to lose. By openly refusing to follow *Bakke*, Texas simultaneously invited a lawsuit challenging it and ensured that the suit would succeed.").

¹³ EEOI Leaflet, *supra* note 11. The admissions statistics for fall 1998's entering class are grim: "Taken together, African Americans, Native Americans and Latinos of all backgrounds, who constitute about 34% of [California's] population, account for just a tenth of this year's [undergraduate] admissions [at Berkeley]." Adam Cohen, *Back to Square One*, TIME, Apr. 20, 1998, at 30. See also Ethan Bronner, *Two Minority Groups in Admissions Fall at U. of California*, N.Y. TIMES, Apr. 1, 1998, at A1 ("At the University of California at Berkeley, the most selective public university in the country, African-Americans, Mexican-Americans, Hispanic Americans and American Indians together made up 10.4% of the total pool of admitted freshmen for 1998. In 1997 they made up 23.1 percent.").

for us,¹⁴ *Hopwood* and Proposition 209 clip our wings short and send us plummeting to earth, confused and shaken. The statistics are not encouraging. Again, from the California students' own observations:

With the repeal[] of affirmative action for graduate and professional schools, the number of underrepresented minorities have [sic] fallen to a historic low, decreasing by as much as 90 percent at schools such as UC Berkeley law school. The number of Asian Americans has also declined at the law school and other schools.

At the UC San Diego and UC Irvine medical schools, zero African-Americans were admitted this fall. At virtually all graduate and professional schools, white students were admitted at a far greater rate than minority students.

This year, the repeal of affirmative action will affect the undergraduate schools. The numbers of underrepresented minorities are expected to drop by as much as 50 to 70 percent.¹⁵

¹⁴ See *supra* text accompanying note 1.

¹⁵ EEOI Leaflet, *supra* note 11. Other reports corroborate the students' statistics. Estela Mara et al., *Can We Rebuild Civic Life Without a Multiracial University?*, CHANGE, Nov. 1, 1997, at 42 ("At UCLA and Berkeley, the [University of California] system's two most diverse and elite campuses, analysts calculate that underrepresented minorities could drop by 50 to 70 percent."); A. Asadullah Samad, *Between the Lines: Time to Throw Prop. 209 Victims to the Lions*, L.A. SENTINEL, Sept. 24, 1997, at A7 ("Minority admissions are dramatically down all throughout the state. Minority graduate and professional (law, medical) school admissions viewed in a microcosm are even more depressing, 50 to 80 percent drops on most campuses. One hundred percent drops on a few."); Wayne Wilson, *Civil Rights Groups Contest UC Ban on Affirmative Action Complaint Alleges U.S. Laws Violated*, SACRAMENTO BEE, Mar. 20, 1997, at A4 ("At Boalt Hall, the complaint said, officials project that the enrollment of racial and ethnic minorities other than Chinese American, Japanese American and Korean American applicants will decline from an average of 60 to 70 during each of the past few years to a level of eight to 12 this year."). Projections for fall 1998 undergraduate minority enrollment at Berkeley and UCLA are likewise disconcerting: at Berkeley, non-Asian minorities will comprise 10.54% of the freshman class, down from 21.92% last year, while at UCLA, the figure stands at 14.1% for this fall, as compared with 21.8% a year ago. See Ethan Bronner, *Fewer Minorities Entering U. of California*, N.Y. TIMES, May 21, 1998, at A28.

The latest outlook from post-*Hopwood* Texas is similarly bleak: "The 296 African-American students admitted this year at UT Austin represent only 2.9% of all admissions,"

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Instead of succumbing to this assault, the Students for Educational Opportunity decided to treat this as a momentary setback and move forward. Such resilience in the face of adversity should be an inspiration to all students. As the poet suggests, we need not settle for the small world of ignorance and oppression, but can take positive, affirmative steps to ensure that our world is truly as big as we can make it.

To prevent this anti-affirmative action juggernaut from rolling over us, we do not all need to organize a national rally or propose a ballot initiative, but each of us, at the very least, must learn to speak the language of diversity and teach that language to others. That language has two powerful parts, both of which I attribute to Lani Guinier's and Susan Sturm's important work on affirmative action.¹⁶ First, I do not think the

in contrast to 4.3% (416) the year before the law changed. At Texas A&M admissions of black students fell 3%, and those of Hispanic students went down 7%." Cohen, *supra* note 13, at 30. See also Hopwood Tests Mettle, AUSTIN AM.-STATESMAN, Feb. 20, 1997, at A13 ("The Hopwood ruling will not prevent minority students from attending college in Texas, but it will make it more difficult. State education officials predict a 40 percent to 50 percent decline in minority enrollment. Moreover, the ruling reinforces an existing segregation in higher education that has not been corrected by more than 30 years of civil-rights initiatives.").

Another interesting phenomenon has arisen out of this backlash. Even when minorities present excellent credentials, they are sometimes denied admission. For example, Ms. Jamese LaGrone, who is African-American, had a 4.0 high school GPA and a 1390 combined SAT score, served as the junior class president of Oakland, California's Holy Names High School, and took many advanced-placement courses. She was one of 800 non-Asian minority students denied admission to Berkeley who had 4.0 averages and a median combined SAT score of 1170. The Oakland Teachers' Union has made a written demand on Berkeley that all 800 be admitted immediately. See Henry K. Lee, *Oakland Teachers Decry UC Rebuff of Top Students*, S.F. CHRON., Apr. 17, 1998. While I appreciate that 7,200 students with averages of 4.0 or better were rejected by Berkeley, I suspect that denying Ms. LaGrone admission to Berkeley sends the message that even if minorities end up performing well according to standards imposed upon it by the majority culture, sometimes such good performance is not enough. In some cases, this might lead to some feeling that they should not even bother trying to play the game. In others, it might lead to the response justifiably expressed by Ms. LaGrone who said that she would not go to Berkeley even if it did change its mind: "It's obvious that they don't want me there." *Id.* Ms. LaGrone's perceptive comment, and the policies that prompted it, take race relations back several significant steps.

¹⁶ See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996). Last year, Lani Guinier took this message beyond the legal academy into the larger populace with her publication of a noteworthy op-ed piece in the New York Times about affirmative action. See Lani Guinier, *The Real Bias in Higher Education*, N.Y. TIMES, June 24, 1997, at A23. Guinier also co-authored a book along with Michelle Fine and Jane Balin highlighting the differences in the way men and women perceive law school and suggesting that "equal" treatment of the

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strongest argument for affirmative action is that the playing field needs leveling, which is the claim traditionally touted by civil rights activists.¹⁷

Rather, diversity—whether based on race, class, gender, religion, or sexual orientation—benefits everyone in an educational environment because each person brings a different set of values and ideas to the table.¹⁸ A recent example from my own experience should make this point clear: This past spring semester, I was appointed to a long-range planning committee for my law school, the goal of which is to come up with a reasonable five-year strategic plan for the school. While attending the committee meetings that were held last spring, I came to be impressed by the thoughtfulness and dedication of my colleagues to the law school. Regarding our school's commitment to teaching law to residents of the Commonwealth, several committee members mentioned the idea, floated among the board of trustees, of scholarships for those socioeconomically

sexes might not be the most "fair." LANI GUINIER ET AL., *BECOMING GENTLEMEN* (1997). Charles Lawrence and Mari Matsuda, longtime warriors in the struggle for a strong minority voice in the legal academy, also chronicled their views for Main Street in a recent book making the case for affirmative action. See CHARLES R. LAWRENCE & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (Houghton Mifflin 1997).

17 Indeed, a lot of scholarship in this area focuses on this justification for affirmative action. See, e.g., Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1045 (arguing that affirmative action remedies are still necessary in the 1990's because conditions for minorities are still much worse than for whites in American society); Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 859-60 (1997) ("In civil law, the past discrimination rationale for affirmative action recasts the traditional construct of 'fair play.' It suggests that because minorities have been denied the benefits of the system, they should not necessarily suffer its burdens. The colloquial expression of this objective is that affirmative action 'levels the playing field.'"); Lundy R. Langston, *Affirmative Action, A Look at South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field?*, 13 AM. U. L. REV. 333 (1997) ("Throughout United States history the problems created by skin-color divisions have been dealt with by numerous approaches. Various Presidents issued executive orders that fostered affirmative action-type programs. President Lyndon B. Johnson actually used the term 'affirmative action' and utilized a sports metaphor to illustrate the need to level the playing field. 'Racism raised high hurdles and made it impossible for otherwise equal runners to compete. Thus, when [blacks] passed the baton to the next generation, they did so running with less speed, having covered a shorter distance, and having less stamina than they would have in a non-racist society.'") (internal citation omitted).

18 See Sturm & Guinier, *supra* note 16, at 1024-25 ("Studies have shown that work-team heterogeneity promotes more critical strategic analysis, creativity, innovation, and high-quality decisions Including people with different tendencies, styles, and approaches enhances flexibility and expands the repertoire of skills and functions that an institution can effectively pursue.").

disadvantaged residents of rural Pennsylvania. While I agree that this is an important and meritorious proposal, I immediately thought that the program, if implemented, would disproportionately privilege white folks due to the demographics of rural Pennsylvania.¹⁹ Now, I do not believe that anyone on the board of trustees is racist for proposing this wonderful idea; indeed, the proposed scholarships would serve a great many Pennsylvanians. My concern was that our committee should also think about ways to make any proposed scholarships available to a larger racial mix of underprivileged Pennsylvanians, especially in light of our stated goal to pursue diversity. To make a long story short, I proposed that our committee consider inner-city scholarships as a way to attract a more racially diverse segment of poorer Pennsylvania. I believe that this concept arose because I, the only person of color on the committee, brought a different perspective to the table, which was welcomed by my colleagues as a positive contribution to the discussion.²⁰

¹⁹ Census data from 1994 comparing more urban Allegheny County (where Pittsburgh is located) and Philadelphia County (where Philadelphia is situated) with more rural Cumberland County (where my home institution is located) supports my hypothesis: Whites constituted 95.8% of Cumberland County's population as opposed to 85.7% in Allegheny County and 48.5% in Philadelphia County. Government Information Sharing Project, Oregon State University, *Population Estimates by Age, Sex and Race—Pennsylvania* (visited April 21, 1998) <<http://govinfo.library.orst.edu/cgi-bin/pe-state?Pennsylvania>>. See also Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *ECOLOGY L.Q.* 1, 15 (1997) ("Urban areas tend to have higher percentages of racial and ethnic minorities than rural areas, so the bias toward urban areas is likely to result in an understatement of the relationship between race, ethnicity and siting choices."); Robert H. Freilich & Stephen P. Chinn, *Transportation Corridors: Shaping and Financing Urbanization Through Integration of Eminent Domain, Zoning and Growth Management Techniques*, 55 *UMKC L. REV.* 153, 157-58 (1987) ("Changing demographics have also had an impact on the public sector. Since World War II the greatest proportion of national growth has taken place in the urban-rural fringe area of major metropolitan centers. As the white middle class retreated to the suburbs, the inner city was left to the poor. With an impoverished tax base, the city was handicapped in its efforts to combat overcrowding, high crime rates, abandonment and deterioration of buildings, and racially and fiscally unbalanced schools.").

²⁰ In a talk at Dickinson College in 1996, Lani Guinier gave an example from the movie *Apollo 13* of the synergy brought about by having persons of diverse experiences working on a problem. Professor Lani Guinier, Address at Dickinson College (Feb. 28, 1996) [hereinafter Guinier Address]. In *Apollo 13*, once the mission began to experience problems in space, the command center in Houston did not give the problem to the "smartest" person at NASA; instead, a *team* of people of different skills worked *together* to devise a viable solution to the crisis. *APOLLO 13* (Universal 1995). Analogously, the most challenging universities tackle the most difficult problems confronting our society. We want persons with different ways of thinking working together toward the optimal answers

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However, our collective task does not end with simply learning the language of diversity. Second, we must strive to reformulate the current, biased concept of merit which supports so many naysayers' claims that affirmative action programs in education favor less qualified minorities over more qualified whites.²¹ The \$64,000 question is "What does 'qualified' mean?" In the realm of law school admissions, for instance, the Law School Admissions Test ("LSAT") is one very important measure of a prospective law student's merit. But we know two things about the LSAT: First, while the data are inconclusive about its ability to predict one's first-year performance in law school,²² the LSAT does not predict whether the candidate will be a good attorney;²³ second, and more importantly, one study shows that white students, *regardless of their socioeconomic background*, perform better on the LSAT than African-, Asian-, Latino-, and Native-Americans of any socioeconomic background except for upper income Asian-Americans.²⁴ So why is the LSAT such

to these problems.

²¹ Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1289 (1997) ("It is not news that race-based preferences in affirmative action programs are unpopular. Scholars assail these preferences as divisive, stigmatizing, and harmful to 'innocent victims.'"). In his review of the history of affirmative action, Anthony Scanlon summarizes the challenge federal courts faced in deciding cases on race-based admissions: "The courts were asked to rule upon the appropriateness of admitting students with numerical credentials lower than the rest of the class and, eventually, on the constitutional aspects of a quota or other devices used to admit minority students. The years of suspenseful litigation left a bitter legacy." Anthony J. Scanlon, *The History and Culture of Affirmative Action*, 1988 BYU L. REV. 343, 355-56.

²² Compare Philip D. Shelton, *The LSAT: Good--But Not That Good*, AALS NEWSLETTER, Nov. 1997, at 10-11 ("[T]he LSAT is a good predictor, but nowhere near a perfect prediction.") with Sturm & Guinier, *supra* note 16, at 971-72 (noting two studies at the Penn and Texas law schools indicating that the LSAT was a weak predictor of performance in law school).

²³ "[T]he data does not even consider the relationship between standardized test scores and a truly functional baseline—post-graduate 'success' in life." Sturm & Guinier, *supra* note 16, at 970. Indeed, "[w]hen asked what predicts life success, college admissions officers at elite universities report that, above a minimum level of competence, 'initiative' or 'hunger' are the best predictors." *Id.* at 977. See also Hugh B. Price, *Tell Me Again: Why Are S.A.T. Scores So Crucial?*, N.Y. TIMES, May 26, 1998, at A27 ("Bates College in Maine no longer requires applicants to submit S.A.T. scores. Those who submit their scores average 160 points higher on the test than those who do not. Even so, there's no difference in the grades and graduation rates of the two groups.").

²⁴ Chris Klein, *Law School Diversity Hinges on Race Policy but Study Says that Bar Pass Rates Among Races Are Close*, NAT'L L.J., Jan. 27, 1997, at A1. In a recent study, the Law School Admissions Council found that the gap between whites and minorities in terms of bar passage rates was not as dramatic as previously thought: "The study found that 92

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an important part of the application process? It is an economically efficient measure that allows an admissions committee to compare candidates from different colleges.²⁵ If the LSAT's only value is its economic efficiency in *somewhat* accurately predicting first-year performance for a *minority* of applicants, and its downside is its statistical bias against persons of color, using the LSAT as a measure will, in many cases, lead to the exclusion of many diverse candidates who might be as qualified as their white counterparts, but lack the scores required for admission.

It is true that law school admissions involve a difficult procedure of sorting through intangibles, and the LSAT provides one palpable means for getting through the process expeditiously. However, should we not devise better ways of measuring one's capacity to be a good lawyer? Or, if that is too difficult, should we work towards minimizing the importance of the LSAT in the admissions game?²⁶ While deciding how to measure

percent of the white law school graduates passed the bar exam on their first try, as did 81 percent of the Asian-Americans, 76 percent of the Mexican-Americans, 75 percent of the Hispanic graduates, 70 percent of the Puerto Ricans, 66 percent of the American Indians and 61 percent of the blacks." Tamar Lewin, *Minorities Achieve High Success Rate in Bar Exams, Study Says*, N.Y. TIMES, May 20, 1998, at A22. Prior to the study, some people expressed the view that very few minorities ever passed the exam; some estimated the bar passage rate of minorities to be as low as 20 to 25 percent. *See id.*

²⁵ *See, e.g.*, John S. Applegate, *A Beginning and Not an End in Itself: The Role of Risk Assessment in Environmental Decision-Making*, 63 U. CIN. L. REV. 1643, 1667-68 (1995) ("The standardized test is an efficient and readily understandable means of expressing certain ideas or concepts. More importantly, it provides a uniform standard for the core task of selecting among highly diverse individuals, which itself provides a kind of equity."); Albert Y. Muratsuchi, Comment, *Race, Class, and UCLA School of Law Admissions*, 16 CHICANO-LATINO L. REV. 90, 125 (1995) ("Despite the problematic nature of formula admissions based strictly on grades and the LSAT, another common reason why law schools rely on them is simply that this approach is easy and cost-efficient. Given the thousands of law school applications that understaffed admissions offices face each year, the pressure is strong to rely on mechanical and computerized decision-making processes.").

²⁶ Lani Guinier and Susan Sturm suggest that the use of a weighted lottery system might be an appropriate way for some institutions to determine admissions. Sturm & Guinier, *supra* note 16, at 1012. For example, each entering class might be determined by selecting a certain number of randomly-drawn balls from a large container, just like a lottery. Each prospective student will be assigned a certain number of balls based on outstanding characteristics the student possesses. In a given year, a tuba player might receive three balls if the school really needs a tuba player for its marching band that year. The beauty of this system is that each year, the school can adjust the number of balls a candidate receives based on its assessment of the need for a particular skill the student possesses, while being sensitive to fairness issues by maintaining the random selection process of the lottery. Thus, if a school did not get a tuba player for two years in a row, the

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merit in law school admissions is more difficult than say, choosing bicycle couriers (i.e. those who can consistently deliver packages on time are the most qualified),²⁷ this complexity should not dissuade us from discussing the issue and actively searching for alternatives to the current regime.²⁸

As we move forward, keeping in mind the value of diversity and the need to redefine merit, let us become well-versed in the arguments of the opposition, so that we can effectively present our case. Recently, I read an article in the Penn State campus newspaper about a new study in which two political science professors claim that the *Bakke* decision striking U.C. Davis's medical school's admissions policy but implicitly reaffirming the concept of affirmative action 'produced almost no change in pre-*Bakke* levels of minority applications and enrollment or admissions decisions made about minorities.'²⁹ Anyone merely glancing at this article entitled "Affirmative Action Did Not Boost Enrollment at Law, Medical Schools," might miss the subtler, and indeed more positive, suggestion that *Bakke* might have sent the message that admissions policies already in place at law and medical schools were constitutionally permissible.³⁰ Let

school might assign fifty balls to the prospective tuba player in the group. See also Guinier Address, *supra* note 20 (discussing admissions hypothetical).

²⁷ Again, this is another example from Lani Guinier's talk at Dickinson College. See Guinier Address, *supra* note 20.

²⁸ For instance, while I do not believe that class is an acceptable proxy for race — for the same reasons that scholarships for rural Pennsylvanians do not help achieve racial diversity — some commentators do. See, e.g., Richard D. Kahlenberg, *Getting Beyond Racial Preferences: The Class-Based Compromise*, 45 AM. U. L. REV. 721 (1996).

²⁹ Vicki Fong, *Affirmative Action Did Not Boost Enrollment at Law, Medical Schools*, PSU INTERCOM, Feb. 12, 1998, at 11, available in <http://www.psu.edu/ur/archives/intercom_1998/Feb12/news5.html> (quoting study co-author Susan Welch).

³⁰ See *id.* ("More than three-quarters of the medical school officials and 63 percent of the law officials claim it affected policies not at all,' Welch said. 'Only a small minority of schools reported that *Bakke* changed, rather than reaffirmed, their admissions policies.'") (emphasis added). I surmise from the above statement that while a majority of the school officials did not believe *Bakke* affected their admissions policies, these same officials might have agreed with the proposition that *Bakke* reaffirmed that their affirmative action policies were legal.

Of course, I am aware that when it came down, *Bakke* was seen by many as the beginning of the end of affirmative action. See, e.g., Ralph R. Smith, *Reflections on a Landmark: Some Preliminary Observations on the Development and Significance of Regents of the University of California v. Allan Bakke*, 21 HOW. L.J. 72, 118-19 (1978). It is therefore ironic that some commentators, such as I, see *Bakke* as a positive statement in support of affirmative action programs given the current post-*Hopwood* climate. See, e.g., Amar & Katyal, *supra* note 12, at 1779-80; Chin, *supra* note 12, at 945, 947 ("*Bakke* is law. Beginning now, American universities and professional schools should get right with

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us not be thrown off track by arguably misleading headlines like the one the newspaper chose; instead, let us learn to read between the lines and, like skilled advocates, find ways to rebut the opposition's arguments by appeals to reason and good sense.

I strongly agree with Chancellor Chambers' remarks today and I caution you to pay heed to them. In addition, I ask that you not waver in the struggle for equal opportunity in the face of the current anti-affirmative action onslaught in this post-*Hopwood* and post-Proposition 209 era. Like the Students for Educational Opportunity in California, we can make a difference. Paraphrasing the words of the great African-American poet Georgia Douglas Johnson, our world is as big as we make it: let us continue to be vigilant, strive hard, and work toward a better and bigger world for us, and for all.

Of course, I know, as Chancellor Chambers surely knows, that I am preaching to the choir here. One of the purposes of affirming affirmative action is to strive for inclusion in society. We people of color want to have the right to the good life that is still primarily reserved for privileged whites in this society. We want "our world" to grow until it becomes as big as "their world," and then both worlds can merge into one unified world—an America in which the term "equal rights" has true meaning.

II. CITIZENS AND IMMIGRANTS OF COLOR WORKING TOGETHER IN AMERICA

Unfortunately, there is a group in this country that is currently excluded from sharing that vision. In recent years, citizens, both whites and people of color,³¹ alienated noncitizens from American society by limiting these persons' access to basic human rights and services. A U.S. district court decision holding that the "illegal alien" defendant had no Fourth Amendment right to protect him from illegal searches and seizures,³² federal welfare reform eliminating welfare for certain legal

Bakke. If *Bakke* is to survive, the case that goes to the Supreme Court must be on a record demonstrating that it can work.")

³¹ The Korean-black conflict in Los Angeles following the riots in 1991 is one example of an intra-minority conflict along perceived citizenry lines. The blacks perceived the Koreans as foreigners who were taking businesses away from the predominantly black communities. See, e.g., Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581, 1585-86 (1993).

³² *United States v. Gutierrez*, 1997 U.S. Dist. LEXIS 16446 (N.D. Cal. Oct. 16, 1997). While this decision was vacated *sua sponte* in January of 1998, see 983 F. Supp.

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permanent residents,³³ California's Proposition 187 denying emergency medical benefits to undocumented immigrants,³⁴ federal acts denying judicial review of immigration decisions³⁵—all these are but a few

905 (N.D. Cal. 1998), the specter of the first decision lingers on, raising the possibility that some future court might find that certain undocumented immigrants enjoy no Fourth Amendment protections. For a discussion of this problem, see, for example, Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* *United States v. Verdugo-Urquidez?*, 56 MO. L. REV. 213 (1991); James G. Connell, III & Rene L. Valladares, *Search and Seizure Protections for Undocumented Aliens: The Territoriality and Voluntary Presence Principles in Fourth Amendment Law*, 34 AM. CRIM. L. REV. 1293, 1304-07 (1997); Victor C. Romero, Note, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999, 1009-10 (1992).

³³ See generally Charles Wheeler, *The New Alien Restrictions on Public Benefits: The Full Impact Remains Uncertain*, 73 INTERPRETER RELEASES 1245 (Sept. 23, 1996); Michael Scaperlanda, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587 (1997).

³⁴ See, e.g., Lolita K. Buckner Inniss, *California's Proposition 187—Does It Mean What It Says? Does It Say What It Means? A Textual and Constitutional Analysis*, 10 GEO. IMMIGR. L.J. 577, 581 (1996); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 651 (1995) ("It also is possible that the passage of Proposition 187 resulted from sheer frustration with immigration."). The saga of Proposition 187 continues: In March 1998, U.S. District Judge Mariana Pfaelzer struck down the remainder of the proposition's provisions as unconstitutional. Unfortunately, we have probably not heard the last of this story because California Governor Pete Wilson, a staunch supporter of the bill, has vowed to appeal the judge's decision. *Judge Tosses Out Anti-Immigrant Law*, ASSOC. PRESS, Mar. 18, 1998.

³⁵ Both the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, [hereinafter AEDPA] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, amended by 104 Pub. L. No. 302 (Oct 4, 1996) [hereinafter IIRIRA] deprive federal courts of jurisdiction to decide certain immigration decisions. For example, Section 306(a) of the IIRIRA amends Section 242 of the Immigration and Naturalization Act by depriving federal courts of jurisdiction over noncitizens' claims that arise out of proceedings brought against the noncitizens by the Attorney General. Section 306(a) provides, in pertinent part:

EXCLUSIVE JURISDICTION. Except as provided in this section and notwithstanding any other provision of the law, no court shall have any jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

8 U.S.C.A. § 1252(g) (1996).

For an analysis of the constitutionality of the IIRIRA's "court-stripping" provision, see Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1416 n.20 (1997). See also Victor C.

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examples of recent federal and state legislation denying many rights to noncitizens that citizens take for granted.³⁶

Let me share with you the story of Jesus Collado, so you can fully appreciate the significant adverse impact these laws had on noncitizens. At Penn State's Dickinson School of Law, many students have had the opportunity to represent asylum seekers at the Immigration and Naturalization Service detention center in nearby York, Pennsylvania. Although not an asylum seeker, perhaps last year's most famous detainee at the York facility was Jesus Collado, a long-time legal permanent resident living in New York City and a victim of the recent restrictive immigration laws.

In 1996, Congress passed a law allowing the INS to remove any noncitizen seeking admission who had committed a crime of moral turpitude.³⁷ On its face, the law sounded like a good idea: why incur expense incarcerating noncitizen criminals when we can simply send them back to their home countries? Unfortunately, Jesus Collado was one person who should not have been prosecuted under that law.

On his way back to New York after a trip to the Dominican Republic, INS officers detained Collado and asked him whether he had been convicted of any crimes. Collado admitted to a 1974 misdemeanor conviction: a then nineteen-year-old Collado was charged with statutory rape because the mother of his teenage girlfriend disapproved of their

Romero, *Expanding the Circle of Membership by Reconstructing the "Alien": Lessons from Social Psychology and the "Promise Enforcement" Cases*, 32 U. MICH. J.L. REFORM 1 (forthcoming 1998) (calling for the repeal of the court-stripping provisions of the IIRIRA based on a review of social psychology research on negative noncitizen stereotypes).

³⁶ For example, Americans take for granted the idea that they can enter and leave the United States as they please, and that they may never be excluded from this country on the basis of their skin color. Interestingly, Jack Chin has asked whether discrimination on the basis of race could ever be resurrected in the context of immigration law. Because the U.S. Supreme Court never overturned *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (upholding the decision to bar Chinese nationals from immigrating to the U.S.), Chin wonders whether such a policy could be adopted in today's society in light of the current anti-immigrant fervor in the U.S. See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

³⁷ The IIRIRA amended the Immigration and Naturalization Act [hereinafter INA] § 101(a)(13)(C)(v), allowing the Immigration and Naturalization Service [hereinafter INS] to treat Collado as an "alien" "seeking an admission" into the United States despite his lawful permanent resident status. Accordingly, the INS charged Collado with inadmissibility under INA § 212(a)(2) for having been convicted of a crime of "moral turpitude." See also T. ALEXANDER ALFINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 427 (4th ed. 1998) (describing *Collado* case).

consensual sexual relationship. Since that incident over twenty years ago, Collado led an upstanding, productive life in New York with his wife and three children, all of whom are U.S. citizens. After much public uproar over his detention, Collado was released from the York detention center; however, he still faces the prospect of deportation. Unfortunately, Jesus Collado is not alone—the INS estimates that 200-300 noncitizens are in the same boat.³⁸

Why do I share this story with you? Because it is a horrible story—a story of exclusion in a country that is one of immigrants. Why should you care? Because this is not just a story about immigration; it is a story that impacts a substantial number of people of color in the United States.

While I believe all citizens should take notice of the ways in which noncitizens' rights are being compromised in today's society, I want to share with you three primary reasons why citizens of color should be particularly concerned about the rights of noncitizens. These three reasons are borne of the interesting, but dangerous, intersection between race and alienage in America: (1) Since 1965, most noncitizens who immigrate to this country are people of color; therefore, current anti-immigrant legislation disproportionately affects racial minorities; (2) due to the historical intersection of race and immigration, many invidious stereotypes of noncitizens are grounded in racial stereotypes that persist still today; and (3) the anti-immigrant backlash mirrors the anti-minority movement alive and well in the United States today.

Let us examine these three ideas in turn. First, a brief review of the history of immigration law in the United States³⁹ reveals that prior to 1965, Congress severely restricted immigration from so-called "third

³⁸ See Mae M. Cheng & Margaret Ramirez, *After Outcry, INS Releases Man Held for Old Crime*, NEWSDAY, Oct. 25, 1997, at A19. For more on Collado, see, for example, *No Justice for Immigrants*, THE PROGRESSIVE, Nov. 1997, at 8; Vincent J. Schodolski, *Immigrants Face Deportation for Old Crimes Under New Laws: Reform Snares Legal Residents*, CHI. TRIB., Oct. 12, 1997, § 1 at 3. Collado and others like him might take some solace from a recent U.S. Court of Appeals decision in which a First Circuit panel ruled that the 1996 amendments to the immigration code that required automatic deportation for certain noncitizen criminals did not apply retroactively to affect currently law-abiding noncitizens with prior criminal records. *Goncalves v. Reno*, No. 97-1953, 1998 WL 236799 (1st Cir. May 15, 1998).

³⁹ See generally GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996). For a recent interesting analysis of the immigration laws from a political philosophy perspective, see ROGERS M. SMITH, *CIVIC IDEALS* (1997). For more on the immigration of different ethnic and racial groups to the United States, see, for example, ROGER DANIELS, *COMING TO AMERICA* (1990) and RONALD T. TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* (1989).

world nations.”⁴⁰ Since this National Origins quota system was abolished in 1965,⁴¹ most recent immigrants have been from Asia and Latin America. While the top five countries of birth for legal immigrants in 1965 were Mexico, Germany, Canada, the United Kingdom, and Italy, the top five in 1990 were Mexico, the Philippines, Vietnam, the Dominican Republic, and Korea—all countries whose ethnic peoples are nonwhite.⁴² Due to the large numbers of non-white immigrants, the current anti-immigration laws will have a disproportionate impact on people of color, as Jesus Collado sadly discovered.

This brings me to my second point. The historical intersection between immigration and race has perpetuated negative stereotypes based on racial differences about who is the presumptive U.S. citizen and who is not. Typically, the stereotypes fall along these lines: Caucasian and African-Americans are presumed to be U.S. citizens, Asian and Latino-Americans are not.

Neil Gotanda and Robert Chang have written extensively about the manner in which Asian-Americans, unlike blacks or whites, have historically been marked as “foreign.” Gotanda sees this presumption at work in the United States Supreme Court’s decision to uphold the wartime internment of Japanese-Americans in *United States v. Korematsu*.⁴³ stating:

The evacuated Japanese-Americans, including U.S. citizens, were presumed to be sufficiently foreign for an inference by the military that such racial-foreigners must be disloyal. Japanese Americans were therefore characterized as different from the African-American racial minority. With the presence of racial foreignness, a presumption of disloyalty was reasonable and natural.⁴⁴

⁴⁰ This system, established by the Immigration and Naturalization Act of 1924, resulted in biased admissions of northern and western Europeans over nonwhite immigrants from “third world” countries. MICHAEL FIX & JEFFREY S. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 10 (1994).

⁴¹ See generally Immigration and Naturalization Act Amendments of October 3, 1965.

⁴² See IMMIGRATION AND NATURALIZATION SERVICE, ANNUAL REPORT (1960); IMMIGRATION AND NATURALIZATION SERVICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1990).

⁴³ 323 U.S. 214 (1944).

⁴⁴ Neil Gotanda, *Asian American Rights and the “Miss Saigon Syndrome,”* in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1098 (Hyung-Chan Kim ed., 1992). See also Neil Gotanda, “Other Non-Whites” in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1190-92 (1985)

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While Japanese-Americans were viewed by the Court as sufficiently untrustworthy, a similar internment of Italian or German-Americans did not ensue.

Building on Gotanda's argument, Chang points out the historical intersection of race and immigration law in the Chinese Exclusion Cases,⁴⁵ in which the Supreme Court affirmed Congress' ban on Chinese immigration because the Chinese "will not assimilate with us,"⁴⁶ and are therefore a threat to U.S. peace and security. Chang believes the Court's use of the term "us" implied its belief in a national community of whites that needed to be protected from the "Yellow Peril."⁴⁷ Chang concludes that Asian-Americans are "perpetual foreigners" whose "[f]oreign-ness is inscribed upon [their] bodies in such a way that Asian-Americans carry a figurative border with [them]."⁴⁸

Some may dismiss Gotanda's and Chang's citations to *Korematsu* and the Chinese Exclusion Cases as irrelevant relics of a racist, bygone era. After all, the Chinese Exclusion Cases were decided around the same time as *Plessy v. Ferguson*,⁴⁹ the Supreme Court decision holding that segregated public accommodations could be "separate but equal."⁵⁰ How I wish it were true! While the Supreme Court has not since issued such blatantly racist opinions, private, racially motivated violence against Asian-Americans has escalated dramatically in recent years.⁵¹ Indeed,

(reviewing PETER IRONS, *JUSTICE AT WAR* (1983) (discussing *Korematsu* and other wartime "camp cases"))).

⁴⁵ See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁴⁶ *Id.* at 606.

⁴⁷ ROBERT S. CHANG, *A Meditation on Borders, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 247 (Juan F. Perea ed., 1997) [hereinafter Chang, *Meditation*].

⁴⁸ *Id.* at 249. See also Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1255-58 (1993) (discussing the concept of "nativistic racism" as racism visited upon Asian-Americans and those others who are viewed as foreign); JOHN HIGHAM, *STRANGERS IN THE LAND* (3d ed. 1992) (analyzing the history of nativism in the U.S.).

⁴⁹ 163 U.S. 537 (1896).

⁵⁰ *Id.* at 551.

⁵¹ "Even as violence overall is dropping, hate crimes against Asian Americans rose 17 percent [in 1996], according to a report . . . by the National Asian Pacific American Legal Consortium." Lena H. Sun, *Anti-Asian American Incidents Rising, Civil Rights Group Says; Organization Executives To Meet With Reno Today*, WASH. POST, Sept. 9, 1997, at A2. See also Basu Rekha, *High Price for Asians Just to Belong*, DES MOINES REG., Sept. 14, 1997, at 3; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, 1995 AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS: THE CONSEQUENCES OF

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the stereotype of the “Asian-American as foreigner” still remains today, as the following example from my own experience in rustic Carlisle, Pennsylvania demonstrates. I wrote the following narrative a couple of months after the event it describes occurred;⁵² I was hoping to capture my feelings about what happened while it was still fresh in my memory.

Academic year 1995-96, my first year in law teaching, was an exceptionally good year. The fall of 1995 saw my wife's and my return to Pennsylvania after many years, where I was fortunate to be offered a job teaching at the Dickinson School of Law in Carlisle, just twenty minutes outside of Harrisburg, the state capital. Needless to say, we were both thrilled—Corie, because she would be closer to her family after having spent a good bit of time in California, and me, because I was thrilled to be offered the opportunity to teach law. Having had our fill of Los Angeles, we were both excited to be moving to peaceful, rural south central Pennsylvania; we gladly gave up our hour-long commutes in exchange for smog-free walks to the law school. And we settled into Carlisle nicely: on a handshake (our wonderful landlady did not believe in leases), we rented the ground floor of a lovely Victorian home in the historic district and looked forward to quickly assimilating into the culture of small-town life. As I start to write this close to a year after we moved to Carlisle, I can report that Corie and I have found that we do not miss big city life and its attractions/distractions. We have settled comfortably into our new roles, she as a graduate student and I as a law teacher, and we have come to fully appreciate the tranquility rural Pennsylvania has to offer. In a year's time, we have become small-town folk and have enjoyed the transformation along the way.

However, unlike probably ninety percent of Carlisle's married couples, we have an interracial marriage—Corie traces her Caucasian roots to Europe, specifically, Wales, the Netherlands, Germany, and Norway, while I came to

INTOLERANCE IN AMERICA 6 (1996) (chronicling incidents of violence against Asian-Americans in 1995)[hereinafter NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM].

⁵² As with many writing projects, it got shelved momentarily, waiting for the appropriate moment to make its appearance.

the U.S. from the Philippines in 1984.⁵³ And while ninety-nine percent of the time Corie and I are never reminded of this difference by others, when we are, it can sometimes be a painful and frightening experience. On a balmy May evening a couple of weeks before the Class of 96's graduation, Corie and I decided to take a walk around the neighborhood, something which we have enjoyed on many an afternoon. As we crossed Willow heading south on West Street, we noticed a pick-up truck whose occupants began to whistle wolf-calls and shout lewd remarks. Naively, my first thought was that these words were being directed at others around us or at occupants of another vehicle. It soon became clear that we were the targets of these obscenities:

"Hey, you Japanese sonofabitch! Why don't you fuck her? I have!"

That said, the truck slowly turned the corner, more obscenities coming from within. At the time, I remember trying to decide where we should run should these people come after us. Corie related to me later that a part of her wanted to grab me and kiss me passionately, proclaiming to our assaulters and the rest of the world that we were not ashamed of our relationship. After several tense moments, we were relieved to see the truck pull away as it rounded the corner. As a last show of power, one of the occupants extended his white arm and thrust his fist into the night air while simultaneously letting out a taunting laugh.

As the truck left our view, Corie and I abandoned our walk and hurried home. Surprisingly, the primary emotion we felt was not anger, but hurt and sadness. Hurt, because we felt that it was unfair that we could no longer enjoy walking around our neighborhood at night; sadness, because here we were in 1996, in what was otherwise an idyllic community, and we had to endure the kind of racist remarks many people only read about in books. Indeed, Corie told me later that evening, "For the

⁵³ Unlike Corie, I am not clear about my foreign heritage except that I suspect that alongside my Malayo-Polynesian forebears one would probably find Chinese and Spanish ancestors as well.

first time, I experienced what it is like to be a minority.”

Almost two years since the incident, I realize how lucky Corie and I are that we were not hurt that evening. Vincent Chin was not so lucky. In 1982, Chin, a young Chinese-American engineer, was beaten to death with a baseball bat by two white auto workers who, thinking he was Japanese, blamed him for the recession of the American auto industry.⁵⁴ Worse, Chin's killers served no jail time.⁵⁵ Sadly, the stereotype of the “Asian-American as foreigner” remains, and the consequences can sometimes be fatal.

Asian-Americans are not the only people of color who live within the border of perpetual foreignness. Latino-Americans, especially Mexican-Americans, also suffer this stigma. Indeed, despite public perception of the “illegal alien” as the unskilled, brown-skinned, Mexican male, Mexicans comprised only thirty-nine percent of all undocumented immigrants in the United States in 1992.⁵⁶ While many more Mexicans are legal immigrants to this country,⁵⁷ Mexican-Americans, like Asian-Americans, are presumed to be foreign because of the color of their skin. Further, just as Asian-Americans were singled out for alienation in *Korematsu* and the Chinese Exclusion Cases, Mexican-Americans similarly have been targeted by government action. Perhaps the most notorious anti-immigration law passed in recent memory is California's Proposition 187, which restricts undocumented immigrants' access to various state benefits. Not surprisingly, anti-Mexican slogans marked the campaign to pass the initiative. As one reader of the *Los Angeles Times* wrote, “[T]he state of California is not a province of Mexico. The victory of Proposition 187 will be proof that the state of California belongs to the United States of America.”⁵⁸ Borders around Asian- and Latino-

⁵⁴ See NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, *supra* note 51, at 6. Just because both Chin (a Chinese-American) and I (a Filipino-American) were mistaken for being Japanese does not mean I condone Japan-bashing. I share Chin's story to emphasize how similar anti-Asian encounters can lead to drastically different outcomes.

⁵⁵ See *id.*

⁵⁶ See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1545-46 (1995)[hereinafter Johnson, *Public Benefits*].

⁵⁷ Indeed, Mexico was the top country of origin for legal immigrants to the United States in 1960 and in 1990. See MICHAEL FIX & JEFFREY S. PASSEL, *IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT* 25 (1994).

⁵⁸ Letter to the Editor, L.A. TIMES, Oct. 30, 1994, at B16; See also Johnson, *supra* note 34, at 629.

Americans remain today.

My third major point follows more subtly from the first two. Aside from noting the large numbers of immigrants of color to the United States since 1965 and the ominous perpetuation of race-based noncitizen stereotypes, American citizens of color should care greatly about the current attacks on noncitizens of color because these assaults mirror the anti-minority backlash currently felt around the country.

In a recent article in the *Indiana Law Journal*, Kevin Johnson showed why citizens of color should not readily assume that the current anti-immigrant backlash and the anti-minority movement are unrelated events.⁵⁹ Johnson contends that any immigration law that explicitly or implicitly targets noncitizens of color reveals how the dominant European-centered culture views domestic people of color.⁶⁰ For example, Johnson views the current frenzy to seal the United States-Mexican border, combined with the acceleration of efforts to deport undocumented Mexicans, as evidence of how society views Mexican-Americans. He sees this anti-Mexican sentiment as suggestive of what society would do to Mexican-Americans if it did not have to obey the Constitution.⁶¹ Johnson grounds this assertion in historical fact: During the New Deal, Mexican-American citizens were "repatriated" alongside Mexican nationals.⁶² Borrowing from critical race theory, Johnson suggests the formulation of coalitions among citizens and noncitizens of color as a means of moving forward against the current anti-immigrant and anti-minority backlash.⁶³

I agree strongly with Johnson's analysis, however, I would like to add this: To the extent that noncitizens are not allowed to vote in this country,⁶⁴ we citizens of color should take the lead in ensuring that the

⁵⁹ See Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 *IND. L.J.* 1111 (1998).

⁶⁰ See *id.* at 1152.

⁶¹ See *id.*

⁶² See *id.* Perhaps just as egregious as the repatriation of Mexican-Americans is the degrading treatment currently suffered by Mexican immigrants at the U.S.-Mexico border. A recent Amnesty International study documenting this abuse describes it as including not only physical beatings and sexual assaults, but racially derogatory comments as well. See Sam Howe Verhovek, *Border Patrol Is Criticized as Abusive*, *N.Y. TIMES*, May 21, 1998, at A14.

⁶³ See Johnson, *supra* note 59, at 1157 (citing Charles R. Lawrence, III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 *STAN. L. REV.* 819, 828-47 (1995); Francisco Valdes, *Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 *LA RAZA L.J.* 1, 29 n.118 (1996)).

⁶⁴ Note, however, that Gerald Rosberg has argued that noncitizens with permanent

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continued assaults against immigrants of color (through the denial of welfare benefits and judicial review of immigration decisions) and citizens of color (through the attacks on affirmative action programs post-*Hopwood* and post-Proposition 209) are halted in their tracks. Let us work together rather than against each other, seeing each other as kindred souls on a single journey towards inclusion in the larger society.

I close with a second poem that I believe captures the idea of coalition-building between citizens and noncitizens of color. Written by the famous African-American poet Langston Hughes, "I, Too" captures the yearning of every person of color—citizen or noncitizen—to be welcomed at the table of America to feast upon the fruits of a truly color-blind dream.

I, too, sing America.

I am the darker brother.
They send me to eat in the kitchen
When company comes,
But I laugh,
And eat well,
And grow strong.

Tomorrow,
I'll be at the table
When company comes.
Nobody'll dare
Say to me,
"Eat in the kitchen,"
Then.

Besides,
They'll see how beautiful I am
And be ashamed—

I, too, am America.⁶⁵

resident status should be allowed to vote. See Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977); see also Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

⁶⁵ Langston Hughes, *I, Too*, in AMERICAN NEGRO POETRY 64 (Arna Bontemps, ed., 1974).