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SPEECH

Reframing the Affirmative Action Debate

BY LANI GUINIER*

Affirmative action has, at least in contemporary terms, been thought of as an issue exclusively concerning blacks and women, and, if we were to think about the most recent debate—particularly in California—only about blacks. My goal in what follows is to try to reframe that debate so that all of us can begin to see the conversation about affirmative action not as a wedge, but as a platform and an opportunity to start a much bigger conversation about democracy, justice, and fundamental fairness. To do this, I would like to use the image of the miner's canary¹

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¹ See Lani Guinier & Gerald Torres, *The Miner's Canary: Race, Representation and the USA Experience; Understanding the Meaning and Uses of Political Synecdoche* (1997) (unpublished manuscript, on file with the author) (citing Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953. A Case Study in Bureaucracy*, 62 *Yale L.J.* 348, 390 (1953) (Race functions like the miner's canary, "mark[ing] the shift from fresh air to poison gas in our political atmosphere").

It is my understanding that miners used to take a canary with them into the mine to alert them when the atmosphere in the mine was beginning to get dangerous—poisonous. The canary’s more fragile respiratory system was a signal to the miners, not just that it was dangerous for the canary to remain in the mine, but that the miners had better leave the mine, too. My central claim is that the experience of blacks and women in this country is the experience of the miner’s canary. Let me explain what I mean by this.

Unfortunately, the way the present affirmative action conversation is framed, we talk about fixing the so-called beneficiaries of affirmative action—namely, black men and women of various ethnicities and races. But this is analogous to talk about fixing the miner’s canary. Perhaps we should provide a lung transplant or some other medical intervention for the canary, or maybe we should outfit the canary with a pint-sized gas mask so it can continue to survive in its deadly environment.² But we know it is not the canary that needs to be fixed; it is the atmosphere in the mines that is poisoning not just

² After I delivered this lecture at the University of Kentucky, a gentleman approached me at the lectern to advise me that he found great irony in my application of the miner’s canary metaphor to issues of racial justice. After all, he reminded me, a black man from Kentucky had invented the gas mask to replace the canary but because of racism had trouble marketing it until the U.S. Army began using the same design in its gas masks during World War I. *See BLACK FIRSTS: 2,000 YEARS OF EXTRAORDINARY ACHIEVEMENT* (Jessie Carney Smith et al. eds., 1994) (“Garret Morgan (1875-1963) was the first black to receive a patent for a safety hood and smoke protector. . . . Born on a farm near Paris, Kentucky, Morgan became a very astute businessman and inventor in Cleveland. In 1923 he patented a three-way automatic traffic signal, which he sold to General Electric.”). *See also Who Invented the First Traffic Light and Gas Mask?*, N.Y. BEACON (New York, N.Y.), Feb. 12, 1997, at 3.

In 1916, [Garret] Morgan came to public attention in a big way when, using a breathing device he had invented two years earlier, he took part in a dramatic rescue. A disastrous explosion had occurred in a tunnel below Lake Erie [in Cleveland, Ohio], trapping nearly thirty [city waterworks] workers. Morgan and his brother, wearing his newly invented device, which he called a “Safety Hood,” went into the smoke-filled shaft and pulled the workers to safety.

When they heard about the rescue, fire officials around the country placed orders for the Safety Hood, but many canceled them when they learned that Morgan was an African-American. At this point, the army saw the value of Morgan’s invention, made some improvements on it, and the Safety Hood became the gas mask that saved thousands of lives in World War I.

Id.

the canary, but eventually all of us. The same is true when we talk about race and gender in our society. That is, women and blacks need to be understood as our miners' canaries – their experiences signal us about the health of our social environment. In particular, the experiences of members of these groups make visible to us fundamental flaws in the way we are distributing opportunity to everyone, but we can't see the flaws except as they are revealed in the canary. Let me give you an example.

In 1976, the percentage of black high school graduates who went on to college was beginning to approximate the percentage of white high school graduates who went on to college – not the same number, but the same percentage.³ That is, of blacks who graduated from high school, approximately the same percentage went on to college as the percentage of whites who graduated from high school. By 1986 that was no longer true. What happened between 1976 and 1986? One significant event was the election of Ronald Reagan as President. The Reagan administration decided to change the way college education was funded through something called the "Pell Grant."⁴ In 1976, the Pell Grant provided scholarship aid to needy students. In an effort to broaden the constituency that would be supported by Pell Grants and consistent with its "self-help" philosophy, the Reagan administration pushed to change Pell Grants from scholarships to primarily loans.⁵

³ See A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 377-79 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989). In a comprehensive study, Jaynes and Williams found that blacks' status in higher education worsened or stalled since the mid-1970s. "After the mid-1970s, the college-going chances of black high school graduates have declined." *Id.* at 378.

⁴ "The purpose of the [Pell Grant] is to assist students from low-income families who would not otherwise be financially able to attend a post secondary institution." MARGOT A. SCHENET, CRS REPORT FOR CONGRESS: PELL GRANTS: BACKGROUND AND ISSUES (Apr. 4, 1997). The Pell Grant program was established to be the foundation of federal student aid to further the goal of access and to provide students with more choice among institutions. *See id.* at 16.

⁵ President Reagan introduced budget proposals throughout the 1980s to cut Pell Grants and other higher education subsidies. *See, e.g.,* Macon Morehouse, *House, Senate Bills Compared: Bills to Curtail Loan Defaults Would Also Expand Aid Rolls*, 46 CONGRESSIONAL QUARTERLY, Sept. 3, 1988, available in 1988 WL 2835183. "Pell Grants authorizations used to be open-ended. After Reagan came into office, however, the authorization was limited to a specific amount – \$2.65 billion for that year." Also under the Reagan administration, the House proposed an expansion of budget authority for loans and other policies more likely to benefit students from middle income families. *See id.* (referring to H.R. 4986, 100th Cong. (1988)). In each of his budget proposals, President Reagan proposed a major philosophical shift in federal student aid: to return to the traditional emphasis on

Now, this may appear on its face as a race-neutral effort to expand the constituency for higher education. But it had a very distinct racial effect because the median net worth, or financial assets, of a black family is significantly less than the median net worth of a white family.⁶ This is the cumulative effect of discrimination. We are not talking now about income; we are not talking about the amount of money coming in through salary. We are talking about the assets that a family has. In 1988, the net financial worth for a white family averaged about \$43,000; for a black family, it averaged about \$3700.⁷ Assets have a significant effect on one's ability to get a loan,

parental and student contributions as the basis of meeting college costs. *See* U.S. DEP'T OF EDUC., REVISED FISCAL YEAR 1982 BUDGET 3 (1981):

The 1982 budget includes reforms of the major post-secondary student assistance programs to focus the aid on students who need it for the costs of attending college while controlling the rapidly escalating growth in Federal costs. In proposing these reforms, the Administration assumes that families and students – not the Federal government – should be the first source of funds for educational expenses.

President Reagan attempted to implement this goal by limiting grant aid and other federal subsidies and by increasing “self-help aid.” In his 1982 proposal, Reagan attempted to underscore his “self-help” philosophical approach by proposing a slight reduction in Pell Grant aid while increasing National Direct Student Loans from \$186 million to \$286 million. *See id.* at 4; *see also* U.S. DEP'T OF EDUC., THE FISCAL YEAR 1984 BUDGET 6 (1983) (“Under the new proposal, self-help would come first. Students would be required to provide a minimum of 40 percent (or a minimum of \$800) of their educational expenses through work or loans before obtaining any grants.”). Reagan's 1988 budget proposal sharply cut back the Pell Grant program from \$4.2 billion in 1987 to \$2.7 billion. *See* David Rapp, *Education: Reagan Targets Student Aid for Deep Spending Cuts*, CONGRESSIONAL QUARTERLY, Jan. 10, 1987, at 59, available in 1987 WL 2647837. This budget proposal would have made up the difference in student aid by expanding “income-contingent” loans from their 1987 level of \$5 million to \$600 million in fiscal year 1988. Under this program, “borrowers would have to repay the loan without the benefit of federal interest subsidies, though on a repayment schedule geared to income after graduation.” *Id.*, *see also* U.S. DEP'T OF EDUC., THE FISCAL YEAR 1988 BUDGET, SUMMARY AND BACKGROUND INFORMATION 2 (1987).

⁶ *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH, WHITE WEALTH (1995).

⁷ *See id.* at 86. To compare median net worth over time, *see* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-70, NO. 7, HOUSEHOLD WEALTH AND ASSET OWNERSHIP: 1984, 22 (1986) (stating that in 1984, white families had a median net worth of \$39,135, black families had a median net worth of \$3397, while families of Spanish origin had a median net worth of \$4913); U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-70, NO. 22,

and the consequence of this difference in financial status between black and white families was that many black families could not compete for Pell Grants. So the fact that the Pell Grant program appeared to be race-neutral masked the way in which the Pell Grants were having a very specific racial effect, namely, lessening the percentages of black high school students going to college. That's the miner's canary

In this case, college-aged blacks provide us a visible sign that there is something wrong. The something wrong is manifested in terms of black families, but it is not only black families who have a net financial worth of \$3700. There are many white families whose net financial worth is only \$3700.⁸ Part of the masked problem here is that the poverty of whites is hidden by the great affluence of other whites. It is only when we look at the effect of the Pell Grant on blacks that we begin to see that this decision, which initially appeared to be so neutral, actually had a very significant effect in determining who had access to higher education. By race? Yes.⁹ But not

HOUSEHOLD WEALTH AND ASSET OWNERSHIP 1988, at 8 (1990) (stating that in 1988, white households had a median net worth of \$43,279, while median net worth of black households was \$4169; the median net worth for families of Hispanic origin was \$5524); U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-70, NO. 47, ASSET OWNERSHIP OF HOUSEHOLDS: 1993, at 8 (1995) ("In 1993, White households had a median measured net worth of \$45,740, while the figure for Black households was \$4418. Hispanic households had median holdings of \$4656."). This census data is the result of the Survey of Income and Program Participation ("SIPP") that was first used in 1984. For a description of SIPP, see OLIVER & SHAPIRO, *supra* note 6, at 55-58.

⁸ In 1984, the total number of households with a white householder was 75,343,000. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-70, NO. 7, HOUSEHOLD WEALTH AND ASSET OWNERSHIP 1984, at 18 (1986). Fourteen percent of these households, or 10,548,020, had a net worth of between \$1 and \$4999. *See id.* In 1984, the total number of households with a black householder was 9,509,000. *See id.* Of those, 23.9%, or 2,272,651, had a net financial worth between \$1 and \$4999 *See id.*

⁹ See OLIVER & SHAPIRO, *supra* note 6, at 37-45, for a discussion of racial effects of "neutral" policies. The current application of the tax code, the authors argue, is another form of the racialization of state policy *See id.* at 43. They argue that the "lower tax rates on capital gains and the deduction for home mortgages and real estate taxes flow differentially to blacks and whites because blacks generally have fewer and different types of assets, than whites with similar incomes." *Id.* at 43. The effect of this "'fiscal welfare' is to limit the flow of tax relief to blacks and to redirect it to those who already have assets. The seemingly race-neutral tax code thus generates a racial effect that deepens rather than equalizes the economic gulf between blacks and whites." *Id.* Oliver and Shapiro

only by race, also by class. What is more, this process of making wealth or making financial assets a pre-condition for college is not just limited to the way we fund a college education. Consider the example of Cheryl Hopwood.

Cheryl Hopwood is a white woman who applied to the University of Texas Law School (“UTLS”) but was denied admission. She claimed that the reason she didn’t get in is that a number of black and Mexican-American students with lower Texas index scores were admitted pursuant to an affirmative action program then in place in the University of Texas Law School. Now, it is true that sixty-three of the ninety-two black and Mexican-American students who were admitted to UTLS did have lower Texas index scores than Cheryl Hopwood. But so did 140 white students who also got into

also discuss the FHA program under which the federal government places its credit behind private loans to homebuyers. *See id.* at 39. They explain that the “FHA’s conscious decision to channel loans away from the central city and to the suburbs has had a powerful effect on the creation of segregated housing in post-World War II America.” *Id.* The FHA even provided restrictive covenants that would be upheld in court to assist in the exclusion of blacks from white neighborhoods. *See id.* at 39. Though now unconstitutional, this “legacy of the FHA’s contribution to racial residential segregation lives on in the inability of blacks to incorporate themselves into integrated neighborhoods in which the equity and demand for their homes is maintained.” *Id.* When blacks move into white neighborhoods, white flight occurs, commencing the segregation process. This causes housing prices to fall, and the home appreciation seen by black homeowners slows relative to that of white homeowners in white areas. *See id.*, *see also* Michael Janofsky, *Report Finds Bias in Lending Hinders Home Buying in Cities*, N.Y. TIMES, Feb. 23, 1998, at A13 (citing report by the United States Conference of Mayors on discriminatory lending practices that disproportionately affect both urban dwellers and minorities; 71.3% of whites are homeowners, while only 43.6% of blacks and 41.7% of Hispanic Americans own homes). These figures are often the result of redlining.

Blacks also paid disproportionately more into the social security system and received less. *See* OLIVER & SHAPIRO, *supra* note 6, at 38. Oliver and Shapiro note that “[b]ecause social security contributions are made on a flat rate and black workers earn less ‘black men were taxed on 100 percent of their income, on average, while white men earned a considerable amount of untaxed income.’” *See id.* (quoting JILL QUADAGNO, *THE COLOR OF WELFARE* (1994)). They also point out that black workers earn lower retirement benefits which do not last as long as those enjoyed by whites due to the shorter average life span for blacks. *See id.* Finally, they argue that the “tax contributions of black working women ‘subsidize the benefits of white housewives.’” *Id.* (quoting QUADAGNO, *supra*). More black women are single, divorced, or separated. They must work now and many of them will not be able to one day share a spouse’s retirement benefit. For these reasons, African-Americans have paid more to Social Security but receive less.

UTLS when Cheryl Hopwood was denied admission. This fact consistently goes unnoticed in discussions of the case, but it turns out to be crucial in understanding it.¹⁰

Why was Cheryl Hopwood denied admission? Part of the reason she wasn't admitted goes back to the issue of using wealth or class or financial status as a credential. It turns out that Cheryl Hopwood had gone to both a state and a community college in Texas, and because of this, she was given a lower Texas index score than candidates who had gone to private colleges. Now, you may think that's odd since the University of Texas Law School is also a state institution. Nonetheless, it is a state institution that discounts the credentials of people who went to other state institutions. Points were taken off of Cheryl Hopwood's application because she went to both a state and a community college.¹¹ She went to those institutions in part because she is a working-class woman who couldn't afford a private institution. Yet the admissions protocol at UTLS discounted her degrees from public colleges in Texas as part of the process for denying her admission, as if going to a state or community college is not about class (although it was) but about competence. But commentators never talk about that. Instead, they talk simply about her Texas index scores in some abstract way, and look only at the black and Chicano students who got in with lower scores. But what do those scores actually tell us about the ability of any of these students to do well in law school? How do those scores relate not only to Cheryl Hopwood's class status, but to the class status of all the students who are applying to UTLS?

As it turns out, if we look at the SAT, the LSAT, and the GRE, within every race and ethnic group scores go up as income goes up – there is a direct correlation between family income and scores on these tests.¹² Part of that is

¹⁰ See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 961-62 (1996).

¹¹ See *id.* at 990. Many law schools do this by creating an admissions index based on the applicant's GPA and LSAT and then adding in the median LSAT of the college from which the applicant graduated. The rationale for including the median LSAT score of all those who took the LSAT from the applicant's college is to provide a uniform standard from which to assess the value of the applicant's GPA. Since there is a strong relationship between LSAT scores and parental income, however, applicants applying from prestigious private institutions (that also cost more to attend) are advantaged by the fact that they attended college with peers who test well, many of whom, not surprisingly, are also upper middle class students. See *infra* note 12.

¹² There is a correlation between income and SAT scores. See Sturm & Guinier, *supra* note 10, at 987-92. Generally, with each 100-point increase in SAT scores, average family income rises. See *id.* at 988 (citing Table 6.1, JAMES CROUSE &

because these are coachable tests. You can learn how to take them and you learn best how to take them if your parents can afford to send you to a review course that coaches you how to take them.¹³ You also do very well on these tests if you have gone to a school that teaches for a long period of time how to start doing the kind of strategic quick guessing that is rewarded on these tests. Yes, guessing! A case in point: Twins in Florida scored a perfect 800 on their SATs; they were the first set of siblings to take the SAT at the same time and each get an 800. The *New York Times* interviewed their mother, who was asked, "Aren't you proud that you have two kids both of whom got perfect scores?" She said she was proud. The *Times* interviewer then asked, "To what do you attribute this great success?" Her answer? They'd been practicing

DALE TRUSHEIM, *THE CASE AGAINST THE SAT* 125 (1988); *see also id.* at 988 n.152 ("There is a positive correlation between income level and standardized test scores.") (quoting ROBERT G. CAMERON, *THE COMMON YARDSTICK. A CASE FOR THE SAT* 11 (1989)) [N/A]; Michael Scott Moore, *Three Hours on a Saturday Morning: UC May Drop the Flawed SAT as an Admission Requirement. But Are the Other Options Any Better?*, *SAN FRANCISCO WEEKLY*, Dec. 10, 1997 ("The correspondence between family income and test scores has historically been as high as 80 percent. So choosing between scores of, say, 1100 and 1000 on the SAT is likely to amount to a decision based on class, not potential"); David K. Shipler, *A Leg Up: My Equal Opportunity, Your Free Lunch*, *N.Y. TIMES*, Mar. 5, 1995, at 4, p.1 (noting that within each racial or ethnic group, SAT scores increase as income rises); *University of California Weighs Optional S.A.T.'s*, *N.Y. TIMES*, Sept. 21, 1997, at 32 ("The only thing the S.A.T. predicts well now is socioeconomic status.") (quoting Eugene Garcia, Dean of the Graduate School of Education, University of California at Berkeley).

There is also a correlation between race and SAT scores. *See Sturm & Gurnier, supra* note 10, at 992-97 "Blacks on average score 110 points below whites on the math portion of the SAT and 92 points below whites on the verbal portion." *Id.* at 992 (citing Robert B. Slater, *Ranking the States by Black-White SAT Scoring Gaps*, *J. BLACKS HIGHER EDUC.*, Winter 1995/1996, at 71). *See also* *Larry P. v. Riles*, 495 F. Supp. 926, 954-60 (N.D. Cal. 1979) (noting persistent disparate impact of so-called aptitude or intelligence tests on blacks and noting existence of cultural bias), *aff'd in part and rev'd in part*, 793 F.2d 969 (9th Cir. 1984).

¹³ *See, e.g.,* Neil L. Rudenstine, *The Uses of Diversity*, *HARV. MAG.*, Mar.-Apr. 1996, 48, 57 ("Students who have had less consistent access to good education (and who lack the money to pay for extra 'prepping') will frequently do less well on standardized tests."). It is important to note the difference here between standardized achievement tests (which give diagnostic information and feedback to the teacher and the students) and aptitude tests, which seek to predict future performance. It is the aptitude test format that I challenge in this lecture. *See infra* note 20.

taking the SAT since the seventh grade.¹⁴ Examples like these show clearly that we're using certain aptitude tests to credentialize a social oligarchy and we're mistakenly calling it merit. Then, when some working class or poor people don't have the attributes that we assume are part of the social oligarchy, we don't say, "Well, it's too bad you're poor," we say, "It's too bad you're stupid."

Once we begin to see these things, we have an opportunity to have a different kind of conversation. This conversation has taken place in the most polarized and divisive way in California. One of the reasons it began there was that California used to have one of the premier systems of higher education in the country. In 1984, California spent more than two-and-one-half times as much money on higher education as it spent, for example, on prisons.¹⁵ Ten years later, California spent the same amount on higher education as it spent on prisons. In 1995, California spent more on prisons than it did on higher education. Now, 140 years ago Victor Hugo said that "every time we build a prison we close a school."¹⁶ He was right. For the cost of imprisoning one person for one year, California could educate ten community college students, five California state university students, or two University of California students. But instead, California decided to pass a "three-strikes-and-you're-out" policy.¹⁷ The decision to imprison a third-

¹⁴ See Peter Applebome, *For Twins, Double Jackpot on the S.A.T.*, N.Y. TIMES, Nov. 10, 1995, at A16 (Mrs. Salthouse, the mother of fraternal twins who scored simultaneous 1600s – the highest possible score – said her children had benefited from taking the SAT repeatedly over time. Mrs. Salthouse said, "The best preparation for taking the S.A.T. is taking the S.A.T.").

¹⁵ Troy Duster, *The New Crisis of Legitimacy in Controls, Prisons, and Legal Structures*, THE AMERICAN SOCIOLOGIST, Spring 1995, at 20, 24-25.

¹⁶ *Id.* at 25 (paraphrasing Victor Hugo).

¹⁷ See CAL. PENAL CODE § 667 (West 1998). This statute reads:

It is the intent of the legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

- (1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

strike burglar for forty years means the state is foregoing the opportunity to educate two hundred community college students for two years.¹⁸

It is not surprising, when higher education becomes such a scarce resource, that people begin fighting over who can get in. As they begin fighting over who can get in, they also start looking around at who seems to be getting in, but they don't look at those like the 140 students with lower Texas index scores or lower SAT scores in California – they look instead at the vulnerable canary. They question the admission of minorities to their schools. They start saying, "Look, these people can't even do well on the SATs." They blame the canary. I've been on a number of television debates in which I was told, "You know, these black and Chicano students, they don't do well on the SAT." And I say, "Yes. Well?" And then I pull out an SAT question, and I say, "Melodian is to organist as (choose one) reveille is to bugler, solo is to accompanist, crescendo is to pianist, anthem is to choir master, kettle drum is to timpanist."¹⁹ I asked that question, for example, of Professor Lino Graglia of the University of Texas Law School, who was making this argument, and he said, "Are you asking me if that question is on the SAT?" I said, "No. I'm telling you it's on the SAT and I want to know the answer." He didn't know the answer. And so what? What difference does it

(2) (A) If a defendant has two or more prior felony convictions as defined in subdivision d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

- (i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.
- (ii) Imprisonment in the state prison for 25 years.
- (iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable to under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

Id.

¹⁸ See Duster, *supra* note 15, at 25. This costs all taxpayers, not just those unlucky to be tracked to prison. In 1995, California spent more money on prison construction than on building colleges for the first time. Between 1984 and 1994, California built 16 new prisons; in the same decade, the state built only one new campus for the California State University system. Furthermore, the Department of Corrections increased its personnel by 25,864 while higher education personnel dropped by 8082. See *id.*

¹⁹ ASA G. HILLIARD III, TESTING AFRICAN AMERICAN STUDENTS 95 (1991) (providing examples of questions from recent SATs).

make whether you know the answer to that question? It makes no difference unless, perhaps, you are going to be a musician.

Now, I am not saying we don't want to have and maintain standards of excellence. I am committed to standards of excellence. I am committed to high expectations for all students. All I am questioning is whether performance on a single paper-and-pencil test in which the stakes are high, and in which a large part of what we measure is quick strategic guessing, represents excellence or whether it, in fact, represents wealth.²⁰ If you look, for example, at those black and Chicano students in California who weren't doing as well

²⁰ Of course, this is an oversimplification. The SAT and other "norm-referenced" aptitude tests do tell us something about one's capacity to do analytic thinking. The problem is that such capacity is often improved by practice, which comes from coaching (which costs money), from taking practice tests (which means exposure to the opportunity of learning from previous mistakes), and from other kinds of exposure to travel, books, and unusual vocabulary words. Thus, while the tests do tell us something about those who do well, they often tell us less about those who do poorly; i.e., they do not tell us what a poor performer is actually capable of doing, only what that person has already learned or not learned to do. See, e.g., Michael Feuer, *The Changing Science of Assessment: Issues and Implications* (remarks at Symposium held Jan. 30, 1998); *Rethinking Law in the 21st Century Workplace*, U. PA. J. LAB. & EMP. LAW (forthcoming 1998) (stating there is a non-trivial proportion of people who would be excluded from employment opportunities because of performance on a test who could nevertheless do the job; low-scoring test takers are more likely to be misclassified; and black applicants, in particular, are more likely to be misclassified). Feuer, who is Director of the Board of Testing and Assessment at the National Academy of Sciences, explained that for many low-scoring individuals, differences in performance on a job are less than the differences in their test performance. This is because the tests only measure certain quantifiable traits and ignore "context, situation, training, teams and prior performance," which also affect job performance. *Id.* Feuer mentioned that the Academy supported research, published as "Fairness in Employment Testing," which included a study of the performance of 3500 Air Force pilots. The study found that previous performance of the pilots was the best predictor of their future performance. Feuer also gave the example of research on milk truck delivery drivers in New York who were able to do sophisticated mathematical calculations as part of their job, but the same drivers would not have been able to perform comparable calculations had they been asked first to take a test. Feuer concludes that some test-driven decisionmaking confuses prediction with merit, especially in light of research regarding the important role of practice and skill acquisition in the workplace itself. See *id.*, see also Sturm & Guiner, *supra* note 10, at 974 n.82 and accompanying text. A study of 300,000 recruits who failed the Army battery of tests in 1976, but because of a calibration error were admitted, was done. Longitudinal study of their subsequent performance showed little difference in re-enlistment and promotion rates compared to those who actually passed the test. See *id.*

on the SAT, thirty-six percent of them came from households with incomes of less than \$15,000 a year.²¹ On the other hand, sixty percent of the white students taking the SAT in California came from households with incomes of more than \$60,000 a year.²² We use these scores to determine merit but they are in many ways functioning as a wealth test. This is important because higher education has become a gateway to democratic citizenship: It is difficult to get a secure job without a college degree, and without a job, you are not treated as a contributing member of this society.²³ Yet, the gateway to

²¹ Cf. Stephanie Simon, *Education/An Exploration of Ideas, Issues and Trends in Education; Working to Compete; Latino Students Preparing for the SAT Want the Opportunity to Show They Can Succeed*, LOS ANGELES TIMES, Oct. 1, 1997 (citing THE COLLEGE BOARD, 1997 "SAT tests taken in California show that scores rise with the income of students' families. Two-thirds of Mexican-American high school graduates come from families with incomes of less than \$25,000 annually") The article includes a table showing that students from families with a total annual income between \$10,000 and \$20,000 had an average combined SAT score of 906 (437 verbal and 469 math) and students whose family income was under \$10,000 annually had an average combined SAT score of 859 (409 verbal and 450 math). *See id.* Meanwhile, students from families with income of \$80,000 to \$100,000 had an average combined SAT score of 1082 (535 verbal and 547 math). *See id.*

²² *See* Fair Test, 1996 California SAT Statistical Data (comparing household income in thousands of dollars with the percentage of Mexican-American, black, and white test-takers) (Fair Test National Center for Fair & Open Testing, Cambridge, Mass., Jan. 1998) (unpublished analysis on file with author). The data analysis was compiled from the Educational Testing Service's Profile of College-Bound High School Seniors data from 1996.

²³ *See, e.g.*, Robert B. Westbrook, *Public Schooling and American Democracy*, in DEMOCRACY, EDUCATION AND THE SCHOOLS 125 (Roger Soder ed., 1996). Westbrook asserts

The relationship between public schooling and democracy is a conceptually tight one. Schools have become one of the principal institutions by which modern states reproduce themselves, and insofar as those states are democratic, they will make use of schools to prepare children for democratic citizenship.

Id. Some might argue that the exclusive or at least primary aim of schools should be to educate students "for the market." In President Clinton's 1994 State of the Union address, he declared, "We measure every school by one high standard: Are our children learning what they need to know to compete and win in the global economy?" *Id.* at 126. Others, such as Benjamin Barber, suggest the important yet neglected goal of "'civic literacy,'" meaning "'the competence to participate in democratic communities, the ability to think critically and act with deliberation in a pluralistic world, and the empathy to identify sufficiently with others to live with them despite conflicts of interest and differences in character.'" *Id.* at 125 (quoting Benjamin Barber, *America Skips School*, 287 HARPER'S MAG. 39, 44 (Nov 1993)).

citizenship is controlled by tests that tell us more about how much money your parents make than what kind of citizen you are ultimately going to be.

Now, we defend these tests by saying that they are efficient and, in any event, they predict first-year performance in college or graduate school. Well, they may be efficient, but they don't necessarily predict first-year performance. The average correlation between SAT scores and first-year college grades is about thirty percent.²⁴ In terms of the LSAT (and going back to those black and Chicano students at the University of Texas), Martin Shapiro, a statistician, did an affidavit in the *Hopwood* case in which he said that the correlation between black students' LSAT scores and first-year UT law school grades was negative.²⁵ In other words, if we wanted to figure out how the students were going to do using the Texas index, we would have to assign a negative number to their undergraduate GPAs. There simply was no correlation that was worth considering. I've spoken to many people, including people at the Law School Admissions Council, who say that nationwide the LSAT is about nine percent better than random in predicting the variation in first year law school grades. Nine percent! Not even ten percent.

I did a study of women and legal education with Michelle Fine and Jane Balin. We got the academic performance records of 981 students, and we also

Westbrook agrees with Barber that public schools are public not just because they are supported by public monies but because they educate every student for the responsibilities and benefits of participating in public life. *See Westbrook, supra*. Professor Susan Sturm and I argue that both goals (of educating citizens for employment opportunities and for democratic participation) are critical although we might restate them differently. *See generally* Susan Sturm & Lanı Gunier, *From Triage to Transformation: The Role of Multiracial Learning Communities* (arguing that learning how to collaborate with people who are different is an essential mission of education both because the workplace of the twenty-first century will demand such "teamwork" and because complex problems are often only solved when diverse perspectives are taken into account through the process of constructive conflict) (unpublished manuscript, on file with author). *See also infra* text following note 40 (summarizing values of democratic diversity).

²⁴ *See* Sturm & Gunier, *supra* note 10, at 971 ("A recent study of the correlation of SAT scores with freshman grades showed correlations ranging from .32 to .36") (citing WARREN W WILLINGHAM ET AL., PREDICTING COLLEGE GRADES: AN ANALYSIS OF INSTITUTIONAL TRENDS OVER TWO DECADES 43 (1990)); *see also* Moore, *supra* note 12 ("According to most independent studies, the SAT's accuracy in predicting first-year college grades hovers around 30 percent, odds Ralph Nader once described as 'a little better than throwing dice.'").

²⁵ *See* Sturm & Gunier, *supra* note 10, at 972-73 nn. 69-70 (citing Shapiro's affidavit that found weak correlations between LSAT scores and first-year law school performance for everyone, but particularly for African-American students).

looked at their undergraduate GPAs and their LSAT scores.²⁶ We found that at the University of Pennsylvania Law School the LSAT did a little better – fourteen percent better than random.²⁷ However, that still means eighty-six percent of the variance in Penn’s first-year grades is not explained by the LSAT scores. When we plotted out these scores on a graph they were all over the map. There were students with perfect LSAT scores who were among the students with the lowest course grades in the first-year class.

Now, if LSAT or SAT scores do not predict first-year grades, do they measure success in some other way? For example, do they measure success in life which, after all, seems a more important measure? A group at Harvard actually decided they were going to investigate this. They did a study of three different classes of alumni over a thirty-year period. They wanted to know what correlates with success. The researchers measured success as financial satisfaction, professional satisfaction, and contribution to the community. Within these three different classes of alumni the researchers found two things that did correlate with their criteria of success: low SAT scores and a blue-collar background. Part of the explanation, they said, is that the SAT does not account for a very important ingredient in achievement – ambition, drive, motivation, hunger to succeed.²⁸ Other variables that correlate with success, such as intense involvement in extracurricular activities,²⁹ willingness to ask for help,³⁰ the tendency to reflect on one’s work and revise

²⁶ See LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 31 (1997).

²⁷ See *id.* at 8 (“For students in their first and second years, the LSAT explains even less: 14% and 15% [of performance] respectively”); see also *id.* at 124 n.74 (“In other words, when LSAT is the only variable in a bivariate regression equation, it explains 14% of the variance in first-year law school GPA.”).

²⁸ See *id.* at 10. According to Marilyn McGrath Lewis, director of admissions for Harvard and Radcliffe, “We have a particular interest in students from a modest background. We know that’s the best investment we can make: a kid who’s hungry.”

²⁹ See *id.*

Intense extracurricular involvement in high school reflects qualities of student leadership as well as initiative, and also usually means that the student has developed a long-term relationship with an adult mentor. The mentoring relationship is critical. It usually means an adult has expressed confidence in the student’s ability and provides emotional and other support even after high school graduation.

Id. at 10 n.17

³⁰ Other capacities associated with success that are not evaluated by high-stakes test include willingness to seek help. See National Commission on Testing and Public Policy, *From Gatekeepers to Gateway: Transforming Testing in America* 7-

it,³¹ the ability to prioritize and juggle tasks,³² are not measured by the SAT. We do not measure these things when we give people a paper-and-pencil test and ask them to guess whether “melodian” is to “organist” as “kettle drum” is to “timpanist.” And yet we are taking performance on these paper-and-pencil tests to be an accurate predictor of success. The discrepancy between test scores and actual performance in law school or ultimate success after graduation serves as the miner’s canary. It is the miner’s canary because black and Chicano students, despite their weak performance on the these timed paper-and-pencil tests, have the capacity to succeed.³³ Their experience is the miner’s canary because it is telling us that we are using the wrong instrument to measure *everyone’s* capacity to succeed, not just theirs.

It’s not just race that’s the miner’s canary, but also gender. The study I did with Michelle Fine and Jane Balin of women at the University of Pennsylvania Law School started when one of my students wanted to do a video. I told her I didn’t know anything about video, but it seemed to me that the first thing she should do would be to write a script. So she did. She wrote a script about various incidents of harassment that she had experienced. When she showed me the script, I said to her, “Ann, I don’t doubt that all of this has happened. But you are the central figure in each of these incidents and if this is going to be a video that other people are going to learn from, perhaps it would help if you found out whether your experiences are representative of your classmates.” So she did a survey. She distributed her survey to all the students. We got back some very discouraging results. On the one hand, over one-half of the students responded to the survey; on the other hand, dispropor-

8 (Boston College, Chestnut Hill, MA 1990).

³¹ See generally DAVID N. PERKINS, *OUTSMARTING IQ: THE EMERGING SCIENCE OF LEARNABLE INTELLIGENCE* (1995); *THE NATURE OF EXPERTISE* (Micheline T.H. Chi et al. eds., 1988); *TOWARD A GENERAL THEORY OF EXPERTISE: PROSPECTS AND LIMITS* (K. Anders Ericsson & Jacqui Smith eds., 1991).

³² In addition to the ability to prioritize and juggle tasks, it is important to understand and be able to do what is valued within one’s environment. See Robert J. Sternberg & R.K. Wagner, *The G-ocentric View of Intelligence and Job Performance is Wrong*, 2(1) *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 1-5 (1993); Robert J. Sternberg & Wendy M. Williams, *Does the Graduate Record Examination Predict Meaningful Success in the Graduate Training of Psychologists?: A Case Study*, 52 (6) *AM. PSYCHOLOGIST* 630 (1997); see generally Mindy Kornhaber, *Some Means of Spurring the Equitable Identification of Students for Selective Higher Education* (Nov. 17, 1997) (unpublished manuscript on file with author).

³³ Indeed, this is Michael Feuer’s point: that high-stakes aptitude tests may disadvantage low-scoring test-takers unfairly because the test results fail to tell us whether the person has the capacity to do the job, yet we rely on the tests to deny the applicant the chance to prove what he or she can in fact do. See *supra* note 20.

tionate numbers of the women students who answered the survey were unhappy. They weren't speaking up in class and they felt alienated from their law school experience. One woman said, "Guys think law school is hard; we think we're stupid." Such comments revealed that they were internalizing their experiences. It reminded me of the razor company that was trying to conduct a study in which they observed (through a one-way mirror) men and women using defective razors. The men took the razor, shaved, cut themselves, declared the razor no good and threw it away. The women used the defective razor, shaved, cut themselves, and started to worry about what was wrong with their technique. So, like the razor study, part of what our study told us was that the women in our law school were internalizing something that everybody was experiencing. We then went from the self-reporting survey to the academic performance data, and we found that the women, despite identical entry level credentials – virtually the same GPAs, LSAT scores, and undergraduate majors – simply were not doing as well in law school.

I brought this information to some of my colleagues, one of whom said, "Varsity sports." "Well," I said, "that's an interesting theory. Play it out for me; what is it that you're saying?" He said, "Well, perhaps the men who attend law school were all very active in varsity sports as undergraduates. And maybe they were so distracted by their efforts in varsity sports that they didn't perform up to their potential in college so their undergraduate GPAs understate their capacity to perform in law school where there are no varsity sports." I did not pursue the theory.

On the other hand, my colleague may have had a point. Many of the men we interviewed said that they basically looked at law school as a game. Now, what do you do when you play a game? In our culture, you play to win. And if you're playing the game of law school and you're playing the game of winning in a law school class, you win by raising your hand first. You are the agenda setter. You get to talk and control how the rest of the class has to respond. The women, however, said that they did not look at law school as a game. Rather, they saw it as a conversation, and they wanted to say something relevant within that conversation. Part of this approach involves building on what the person before has said. So we found that women commonly edit their remarks. They want to make sure what they are saying is right. By the time they feel confident in what they have to say, however, the class has moved on. Or, they have been so efficient at editing their remarks that when they raise their hands, they essentially deliver a haiku poem. It can take many days to really figure out the significance of their comments.

Now, what does all of this have to do with affirmative action? And what does this have to do with the miner's canary? I think the women at Penn. Law School are a miner's canary. They are telling us that there may be something wrong with an academic style of discourse in which we, the professors, are

sages on the stage. We engage in a dialogue with students where we have complete information. But we purposely edit student casebooks so that our students have less-than-perfect information. This method of teaching demonstrates to students that they, unlike their professors, do not know the answer because students, of course, have not read the entire case with all its footnotes, and the cases that came before it and the cases that came after it. As one of my law school colleagues observed, the law school process is too often like learning how to ask rude questions. That is, in normal contexts when you ask a question, you ask it because you want to know the answer. That's the reason you ask the question. Lawyers are trained *never* to ask a question to which they don't already know the answer. Thus, law professors ask questions of students, but the professors already know the answer. It's an intimidating environment. Some people learn by intimidation. But not everyone does. And the women were our miner's canary. Their doing less well than their male counterparts suggests that we are using a one-size-fits-all pedagogy that may impair some students' capacity to perform and denies *all* of the students the value of genuine conversation.

Now why do I say that lawyers, of all people, need to know the value of genuine conversation? Think about lawyers in the Twenty-first Century, even lawyers in the late Twentieth Century. Put out of your mind some of the lawyers on television, because they are exceptions. Most lawyers do not go to court, most lawyers do not litigate, most lawyers are not solo practitioners, most lawyers must function in a team.³⁴ And those who function in a team

³⁴ See Lanı Guinier, *Lessons and Challenges of Becoming Gentlemen*, N.Y.U. J. L. & SOC. POL'Y 18 (forthcoming 1998) (citing LAW SCHOOL ADMISSION COUNCIL/LAW SCHOOL ADMISSION SERVICES, *LAW AS A CAREER: A PRACTICAL GUIDE* 17 (1993) (stating that many lawyers do not litigate at all)); Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 322, 325 (1995) (asserting that even in litigation what counts is judgment and experience, and many lawyers work as members of teams representing large organizations in multiparty transactions and disputes and only rarely go to court)). "Lawyering is a 'bundle of skills' including the lawyer's ability to 'integrate factual and legal knowledge and to exercise good judgment in light of that integrated understanding.'" See GUINIER ET AL., *supra* note 26, at 107 n.27 (quoting Blasi, *supra*, at 326). For example,

[o]ften lawyers work as members of teams representing large organizations in multiparty transactions or disputes and only rarely go to court. The lawyer as aggressive litigator representing a single client may be outmoded in terms of what most lawyers actually do, and this paradigm may be dysfunctional in terms of 'the collection of competencies' lawyers need to possess in order to do their job well.

Id. at 15-16.

A study found that the three most important qualities of lawyers were

have to know how to cooperate, they have to know how to listen, they have to know how to build on what other people have said. These are skills that are valuable, not just for women lawyers, but for lawyering generally. So the model of advocacy that we are using as the singular frame to teach how to be a lawyer – learning how to ask rude questions – probably isn't the best way to teach all potential lawyers. The Penn. women students provide an opportunity to start re-thinking the educational process for *everybody*. The women are the miner's canary – their experiences suggest that we can do better. We can do better by the women and we can do better by the men. We can make better lawyers.

I've said that there are certain skills that are valuable to lawyers in the Twenty-first Century, but I know that not everybody is going to be a lawyer. Uri Treisman had some African-American students who were studying math; they were studying calculus. They weren't doing as well as some of his Chinese-American students, and he wanted to know why.³⁵ He asked some of the other math professors at his college about this, and they offered all sorts of classic stereotypes: they came from single-parent households, they didn't study as hard, they weren't as motivated. But none of that was true. In fact, the African-American students were studying harder, longer than the Chinese-American students. The difference was that the Chinese-American students were studying as a group. They would talk calculus on their way to lunch. They would talk calculus on their way to the library. They would work

oral communication, written communication, and "instilling others' confidence in you." After these, the skills or areas of knowledge considered most important were, in order, "ability in legal analysis and legal reasoning, drafting legal documents, and *ability to diagnose and plan solutions for legal problems.*"

Id. at 107 n.27 (quoting Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 473 (1993)).

³⁵ See GUINIER ET AL., *supra* note 26, at 103 n.2 (citing Uri Treisman, *Studying Students Studying Calculus: A Look at the Lives of Minority Mathematics Students in College*, 23 C. MATHEMATICS J. 362, 364-65 (1992), and PHILIP URI TREISMAN, A STUDY OF THE MATHEMATICS OF BLACK STUDENTS AT THE UNIVERSITY OF CALIFORNIA, BERKELEY 13-15, 46 (1985)). Uri Treisman found that the

collaborative approach of Chinese American students "provided them with valuable information that guided their day-to-day study"; these students "routinely critiqued each other's work" and thus discovered when studymates also found problems unusually difficult; as a result, students learned that their failure "was not one of simple oversight" but could be addressed by asking a teaching assistant "without fear of appearing incompetent or ill-prepared."

Id. (quoting TREISMAN, *supra*).

through problems together. They engaged in a conversation about calculus and as a result of that conversation, they became better mathematicians. So the notion of engaged conversation, a communication of learning how to cooperate, is not just something that is good for lawyers. It's also something that is good for calculus students. When Uri Treisman designed a peer workshop in which he adapted some of the techniques he had seen his Chinese-American students use, he invited the African-American students into the workshop. These students drew some of the highest scores in his calculus class the next semester. The lesson was simple, easy to learn, easy to use—Chinese-American students had a better way of learning calculus. We can learn from bringing in new perspectives and new ways of thinking about old jobs. The miner's canary signals us that the atmosphere in the mine is dangerous, but the warning also tells us to start thinking about new ways of fixing not the canary but the mine.

One final example involves women. The New York City Police Department used to have a height requirement. One had to be almost six feet tall in order to be a police officer. A group of women challenged this, since there aren't many women who are six feet tall. Their challenge to the height requirement was successful. More women became cops; more Latino men became cops; more Asian men became cops; more short white men became cops.³⁶ Women of average height executed the first role of the canary – to signal that the standard didn't really make a lot of sense; it was arbitrary. But they also executed the second role of the canary – they became the instigators of a different kind of thinking about police work.³⁷ This was especially true

³⁶ See *id.* at 18 (“New York City once used a height requirement pegged to tall men to select police officers. This discriminated against women, Asian men, some Latino men, and short white men—and normalized a particular type of officer—tough, brawny, macho.”). The Los Angeles Police Department had similar policies. See Sturm & Gunier, *supra* note 10, at 985 n.136 (citing Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 87 (noting report finding that LAPD training officers criticized female officers for a perceived lack of “stereotypically masculine qualities”).

³⁷ See Sturm & Gunier, *supra* note 10, at 984-85 n.134 (citing Telephone Interview with J. Phillip Thompson, Director of Management and Operations, New York City Housing Authority, 1992-93 (Jan. 25, 1996)).

Thompson recounted that an internal evaluation conducted by the Housing Authority revealed that women housing authority officers were policing in a different, but successful, way. As a result of this evaluation, the authority sought to recruit new cops based on their ability to relate to young people, their knowledge of the community, their willingness to live in the housing projects, and their interest in police work. They also offered

of the black and Puerto Rican women who lived near some of the housing projects in New York. They made the projects safer by approaching the young, primarily African-American and Puerto Rican teenage males, who were the likely trouble-makers, as mentors.³⁸ They offered these young men respect, and the young men, grateful for the attention of an adult, constrained their old behaviors so they could continue to earn that respect.³⁹ These women were developing a different style of policing. This is not to say that we want all police officers to become mentors, but it wouldn't hurt if more officers knew how to modify their command and control approach when appropriate. When the Los Angeles Police Department commissioned a study (headed by Warren Christopher, the former Secretary of State) to find out what they should do about excessive use of force by police officers, the answer that came back was, "Hire more women." Hire more women. Women, the study showed, were not reluctant to use force, but they didn't resort to force as their initial reaction to a situation involving conflict.⁴⁰

Now, I have to say I'm optimistic about conversations in which we think about the miner's canary as a signal and as a lesson. I am optimistic as more people begin to see diversity as something that benefits the entire society – in other words, as more people learn the lessons of the miner's canary. To summarize, these lessons include:

(1) the value of democratic legitimacy – that all taxpayers feel they have an opportunity to pursue the benefits they are subsidizing;

(2) the value of diversity as an important tool for solving complex problems in the information economy when no single individual can memorize all the available information (nor do we need anyone to memorize

free housing to any successful recruit willing to live in the projects.

Id.

³⁸ See *supra* note 29 (describing importance of mentoring relationship with an adult during adolescence).

³⁹ See Sturm & Guinier, *supra* note 10, at 985 n.135 (noting that the "women officers showed the young men respect, which was critical to the social status needs of these males; and that the men in turn checked their own behavior, out of mutual respect for the women officers") (citing Telephone Interview with J. Phillip Thompson, *supra* note 37).

⁴⁰ See *id.* at 983 n.133 (citing Independent Commission on the Los Angeles Police Department, Report of the Independent Commission on the Los Angeles Police Department 83-84 (1991) ("'[F]emale LAPD officers are involved in excessive use of force at rates substantially below those of male officers. The statistics indicate that female officers are not reluctant to use force, but they are not nearly as likely to be involved in use of excessive force,' due to female officers' perceived ability to be 'more communicative, more skillful at de-escalating potentially violent situations and less confrontational.'")).

it when it keeps changing, yet is quickly accessible. In other words, what we really need is synthesis of information – being able to take information from diverse sources, then put it together in innovative and creative ways to solve problems; and

(3) that bringing in previously underrepresented or marginalized groups can help all of us rethink the nature of the job or the task (for example, the lesson of the women cops and Uri Treisman's Chinese-American calculus students).

I'm optimistic as well because of my own experience raising my nine-year-old son, Nikolas. When Nikolas was seven he was in second grade, and the teacher had him keep a journal. (I asked him if it was okay to share with you his journal, and he said it was okay as long as I told you it was written when he was in second grade. He's now in fourth grade.) The teacher said, "Tell us what your family does, you know, what does your mother do? What does your father do?" Nikolas talked about his mom. "My mom is a professor," he said. "I think it's boring. I think it's boring because you get to sit in front of a computer and you don't get to play games. On the other hand, I think it's fun because you get to stand in front of a class and you're the boss." I could hear in my son's journal an echo of conversations with a lot of the men in my Penn. Law School classes who also see things as a game; the goal is to win, to be powerful. On the other hand, my son also showed me that he, too, can learn to look at the world differently. His second-grade teacher subsequently told me that they were sitting around talking about what each of their parents did, and one of Niko's classmates said that his mom is the vice-president of a bank. At which point my son just looked at him and blurted out, "Well, why isn't *she* president?"

