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Rethinking Equality in the Global Society

Clark D. Cunningham

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WASHINGTON UNIVERSITY SCHOOL OF LAW

RETHINKING EQUALITY IN THE GLOBAL SOCIETY

TABLE OF CONTENTS

FOREWORD	1562
CONFERENCE AGENDA	1563
BIOGRAPHIES OF CONFERENCE PARTICIPANTS.....	1565
TABLE OF CONTENTS FOR CONFERENCE MATERIALS.....	1577
OPENING REMARKS ON SATURDAY, NOVEMBER 8, 1997	
Clark D. Cunningham.....	1579
TRANSCRIBED CONFERENCE PROCEEDINGS ON MONDAY, NOVEMBER 10, 1997	
9:00 a.m.	
<i>Opening Plenary</i>	
Dorsey Ellis, Jr., John Bowen, Clark D. Cunningham.....	1586
9:15 a.m.	
<i>Session I</i>	
Pauline Kim, John J. Donohue, B.P. Jeevan Reddy, Sunita Parikh	1590
<i>Session II</i>	
John Bowen, Linda Krieger, Aaron Porter, Pansy Tlakula.....	1603
10:15 a.m.	
<i>Session I</i>	
Garrett Duncan, Joshua Aronson, Gerald Torres, Karthigasen Govender	1620
<i>Session II</i>	
Lani Guinier, Jack Knight, David B. Oppenheimer, Karen Tokarz.....	1635
11:15 a.m.	
<i>Session I</i>	
Virginia Dominguez, M.N. Srinivas, Karen Porter.....	1657
1:15 p.m.	
<i>Closing Plenary</i>	
N.R. Madhava Menon, Marc Galanter, Clark D. Cunningham.....	1666

FOREWORD

From November 8-10, 1997 Washington University hosted an international conference designed to broaden American debate on the future of affirmative action. The conference, "Rethinking Equality in the Global Society," brought together leading scholars from the United States and abroad to discuss the future of affirmative action from cross-national and interdisciplinary perspectives.

The future of affirmative action, especially in the area of American higher education, has been called into question by the 1996 decision of the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. State of Texas*, requiring race-blind admission to state universities in Texas, and the passage of Proposition 209 in California. The seemingly endless American debate on this issue almost entirely has ignored the fact that other countries faced with comparable problems of remedying the effects of past discrimination have developed programs and acquired experience from which Americans might learn. Further, the legal debate has not been adequately informed by the social science disciplines. This conference was intended to expand discussion at a critical moment by introducing these missing perspectives.

The conference was organized by Professors Clark D. Cunningham (Washington University), Marc Galanter (Wisconsin) and N.R. Madhava Menon (National Law School of India). The conference was jointly sponsored by the School of Law and the Program in Social Thought and Analysis, an interdisciplinary, university-wide program. The conference was a major event to celebrate the opening of a new law school building at Washington University.

Total attendance at the conference was limited because most sessions were small group discussions. Session topics included affirmative action policies and programs in India and South Africa; approaches to designing, implementing and measuring effects of affirmative action programs; and how affirmative action differs in contexts of higher education, employment, and governance. The plenary speeches and panel discussions on the final day were transcribed and form the basis of this article.

AGENDA

SATURDAY, NOVEMBER 8, 1997

Introductory Remarks 1:00 p.m. – 2:00 p.m.

Mark Wrighton, Chancellor, Washington University
Jack Knight, Social Thought & Analysis, Washington University
Marc Galanter, Institute for Legal Studies, University of Wisconsin
N.R. Madhava Menon, National Law School of India
Clark D. Cunningham, Washington University School of Law

Concurrent Sessions 2:00 p.m. – 4:00 p.m.

INDIA
SOUTH AFRICA

SUNDAY, NOVEMBER 9, 1997

Concurrent Sessions on Affirmative Action

Session I 9:30 a.m. - 11:30 a.m.

Group A: *Selecting and Defining Groups to Receive Preference*
Group B: *Program Design: Quotas v. Goals v. Incentives/Subsidies*
Group C: *Evaluating Effects: Positive and Negative*

Session II 1:30 p.m. – 3:30 p.m.

Group A: *Higher Education*
Group B: *Private Sector Employment*
Group C: *Government: Employment and Governance*

MONDAY, NOVEMBER 10, 1997

9:00 a.m.

Opening Plenary

Dorsey D. Ellis, Jr., Dean, Washington University School of Law
John Bowen, Social Thought & Analysis, Washington University
Clark D. Cunningham, Washington University School of Law

9:15 a.m.

Session I

Pauline Kim, Washington University School of Law
John J. Donohue III, Stanford Law School
B.P. Jeevan Reddy, Justice, Supreme Court of India (retired)
Sunita Parikh, Department of Political Science, Washington University

Session II

John Bowen, Department of Anthropology, Washington University
Linda Krieger, University of California, Berkeley Law School
Pansy Tlakula, Human Rights Commission, South Africa
Aaron Porter, Department of Sociology, University of Illinois

10:15 a.m.

Session I

Garrett Duncan, Department of Education, Washington University
Gerald Torres, University of Texas Law School
Joshua Aronson, Department of Educational Psychology, University of
Texas
Karthi Govender, Law Faculty, University of Natal-Durban, South Africa

Session II

Karen Tokarz, Washington University School of Law
Lani Guinier, University of Pennsylvania Law School
Jack Knight, Department of Political Science, Washington University
David Oppenheimer, Golden Gate Law School

11:15 a.m.

Session I

Karen Porter, Washington University School of Law
Virginia Dominguez, Department of Anthropology, University of Iowa
M.N. Srinivas, National Institute of Advanced Studies, India

1:15 p.m.

Closing Plenary

Marc S. Galanter, University of Wisconsin Law School
N.R. Madhava Menon, National Law School of India
Clark D. Cunningham, Washington University School of Law

BIOGRAPHIES OF CONFERENCE PARTICIPANTS

Joshua Aronson, Assistant Professor of Social and Educational Psychology
University of Texas at Austin

B.A. University of California, Santa Cruz (1986); M.S. Princeton University
(1989); Ph.D. Princeton University (1992).

His research focuses on the effects of racial stereotypes on the academic achievement, attitudes and self-esteem of minority students. He has conducted numerous studies examining how awareness of stereotypes interferes with performance on standardized tests, thus offering an alternative account to genetic and cultural accounts for race and gender differences in testing and school performance. His most recent work offers innovative methods of improving the performance of African American college students. His awards for research include a Spencer fellowship and a James S. McDonnell fellowship. His publications include, *Stereotype Threat and the Academic Performance of Minorities And Women*, in J. Swim and C. Stangor (Eds.), *PREJUDICE: THE TARGET'S PERSPECTIVE*, Academic Press (with Diane Quinn and Steven Spencer), *Stereotype Threat and the Intellectual Test Performance of African-Americans*, 69 *J. PERSONALITY & SOC. PSYCHOL.* 797 (with Claude Steele), and *How Stereotypes Influence the Standardized Test Performance of Talented African American Students*, in C. Jencks & M. Phillips (Eds.), *BLACK-WHITE TEST SCORE DIFFERENCES*, Harvard Press (with Claude Steele).

Ian Ayres, William K. Townsend Professor
Yale Law School

B.A. Yale University (1981); J.D. Yale Law School (1986); Ph.D.
Massachusetts Institute of Technology (1988).

He clerked for the Honorable James K. Logan of the Tenth Circuit Court of Appeals, previously taught at Northwestern, Stanford and Virginia law schools, and has been a research fellow of the American Bar Foundation. His scholarship focuses on antitrust, contracts, corporations, civil rights, and the field of law and economics. He has advised the U.S. Department of Justice in the development of affirmative action policies and procedures. His publications include *Narrow Tailoring*, 43 *UCLA L. REV.* 1781 (1996), *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 *TEX. L. REV.* 1487 (1996) (with Peter Siegelman), and *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 *HARV. L. REV.* 817 (1991).

John Bowen, Professor of Anthropology and
Chair, Committee on Social Thought & Analysis
Washington University

B.A. Stanford (1973); Ph.D. University of Chicago (1984).

He is currently working on modern legal changes and religious jurisprudence in Indonesia, and has most recently written on ethnic conflict, Islamic ritual, and comparative methods in the social sciences. His publications include *MUSLIMS THROUGH DISCOURSE: RELIGION AND RITUAL IN GAYO SOCIETY* (1993), *SUMATRAN POLITICS AND POETICS* (1991), and *RELIGIONS IN PRACTICE* (1997).

Clark D. Cunningham, Professor of Law
Washington University

A.B. Dartmouth College (1975); J.D. Wayne State University (1981).

He has been a visiting scholar at the Indian Law Institute, Sichuan University in China, the University of Sydney, and the National Law School of India. He received an Indo-American Fellowship for a comparative study of civil rights litigation in the Supreme Courts of India and the United States, and is currently the director of a U.S.-India Ford Foundation project, *Enforcing Human Rights Through Law School Clinics*. His publications include *Why American Lawyers Should Go to India*, 16 *LAW & SOC. INQ.* (J. OF THE AMERICAN BAR FOUND.) 777 (1991), *Plain Meaning and Hard Cases*, 103 *YALE L.J.* 1561 (1994) (with others), and *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment*, 73 *IOWA L. REV.* 541 (1988), which won the 1988 Scholarly Paper Competition of the Association of American Law Schools.

Virginia R. Dominguez, Co-Director of the International Forum for Studies
Professor of Anthropology
University of Iowa

B.A. Yale University (1973); M.Phil. Yale University (1975); Ph.D. Yale University (1975).

She is immediate past Director of the Center for International and Comparative Studies at the University of Iowa. Nationally she serves on the Board of Directors of the Society for Cultural Anthropology and on the editorial boards of *PUBLIC CULTURE*, the *AMERICAN ETHNOLOGIST*, *Public Worlds Books* (University of Minnesota Press), and *Transnational Cultural Studies* (University of Illinois Press). She was born in Cuba, but spent much of her early life in and out of the

U.S. She has taught at Duke University, the Hebrew University of Jerusalem, the University of California at Santa Cruz, and the University of Iowa. Her work has focused for many years on the historical and cross-cultural analysis of systems of social classification, how they develop, become discursively naturalized and institutionally entrenched. Among her publications are *WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA* (1986); *PEOPLE AS SUBJECT, PEOPLE AS OBJECT: SELFHOOD AND PEOPLEHOOD IN CONTEMPORARY ISRAEL* (1989), and 4 (co)edited collections, including *QUESTIONING OTHERNESS* (1995), *(MULTI) CULTURALISMS AND THE BAGGAGE OF "RACE"* (1995), and the forthcoming *FROM BEIJING TO PORT MORESBY: THE NATIONAL(IST) POLITICS OF CULTURAL POLICIES*.

John J. Donohue III, John A. Wilson Distinguished Faculty Scholar
Stanford Law School

B.A. Hamilton College (1974); J.D. Harvard Law School (1977); M.A. Yale University (1982); M. Phil. Yale University (1984); Ph.D. Yale University (1986).

He became a member of the Stanford faculty in 1995 after nine years at the Northwestern University School of Law. He specializes in law and economics, and has written in the areas of employment discrimination, criminal justice policy, corporate law, and the empirical evaluation of public policy measures. His publications include *FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW* (1997), *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 *MICH. L. REV.* 2583 (1994), and *Diverting the Coasean River: Incentive Schemes to Reduce Unemployment Spells*, 99 *YALE L.J.* 549 (1989), which won the 1989 Scholarly Paper Competition of the Association of American Law Schools.

Garrett Albert Duncan, Assistant Professor of Education and
African and Afro-American Studies
Washington University

B.S. California State Polytechnic University (1984); Ph.D. Claremont Graduate School (1994).

He is a former middle and senior high school science teacher. In his research and writing, he seeks to clarify the construction and experience of adolescents of color in the United States, Black youth in particular, and to design and implement anti-racist pedagogy and

systemic interventions. His current research focuses on adolescent language and literacy as these practices inform the moral and political lives of Black youths. His publications include *The Play of Voices: Black Adolescent Literacy as Mediated Action* (forthcoming), *Educating Adolescent Black Males: From Self-Esteem to Human Dignity*, in L. Davis (Ed.), *AFRICAN AMERICAN MALES: A PRACTICE GUIDE* (1997), and *Space, Place, and the Problematic of Race: Black Adolescent Discourse as Mediated Action*, *J. NEGRO EDUC.*, 65(2), 133-150.

Richard G. Fox, Professor of Anthropology
Washington University

B.A. Columbia University (1960); M.A. University of Michigan (1961);
Ph.D. University of Michigan (1965).

He is editor of *Current Anthropology* and was a member of the Institute for Advanced Study in 1971 and a Guggenheim Fellow in 1987. His publications include *LIONS OF THE PUNJAB* (1985), *GANDHIAN UTOPIA* (1989) and, as editor, *BETWEEN RESISTANCE AND REVOLUTION: CULTURAL POLITICS AND SOCIAL PROTEST* (1997).

Marc Galanter, John & Bylla Bossnard Professor of Law and
Director of the Institute of Legal Studies
University of Wisconsin-Madison

B.A. University of Chicago (1950); M.A. University of Chicago (1954); J.D.
University of Chicago (1956).

He is past president of the Law and Society Association, a former editor of *LAW & SOCIETY REVIEW*, and past chair of the Association of American Law Schools' Section on Law and Social Science. His publications include *COMPETING EQUALITIES* (1984), an extensive, empirically-based study of India's affirmative action programs for untouchables and other backward classes, as well as *LAW AND SOCIETY IN MODERN INDIA* (1989) and *TOURNAMENT OF LAWYERS* (1991) (with Thomas M. Palay).

Karthigasen Govender, Professor and Acting Head
Department of Public Law, University of Natal-Durban

LL.B London (1981); LL.B. University of Natal (1986); LL.M. University of
Michigan (1988).

He is a member of the South African Human Rights Commission and has participated in a number of cases before the Constitutional Court

of South Africa as a practicing attorney. In 1995-96 he was Technical Advisor to the KwaZulu-Natal Provincial Legislature's Constitutional Drafting Committee, and he has been a Mediator for the Independent Mediation Service of South Africa since 1991. He has been a Fulbright Scholar at the University of Michigan Law School. His publications include *An Analysis of the Federal Features of the Interim Constitution*, 3 REVIEW OF CONSTITUTIONAL STUDIES (UNIVERSITY OF ALBERTA) 76 (1996) and *Administrative Law and Democracy in South Africa*, OBITER (1993); he is Editor of THE HUMAN RIGHTS AND CONSTITUTIONAL LAW JOURNAL OF SOUTHERN AFRICA (Issue Three 1996).

Lani Guinier, Professor of Law
University of Pennsylvania

B.A. Radcliffe College (1971); J.D. Yale Law School (1974).

She was a civil rights lawyer for more than ten years with the NAACP Legal Defense and Educational Fund, Inc. and the U.S. Department of Justice. She has received the 1995 Margaret Brent Women Lawyers of Achievement Award from the ABA Commission on Women in the Profession, the 1995 Champion of Democracy Award from the National Women's Political Caucus, and the 1994 Rosa Parks Award from the American Association of Affirmative Action. Her publications include *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996) (with Susan Sturm), THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994), and BECOMING GENTLEMEN: WOMEN, LAW SCHOOLS AND INSTITUTIONAL CHANGE (1997) (with others).

Cheryl I. Harris, Associate Professor of Law
Chicago-Kent College of Law

B.A. Wellesley College (1973); J.D. Northwestern University (1978).

During the 1995-96 and 1996-97 academic years, she was a Visiting Professor at UCLA School of Law teaching courses in Constitutional Law, Civil Rights, and other courses relating to race and the law. She played an important role in establishing the dialogue between U.S. law professors and lawyers and the ANC's Department of Legal and Constitutional Affairs and other crucial actors on South Africa's new Constitution. She was part of a 1991 Conference at the University of the Western Cape on Constitution Making and also assisted in

organizing and participated in subsequent conferences and fora on these issues. She has lectured at a number of leading institutions and has participated in numerous conferences and workshops on contemporary issues and developments particularly relating to race. Her publications include *Finding Sojourner's Truth: Race, Gender and the Institution of Slavery*, 18 CARDOZO L.J. 1901 (1996), *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (reprinted in CRITICAL RACE THEORY; KEY WRITINGS THAT FORMED A MOVEMENT ed. K. Crenshaw et al.) (1996), and *Law Professors of Color and the Academy: Of Poets and Kings*, 68 CHICAGO-KENT L. REV. 331 (1992) (reprinted in CRITICAL RACE FEMINISM, A. Wing ed.) (1997).

Pauline Kim, Associate Professor of Law
Washington University

B.A. Harvard University (1984); J.D. Harvard Law School (1988).

She was formerly a staff attorney at the Legal Aid Society of San Francisco where she litigated employment discrimination cases. Her research concentrates on the legal regulation of the workplace, and includes empirical study of the influence of legal rules in the employment context. Her publications include *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protections in an At-Will World*, forthcoming in CORNELL L. REV., Volume 83, Issue 1 (1997), and *Privacy Rights, Public Policy and the Employment Relationship*, 57 OHIO ST. L.J. 671 (1996).

Jack Knight, Associate Professor of Political Science
Washington University

B.A. University of North Carolina at Chapel Hill (1974); J.D. University of North Carolina at Chapel Hill (1977); M.A. University of Chicago (1980); Ph.D. University of Chicago (1984).

He is a political and social theorist who is currently working on projects related to (1) the role of social norms in culturally-diverse societies, (2) the pragmatic bases of democratic legitimacy and (3) the institutionalization of the rule of law. His publications include INSTITUTIONS AND SOCIAL CONFLICT (1992), EXPLAINING SOCIAL INSTITUTIONS (1995) and THE CHOICES JUSTICES MAKE (1997).

Linda Hamilton Krieger, Acting Professor of Law
University of California School of Law (Boalt Hall)

B.A. Stanford University (1975); J.D. New York University (1978).

She taught previously at Stanford Law School and was a research fellow at the Stanford Center on Conflict and Negotiation. She served as a trial attorney for the US Equal Employment Opportunity Commission and was a staff attorney at the Employment Law Center of the San Francisco Legal Aid Society. Her publications include *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995), *Symposium on the Twenty-First Century Lawyer: On Teaching Professional Judgment*, 69 WASH. L. REV. 527 (1994) (with Paul Brest), and *The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women's Equality*, in FEMINIST LEGAL THEORY: FOUNDATIONS (ed. D. Kelly Weisberg) (1993).

Timothy J. Lensmire, Associate Professor of Education
Washington University

B.S. University of Wisconsin at Stevens Point (1983); Ph.D. Michigan State University (1991).

His research and writing focuses on the development of student voice through writing, and teaching in a pluralistic world. His publications include WHEN CHILDREN WRITE: CRITICAL RE-VISIONS OF THE WRITING WORKSHOP (1994), *Writing Workshop as Carnival: Reflections on an Alternative Learning Environment*, 64 HARV. EDUC. REV. 371 (1994), and *Appropriating Others' Words*, 23 LANGUAGE IN SOC. 411 (1994) (with D. Beals).

Glenn C. Loury, University Professor
Professor of Economics and
Director of the Institute on Race and Social Division
Boston University

B.A. Northwestern University (1972); Ph.D. Massachusetts Institute of Technology (1976).

He is an economic theorist, with publications in the fields of game theory, industrial economics, natural resources and economics of income inequality. He has been a scholar in residence at Oxford University, Tel Aviv University, the University of Stockholm, the Delhi School of Economics, and the Institute for Advanced Study at

Princeton. He is a Fellow of the Econometric Society, and was elected Vice President of the American Economics Associations for 1997. His publications include *Will Affirmative Action Policies Eliminate Negative Stereotypes?*, 83 AMERICAN ECON. REV. 1220 (1993) (with Stephen Coate), *The Incentive Effects of Affirmative Action*, 523 ANNALS OF THE AMERICAN ASS'N OF POL. & SOC. SCI. 19 (September 1992), and ONE BY ONE, FROM THE INSIDE OUT: ESSAYS AND REVIEWS ON RACE AND RESPONSIBILITY IN AMERICA, which won the 1996 *American Book Award* and the 1996 *Christianity Today Book Award*.

N.R. Madhava Menon, Professor

National Law School of India University

BSc. Kerala University (1953); B.L. Kerala University (1955); M.A. Punjab University (1960); LL.M. Aligarh Muslim University (1962); Ph.D. Aligarh Muslim University (1968).

He is the former dean of the National Law School and the immediate past-President of the Commonwealth Legal Education Association. He has previously been Head of the Department of Law, Delhi University; Principal of the Government Law College, Pondicherry (India); a Fellow of the American Council of Learned Societies; Editor of the INDIAN BAR REVIEW; and Secretary of the Bar Council of India Trust. In 1994 the International Bar Association conferred on him its Living Legend of Law Award. His publications include SOCIAL JUSTICE AND LEGAL PROCESS (1985), THE LEGAL PROFESSION IN INDIA (1983), and LEGAL EDUCATION IN INDIA (1982).

David B. Oppenheimer, Associate Professor of Law

Golden Gate University

B.A. University Without Walls, Berkeley (1972); J.D. Harvard Law School (1978).

He clerked for Chief Justice Rose Bird of the California Supreme Court, practiced employment discrimination law for ten years, first as a government prosecutor, then as a law school clinic director at the University of California (Boalt Hall) and the University of San Francisco, before joining the faculty at Golden Gate University in 1991. He was a principal spokesperson for the Campaign to Defeat Proposition 209, and is a project leader in the Society of American Law Teachers' Activist Campaign in support of affirmative action. His publications include *Understanding Affirmative Action*, 23

HASTINGS CONST. L.Q. 926 (1996), *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993), and *Distinguishing Five Models of Affirmative Action*, 4 BERKELEY WOMEN'S L.J. 42 (1989).

Sunita Parikh, Assistant Professor

Washington University Department of Political Science

B.A. University of Chicago (1982); M.A. University of Chicago (1982);

Ph.D. University of Chicago (1990).

She previously taught at Columbia University. She has been a Spencer Fellow of the National Academy of Education and a Peace Fellow of the Hoover Institution, Stanford University. Her publications include *THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA* (1997), *A Comparative Theory of Federalism: India* (forthcoming, UNIV. VA. L. REV.) (with Barry Weingast), and *The Supreme Court, Civil Rights, and Preference Policies*, 92 TEACHERS COLLEGE REC. 192 (1990).

Aaron Porter, Assistant Professor, Sociology Department and

Afro-American Studies

University of Illinois, Urbana/Champaign

B.A. Bloomsburg University (1985); M.A. University of Pennsylvania (1987); Ph.D. University of Pennsylvania (1993).

He has also taught at the University of Florida, Indiana University, and University of Pennsylvania. Much of his research has focused on racial relations and the American legal process and has been supported by the Ford Foundation, the American Bar Foundation, and the John D. and Catherine T. MacArthur Foundation. In 1989 he received a commendation from Pennsylvania Governor Robert Casey for development of a state-wide youth development model and for his community leadership in Philadelphia's war on drugs. His publications include *Opening Doors: The Influence of Philadelphia's Stellar Law Firm* (forthcoming), *Bibliographic Essay: White Racism*, CHOICE (Feb. 1996) (with J. Feagin), and *Affirmative Action and African Americans: Practice and Rhetoric*, 21 HUMBOLDT J. OF SOC. RELATIONS No. 2 (1995) (with J. Feagin).

Karen Andrea Porter, Associate Professor of Law
Washington University

B.A. Yale University (1986); J.D. Yale Law School (1990).

From 1989-93 she was a senior policy analyst and staff counsel to the National Commission on AIDS. Prior to joining Washington University she was an assistant professor at the Albert Einstein College of Medicine, Yeshiva University, specializing in bioethics. Her publications include *HIV/AIDS in African American Communities*, in P.T. Cohen, et al. eds., *THE AIDS KNOWLEDGE BASE* (1994), *THE CHALLENGE OF HIV/AIDS IN COMMUNITIES OF COLOR*, National Commission on AIDS (1992), and *HIV IN CORRECTIONAL FACILITIES*, National Commission on Aids (1990).

B.P. Jeevan Reddy, Justice Indian Supreme Court (Retired)

The Honorable Jeevan Reddy served as Justice of the Indian Supreme Court from 1990-1997, during which time he authored numerous leading decisions, including the majority opinion of the Court in *Indra Sawhney v. Union of India* (The Mandal Commission Case) (1992) authoritatively interpreting Article 16 of the Indian Constitution which authorizes the reservation of public employment posts for members of backward classes. He previously served as Chief Justice of the Uttar Pradesh High Court and as a Judge of the Andhra Pradesh High Court.

Michael Selmi, Associate Professor of Law
George Washington University

A.B. Stanford University (1983); J.D. Harvard Law School (1987).

Prior to entering teaching, he clerked for Chief Judge James Browning of the 9th Circuit Court of Appeals and was an attorney in the Civil Rights Division at the United States Justice Department and with the Lawyers' Committee for Civil Rights Under Law. He teaches Civil Rights Legislation, Constitutional Law and Employment Law. His publications include *Testing For Equality: Merit, Efficiency & the Affirmative Action Debate*, 42 UCLA L. REV. 1251 (1995), *The Value of the EEOC*, 57 OHIO ST. L.J. 1 (1996), and *Proving Intentional Discrimination: the Reality of Supreme Court Rhetoric*, forthcoming in GEO. L.J.

M.N. Srinivas, J.R.D. Tata Professor

National Institute of Advanced Studies, India.

M.A. University of Bombay; LL.B. University of Bombay; D. Phil. University of Oxford.

He has served as Chairman of the Institute for Social and Economic Change in India and as Chair of the Department of Sociology, Delhi University. He has been a visiting professor at Oxford University, Cornell University, the University of California, Stanford University, the University of Singapore, the Australian National University, and Cambridge University. His publications include *CASTE: ITS 20TH CENTURY AVATAR* (1996), *VILLAGE, CASTE, GENDER AND METHOD* (1996), and *INDIAN SOCIAL STRUCTURE* (1980).

Faith Pansy Tlakula, Commissioner

South African Human Rights Commission.

B. Proc. University of the North; LL.B. University of the Witwatersrand; LL.M. Harvard University.

She is the Former Executive Director, Black Lawyers Association—Legal Education Centre and was a Senior Lecturer in Law, University of the North-West (formerly Bophuthatswana). She is an admitted Advocate of the Supreme Court of South Africa. She is a Member of the Council for The University of the North-West; the Deputy-Chairperson of the National Institute for Public Interest Law and Research; and a Member of the Board of Directors, Centre for Applied Legal Studies, University of the Witwatersrand. In 1988 she was awarded a Harvard Fellowship, and in 1995 she was named by Tribute Magazine as one of the Top 100 Black Achievers in South Africa.

Karen Tokarz, Professor of Law and

Director of Clinical Education

Washington University

B.A. Webster College (1970); J.D. Saint Louis University (1976); LL.M. University of California, Berkeley (1985).

She teaches Employment Discrimination, Employment Law and Public Policy Clinic and Alternative Dispute Resolution. She mediates federal employment discrimination and civil rights cases. She served as the co-reporter for the Missouri Gender and Justice Task Force. Her publications include *ELDERLAW: ADVOCACY FOR THE AGING* (West 1993, Supp. 1997), *A Tribute to Judge Theodore McMillian: A Man of*

Law and Justice, 52 WASH. U. J. URB. CONTEMP. L. 1 (1997), and *Women Judges and Merit Selection Under the Missouri Plan*, 64 WASH. U. L.Q. 905 (1987).

Gerald Torres, H.O. Head Centennial Professor of Real Property Law
University of Texas

B.A. Stanford University (1974); J.D. Yale Law School (1977); LL.M.
University of Michigan (1980).

He was previously Professor of Law and Associate Dean at the University of Minnesota Law School and also served in the U.S. Department of Justice, first as Deputy Assistant Attorney General for Environment and Natural Resources and then as Counsel to Attorney General Janet Reno. In those roles he had principal responsibility for advising the Attorney General on issues of environmental policy and law, and on issues affecting Native Americans. His publications include *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597 (1996), *Understanding Environmental Racism*, 63 UNIV. COLO. L. REV. 839 (1992), and *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice*, 75 MINN. L. REV. 993 (1991).

TABLE OF CONTENTS TO CONFERENCE MATERIALS*

A. CONFERENCE INFORMATION

1. Preliminary Agenda
2. Biographies of Conference Participants

B. INDIA

1. Cunningham & Menon, *Seeking Equality in Multicultural Societies* (Discussion draft prepared specifically for the conference)
2. Appendices to Cunningham & Menon
 - (1) Excerpts from Indian Constitution
 - (2) Speech by Dr. Ambedkar during debates on adopting the Constitution
 - (3) Survey form used by Mandal Commission
 - (4) Excerpts from Justice Reddy's opinion in Union of India v. Sawhney
 - (5) Government of India Rules for Defining "Creamy Layer" to be Excluded from Reservations
 - (6) History of Texas Law School Case
 - (7) History of Racial Classifications in Louisiana (summarized from Dominguez)
 - (8) Simplified Example of Lundberg & Startz Model of Intergenerational Transmission of Inequality
3. Srinivas, *The Pangs of Change* (reprinted from FRONTLINE, August 22, 1997)
4. Srinivas, *Caste: A Systemic Change*
5. Reddy, *Equality and Social Justice* (Discussion draft prepared specifically for the conference)
6. PARIKH, THE POLITICS OF PREFERENCE (excerpts from Chapter 1, *Introduction* and Chapter 8, *Conclusion*)

* The following Table of Contents appeared at the beginning of a set of materials prepared specifically for the Rethinking Equality in the Global Society Conference and distributed to the participants in advance. These materials were not formally presented at the conference but were assumed to form a common basis of knowledge for conference discussions. Many of the materials listed can be found on the Equality Conference Web Site: <http://ls.wustl.edu/Conferences/Equality>.

C. SOUTH AFRICA

1. Selected Provisions of the South African Constitution
2. K. Govender, *Equality—The South African Perspective* (Discussion draft prepared specifically for the conference)
3. *Motala v University of Natal*, 3 BCLR 374 (S. Ct. Durban & Coast Div. 1995) (challenge by unsuccessful Indian applicant to medical school preferences for Africans)
4. *President v. Hugo*, 6 BCLR 708 (Const. Ct.) (18 April 1997) (edited) (challenge by male prisoners with children to presidential decree providing early release to female prisoners with children)
5. Galanter, *The Structure and Operation of an Affirmative Action Programme: An Outline of Choices and Problems* (paper prepared for presentation at *Affirmative Action in New South Africa*, a conference convened by the Constitutional Committee of the African National Congress in October 1991).

D. RESUMES OF CONFERENCE PARTICIPANTS

**OPENING REMARKS BY CLARK D.
CUNNINGHAM, PROFESSOR OF LAW,
WASHINGTON UNIVERSITY SCHOOL OF LAW
SATURDAY, NOVEMBER 8, 1997**

In writing newspaper stories, journalists typically address four questions: what, why, when, and where? I will use the same format to welcome you to this conference and to give you a brief explanation of what we plan to do for the next three days.

A. When

Although public debate in the United States over the problem of inequality has been lively and intense for the last two years, the past seven days have seen a remarkable convergence of events. On Monday, the Supreme Court decided that it would not review the decision by the Court of Appeals for the Ninth Circuit allowing Proposition 209 to take effect in California.¹ Last Tuesday, the City of Houston rejected a provision similar to California's Proposition 209 in a referendum vote.² On Thursday the House Representatives announced that it would delay any debate of, or vote on, proposed legislation to cut back on affirmative action until next session.³ The same day, the Senate Judiciary Committee delayed the controversial nomination of Bill Lee to head the Civil Rights Division of the Justice Department for another week.⁴ The Republican majority of the Senate Judiciary Committee opposes Lee's nomination largely because of his support for various forms of affirmative action as an attorney for the National Association for the Advancement of Colored People. *Time* carried this week a story on a recent federal suit challenging affirmative action admission policies at the University of Michigan.⁵ And today's *New York Times* carries

1. See *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997). Proposition 209, formally known as the California Civil Rights Initiative, will have the result of banning most forms of conventional affirmative action based on race, ethnicity, or gender in state-funded employment and higher education. See 110 F.3d at 1434.

2. See Sam Verhovek, *Houston Vote Underlined Complexity of Rights Issue*, N.Y. TIMES, Nov. 6, 1997, at A1. See also Editorial, *Affirmative Action in Play*, N.Y. TIMES, Nov. 6, 1997, at A26.

3. See Lizette Alvarez, *House Panel Delays Till Next Year Measure to End Affirmative Action*, N.Y. TIMES, Nov. 7, 1997, at A10.

4. See Steven A. Holmes, *Backers of Rights Nominee Delay Vote*, N.Y. TIMES, Nov. 7, 1997, at A10. See also Steven A. Holmes, *Champion for Minorities Finds Himself an Underdog*, N.Y. TIMES, Nov. 6, 1997, at A1.

5. See Adam Cohen, *The Great Battle Over Affirmative Action: A Lawsuit Against the*

the following stories: *Colleges Look for Answers to Racial Gaps in Testing*,⁶ *Racism is (a) entrenched? Or (b) fading?*,⁷ and as the lead editorial, *Multiracial Americans*.⁸

B. *Where*

It may be obvious that this conference is well-timed; but is it equally well-situated? St. Louis has always been one of the great crossroads of America, indeed the world. A few miles east of where I now stand is a United Nations World Heritage site known as the Cahokia Mounds. These monumental mounds mark the site of the largest pre-Columbian city north of Mexico. This huge trading center and ceremonial site thrived for centuries. St. Louis was later founded by French traders because it was centrally located near the intersection of the two most important river systems, the Mississippi and the Missouri. In the nineteenth century, St. Louis became the gathering point for pioneers coming from the north, east, and south to launch their overland trips to the west. And the 1904 World's Fair here in St. Louis is believed by many, including all in St. Louis, to be the greatest of all of the world's fairs.

St. Louis is not just a crossroads, however. It is also a place where boundaries meet. In 1803, the border of the United States was the Mississippi River immediately to our east. The expansion of the United States past that border, eventually to the Pacific Ocean, is marked by the famous Gateway Arch, which has become the symbol of St. Louis. St. Louis is not only the place where east and west are marked; it is also the point where north and south meet. Under the terms of the Missouri Compromise, Missouri was considered a slave state prior to the Civil War, and thus was part of the Old South. Furthermore, during that time, St. Louis was one of the most important stops on what was known as the "Underground Railroad," used to smuggle the slaves from the South into free states like Illinois. But when the Civil War began, Missouri remained part of the Union.

Perhaps the most important, and infamous, decision of the United States Supreme Court on the issue of inequality, the Court's 1856 decision in *Dred*

University of Michigan Could End Racial Preferences in College Admissions, TIME, Nov. 10, 1997, at 52.

6. Ethan Bronner, *Colleges Look for Answers to Racial Gap in Testing*, N.Y. TIMES, Nov. 8, 1997, at A1.

7. Richard Bernstein, *Racism is (a) Entrenched? Or (b) Fading?*, N.Y. TIMES, Nov. 8, 1997, at A11.

8. Editorial, *Multiracial Americans*, N.Y. TIMES, Nov. 8, 1997, at A20.

Scott v. Sandford,⁹ was initiated in federal court here in St. Louis. Dred Scott, born a slave, filed suit in federal court seeking his freedom based on trips that he and his master took into free states such as Illinois. His claims were denied by the Supreme Court on various grounds, most notably that Dred Scott, as a descendant of Africans, could not be considered a “person” for purposes of invoking the jurisdiction of the federal courts.

More recent suits seeking equality have fared better in St. Louis. The landmark Supreme Court decision in *Shelley v. Kramer* in 1948 struck down restrictive deeds in St. Louis that prohibited African Americans from buying homes.¹⁰ In 1973 one of the most important employment discrimination cases was decided by the Supreme Court, *McDonnell Douglas Corp. v. Green*; it also originated in St. Louis.¹¹ And as reflected on the front page of today’s local newspaper, *The St. Louis Post-Dispatch*, St. Louis is also the site of the country’s most ambitious and expensive voluntary school desegregation program.¹²

This brief history of St. Louis highlights the fact that a place where roads cross and boundaries meet is an exciting place to be. It is also a challenging and dangerous place to be. This conference marks a place where two other kinds of boundaries meet, the boundaries between nations and the boundaries between disciplines. We believe that the difficult and indeed dangerous problem of confronting the effects of past discrimination in preventing continuing inequality needs to be addressed by crossing over both national and disciplinary boundaries.

C. Why

Answering the questions of “when” and “where” naturally brings me to answering the question “why.” To expand upon my answer to, “why this Conference?” I turn to the biographies of my two distinguished co-chairs: Dr. N. R. Madhava Menon, former Dean of the National Law School of India, and Professor Marc Galanter, Director of the Institute for Legal Studies at the University of Wisconsin.

9. 60 U.S. 383 (1856).

10. See *Shelley v. Kramer*, 334 U.S. 1 (1948).

11. See *McDonnell Douglas Corp. v. Green*, 414 U.S. 811 (1973).

12. This University also has a long history of seeking equality. The University was founded in 1853 as a non-sectarian institution whose charter prohibited discrimination on the basis of religious or political affiliation. Our law school takes pride in being the first chartered law school in the United States to admit women as students. We also were an early leader in admitting African-Americans, graduating our first African-American student soon after the Civil War’s end in 1889.

Several years ago Dr. Menon was awarded the title "living legend of the law" by the International Bar Association. That title is, in fact, no exaggeration. Among his many notable achievements, the most outstanding is his leadership in founding and directing the National Law School of India, located in Bangalore. Although this school is less than a decade old, it is already the premier law school in India and has gained world-wide recognition, particularly for its innovative five-year curriculum that combines the study of the social sciences with law. Dr. Menon's leadership has extended well beyond India; he has just completed a three-year term as President of the Commonwealth Legal Education Association, representing law schools in the almost fifty nations of the commonwealth. A year and a half ago we had the privilege here at Washington University of having Dr. Menon teach a course on comparative constitutional law. Several weeks of the course were devoted to comparing Indian and American constitutional law specifically on the subject of equality. That course was the impetus for this conference.

When Dr. Menon and I developed the idea for the conference, he said that we must recruit our mutual friend Marc Galanter to be the third co-chair. Marc Galanter's biography is living proof why comparative and interdisciplinary work go hand-in-hand. His seminal article, *Why The "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*¹³ is the most frequently cited article in the law and society field,¹⁴ and he has served both as President of the Law and Society Association and Editor of the *Law and Society Review*. Marc was brought to inter-disciplinary work by his first passion, the study of India. Immediately after completing law school, he went to India to study the abolition of untouchability under the new Indian constitution. His research ultimately led to his monumental book, *Competing Equalities: Law and the Backward Classes in India*,¹⁵ which is still the leading work on the subject of India's constitutionally mandated programs for addressing the continuing effects of the caste system.

The three of us then sought to bring the best people we could identify from India and South Africa to the United States for this conference. Within the field of law, we were honored that Justice Jeevan Reddy accepted our

13. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

14. In 1983 the Social Sciences Citation Index indicated that this article had been cited in over 155 publications since 1974, making it at that point the most-cited article published in the history of the *Law & Society Review*. See *This Week's Citation Classic*, 52 CURRENT CONTENTS, Dec. 26, 1983, at 24.

15. MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* (1984).

invitation. Justice Reddy, recently retired from the Indian Supreme Court, is the author of the leading Supreme Court decision on the subject. For Americans, the analogy would be perhaps if Justice O'Connor would agree to participate in an academic conference on affirmative action two months after retiring from the U.S. Supreme Court. And from the social sciences, we were delighted that Professor M. N. Srinivas agreed to come. Professor Srinivas was the pre-eminent sociologist of his generation in India, and is undoubtedly the leading expert in the world on the caste system.

We had similar success in inviting participants from South Africa. With us today is Professor Karthy Govender, head of the Public Law Department at the University of Natal-Durbin. Professor Govender is both a leading constitutional law scholar and an active litigator before the Constitutional Court of South Africa. He also serves on the South African Human Rights Commission. After Professor Govender accepted our invitation, we asked him to select an ideal person to serve as the second participant from South Africa. He advised us to make every effort to get Pansy Tlakula to participate, and to our delight, she agreed to do so. Pansy Tlakula is the former chair of the Black Lawyers Association of South Africa's Legal Education Centre and is currently a full-time member of the South African Human Rights Commission.

We followed a similar strategy of asking the experts for their "dream team" of conference participants in seeking social scientists from the United States. I asked my colleague, Richard Fox, in the Anthropology Department. He said the perfect person is Virginia Dominguez, if you could get her; with Dick Fox's help, we did get her. And looking for an expert from psychology, I asked Jim Wertsch, chair of our Education Department, and Alan Lambert in our Psychology Department. They said the seminal work on stereotype threat is being done by Claude Steele at Stanford and Joshua Aronson at Texas; both accepted our invitation, although Claude Steele was unable to attend for personal reasons.¹⁶ Robert Pollak, in our Economics Department advised us to invite Glenn Loury from Boston University; and we are privileged to have him as a participant as well.

Rounding out the roster of conference participants is a combination of outstanding senior and rising stars in U.S. legal scholarship.

16. Randall Kennedy, Harvard Law School; Cass Sunstein, University of Chicago Law School; Adrien K. Wing, University of Iowa School of Law; and Christopher Jencks, John F. Kennedy School of Government, Harvard University also accepted conference invitations but for various reasons were unable to attend.

D. What

By now many of you who have asked us what kind of conference is this at which no papers are scheduled to be presented?¹⁷ Our answer is that we hope this will be an academic conference marked by intense and collegial exchange of ideas, across the national and disciplinary boundaries that are so often formidable. To that end we have avoided entirely the traditional format of talking heads at a front table and passive listeners for today and tomorrow. We also want to emphasize that this conference is not intended in any way to take a position on the merits of affirmative action either in the United States, or as to comparable versions in other countries. Our goal today and tomorrow is to promote maximum informality and candor: brainstorming, where all ideas are offered without criticism. The challenge, though, is how not to lose the ideas we expect will precipitate out of these intellectual storms. Our answer is a reporter system where graduate students will take detailed notes in each room. These notes will be circulated only to persons who were in the room for the discussion. Participants will be free to delete, edit, or clarify anything in the reporter's notes; the edited notes will be circulated as conference proceedings only after all have approved.

You will see that we have assigned each of you to various small groups. As much as possible, these assignments reflect the preferences you indicated in advance of the conference, and represent roughly equal numbers in each group. This afternoon there will be two large concurrent sections, one discussing India and the other South Africa. The two rooms are adjacent to each other, and after the first hour you should feel free to move to the other room, especially if you come with questions about both India and South Africa. We will compare notes from these two concurrent sessions in a closing plenary at 4:00 p.m. today.

Tomorrow is when we expect that the real brainstorming will take place. As you can see, there are three concurrent sessions in the morning and another set of three in the afternoon. On Monday we will revert to a more formal format, with concurrent panel discussions open to the public. These panel discussions will be videotaped and transcribed; an edited version will be published in a forthcoming issue of the *Washington University Law Quarterly*.¹⁸ During these panel discussions each conferee will have ten

17. Several papers were written for the conference and distributed in advance; the titles and authors are listed in the Table of Contents of Conference Materials which appears at pages 1577-78.

18. The court reporter's transcript was sent to all Monday panelists by November 25, 1997. The editors thank the panelists, all of whom agreed to review and approve their transcribed comments in time to meet the mid-March 1998 publication deadline for the symposium issue.

minutes to use as he or she pleases.¹⁹ We hope that this time will be used to propose totally new ideas for a research agenda. There is time allowed in each session on Monday for interaction among the panelists, other conferees and the public. Marc Galanter, Madhava Menon, and I will each attend one of the panels, compare notes over lunch Monday, and report a summary to you at the closing plenary on Monday afternoon.

19. Glenn Loury, Michael Selmi, Cheryl Harris and Ian Ayres, as well as some Washington University faculty members, were unable to participate in the Monday panel discussions.

MONDAY, NOVEMBER 10, 1997

9:00 a.m. *Opening Plenary*

PANEL MEMBERS:

Dean Dorsey Ellis, Jr.

Professor John Bowen

Professor Clark Cunningham

DEAN DORSEY ELLIS: Good morning. I am Dorsey Ellis, Jr. I am Dean of the Washington University School of Law. It is my pleasure to welcome you to this session of Rethinking of Equality Global Conference. I regret I had been out of town and unable to participate in the earlier sessions of the conference, but those of you who are law professors know this is the time when law schools and prospective law professors meet in Washington for grueling days of interviews, and that is what I have been doing for the last several days.

No issue is more critical to a global society than being able to learn to live and work with each other in spite of differences. At a time when societies were separated by distance, by language, and by effective inability to communicate, learning how to work across racial and ethnic lines to the satisfaction of everyone may have been less important. No one could suggest that it is so today.

So this is an extremely timely conference. Not only are we wrestling with the issues in the United States today, but other parts of the world are doing the same. All of us can learn from each other.

We are especially proud to be hosting this conference at Washington University and I am grateful to have Professor Clark Cunningham and his colleagues at Washington University, as well as Marc Galanter for conceiving organizing, and putting on this conference.

This is the second international conference we have had at the School of Law this fall. Earlier this month we held a conference on European currency. In the spring we will have yet another on law in Japan. Participants will be here both from the United States and Japan.

We are especially pleased now at the Law School to have a facility that supports the kind of intellectual interaction that these conferences represent. For many years as many of you know, we occupied facilities such that when we did try to have a conference, we usually borrowed the accommodations from the School of Business or some other part of the campus. But today as you can see we have a building that is designed to be hospitable to such

things as this.

I wish all of you a very successful conference today. As I look over the agenda, it is evident we have some very well informed and interesting people stimulating the discussions and I look forward to being part of it, thank you.

PROFESSOR JOHN BOWEN: I am John Bowen. I chair the Program in Social Thought and Analysis and I would also like to welcome you here to this conference. It is a pleasure to be able to hold it in this new facility with its many rooms of different sizes which are very well suited for this kind of conference. It is these conferences that we have sponsored over the last six years, which bring together people from different professions and social science disciplines.

I have been involved in this conference for the last two days and will be today as well. I have enjoyed the ways in which we have come to a better understanding of several disciplines' perspectives on the possibilities of the current developments in seeking equality, in learning about the dimensions of the political, in learning about what is politically possible and difficult, in learning about the way in which particular legal traditions in India, South Africa and the United States constrain the possible and in learning from social scientists and psychology, anthropology, political science more about the implications of particular ways of classifying groups.

In one session yesterday, for example, we had an expert on the law and politics of electoral representation, discussing with an expert on the history of cultural classification in Louisiana, South Africa, and Israel. The ways in which U.S. categories for preference for achieving equalities could be reshaped, and limitations on that. I think this kind of interdisciplinary conference which crosses and which includes people from the professional world, the political world, the legal world, as well as from various social science disciplines, is the kind of thing we have been able to do here with our cooperation among professional schools, departments, and different disciplines at Washington University. So I certainly hope and trust that today's conference will be as stimulating as the last two days have been and again welcome you to today's proceedings.

PROFESSOR CLARK CUNNINGHAM: Thank you, John. Good morning. My name is Clark Cunningham. I am on the faculty of the Law School here and together with Dr. N. R. Madhava Menon and Professor Marc Galanter, I am one of the three co-chairs of the conference. Just a few words about what has been happening for the last two days leading up to this final concluding day of the conference.

The last week you could not pick up a newspaper or turn on the radio without hearing a story about affirmative action. Last Monday, the Supreme Court decided not to review the decision of the Ninth Circuit Court of

Appeals in California, basically upholding the constitutionality of Proposition 209 in California. The *New York Times* in an editorial later this week said that the decision not to take the case was probably the most momentous decision the Supreme Court will make this year.

On Tuesday, Election Day, a ballot initiative in the City of Houston was closely watched around the country because a Proposition 209 type prohibition on affirmative action was on the ballot. Houston voters rejected that proposal, choosing to allow the city to go forward with the system of affirmative action, a closely watched decision.

Thursday of this week Bill Lee, President Clinton's nominee to head the Civil Rights Division of the Department of Justice, was supposed to be voted on in the Senate Judiciary Committee. There was a lot of coverage in the paper Thursday about him. He would among other things be the first Asian-American to take that position, and has had a long and distinguished career.

And then we discovered that at the same time the House delayed for a year a vote on a federal bill that would limit affirmative action, the Senate Judiciary put off for a week the vote on Bill Lee. And the primary point of the discussion was his past position on affirmative action and what he would do in the Justice Department.

Friday and Saturday's *New York Times* were full of articles about affirmative action, particularly in the context of higher education. I was driving up here Sunday morning and that is all I heard on National Public Radio coming up here. There is an article again in today's *New York Times*.

Despite all of this attention, I think a typical reaction in the United States is, well, everything has already been said. People are simply repeating and rehearsing their well established positions on the question. We think something new can be said and we hope that this conference is the beginning of that experience.

What new can be said about this? Well, first of all, other countries have wrestled with comparable problems and yet you would find almost nothing in the decisions of U.S. courts. You would find precious little in law reviews, very little in law school classrooms about the fact that other countries have wrestled with these problems, and perhaps might have done some things we could learn from.

Almost as absent is any learning from the social sciences. The U.S. legal system still remains rather hermetically sealed. Yet we believe there is an enormous amount that can be learned from social sciences on this subject and a great deal of research has been done.

Many law review articles are full of assertions about affirmative action and certainly look like they could be empirically tested. You also find this in decisions by courts but there does not seem to be any sense on the part of

people making these assertions that perhaps it would be worth testing them empirically.

So this conference has brought together leading intellectuals from India, from South Africa, from the United States, both law trained scholars and people from the social sciences. It has been an unconventional academic conference in that there have been no pre-prepared papers presented. Those of you that have gone to academic conferences know it is a very standard format just to have three or four people sitting up here reading pretty much verbatim from a prepared text on the subject, and then the panels may talk to each other and there will be questions from the audience. That has not been our approach, because we really want to start something new. And so, what has been happening for the last two days is that the conferees have been involved in a kind of nonstop brainstorming session.

There were readings assigned in advance primarily written by people from India and South Africa to bring the Americans a little bit up to speed on what has been happening in those two countries. Saturday afternoon we had sessions on India and South Africa where people could learn more about what is going on in those countries, and then yesterday we had a number of sessions devoted to the particular kinds of topics that we felt cut across disciplinary boundaries and national boundaries.

Today, everyone who has come to the conference has about ten minutes to say something in a sense for the record. The last two days have been informal, off the record, candid, and now people have a chance to have collected their thoughts and to say things which may be extremely tentative but we hope provocative and fresh coming out of the experience of the conference. And so once again, there are no prepared papers.

We will, as you can see, be having a court reporter transcribing what happens in this room and in the trial courtroom across the hall. It is being videotaped. The transcript of these sessions will appear in the next issue of the *Washington University Law Quarterly* in edited form. That also means that you all will perhaps be in print as well because we will transcribe the videotape suggestions and comments from everyone who is in the room at this time permits. That of course will include conferees who are not themselves up to bat at any particular time. We therefore ask you to please clearly identify yourself before speaking so, as in a trial courtroom, the court reporter can take your name down and you can be recorded for posterity.

* * *

9:15 a.m. Session I

PANEL MEMBERS:

Professor Pauline Kim
Professor John J. Donohue, III
Justice B.P. Jeevan Reddy
Professor Sunita Parikh

PROFESSOR PAULINE KIM: This morning we have Justice Reddy, who is sitting to my right, who is a former Justice on the Indian Supreme Court.

To his right is John Donohue, who is the John A. Wilson Distinguished Faculty Scholar at Stanford Law School.

And to his right Sunita Parikh, who is an Assistant Professor in Political Science here at Washington University.

PROFESSOR JOHN DONOHUE: It is a great pleasure to be here and I am particularly grateful to Clark for inviting me because I feel that I have gained so much more from the conference than I can possibly give in return. One of the strange things about decisions about acquiring knowledge is that if you do not know what it is that you should know, you cannot spend the time to learn it. Without being invited here, I probably would not have been exposed to so much very, very helpful information about the process of affirmative action in South Africa and India, and I must admit, sort of embarrassedly that I was so unaware of the rich opportunities for comparative work in this area.

It seems to be a bleak hour for affirmative action in the United States right now, but perhaps some historical perspective can relieve the gloom, because there have been some very positive changes both at the theoretical level and in terms of the actual improvements in the economic status of underprivileged groups in the United States.

To give a sense of scholarly opinion, prior to the major federal antidiscrimination initiative in 1964, let me quote the famous American economist and Nobel prize winner Milton Friedman, writing in 1962 not about affirmative action, but just the basic prohibition against discrimination on the basis of race and sex. Friedman wrote,

[Antidiscrimination] legislation involves the acceptance of a principle that proponents would find abhorrent in almost every other application. If it is appropriate for the State to say that individuals may not discriminate in employment because of color or race or religion,

then it is equally appropriate for the State, provided a majority can be found to vote that way, to say that individuals must discriminate in employment on the basis of color, race or religion. The Hitler Nuremburg laws and the laws of the southern states imposing special disabilities upon Negroes are both examples of laws similar in principle [to antidiscrimination laws].¹

So, Friedman's view was that there was no difference between the Jim Crow laws of the south, which mandated discrimination, and Title VII of the 1964 Civil Rights Act,² which prohibited discrimination. He said that the government should never be involved in influencing the acts of private employers, and therefore both laws were equally bad.

Right now in the United States I do not think there is any mainstream politician who voices opposition to the basic antidiscrimination principle. That is now accepted, and the terms of the debate have shifted to whether affirmative action is legitimate. But that shift represents a move forward at the conceptual level. Also, the fact that for the first time in history the poverty rate of American blacks has fallen below 30% indicates that at least the direction of change is favorable.

Certainly one of the lessons of the 20th century concerns the great danger of racial and ethnic tensions and their explosive character. Law has the task of trying to dampen down those tensions and hostilities and to keep them from rising to destructive and violent levels. The great question, about which we can learn much from studying other countries, is "What is the best way to dampen down those potentially explosive passions?" Is a policy of pure color blind treatment, which is now advocated by many U.S. policy makers, the best way? It does have some advantages. It reduces the selfish haggling and tensions of a racial spoils system. On the other hand, the unredressed injustices of the past themselves fester and have the potential to cause tensions to continue to rise to an unhealthy level. Looking to the experience of India and the unfolding experience of South Africa and seeing what works and what does not work and why holds enormous potential for re-assessing the American experience.

In our country one of the contentious issues of the day concerns how long affirmative action should continue. This conference has shown how we could look to affirmative action in India, which has already lasted a number of decades longer than America. While the extent of my ignorance concerning

1. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 109, 113 (1962).

2. See Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e-2 (1994)).

India's fifty year history is appalling, this conference has truly opened my eyes to this important comparativist perspective.

One tidbit of information that I found useful, at least in thinking in terms of how long preferential treatment might be appropriate in the United States, was to look to some work by the economist George Borjas, who analyzed thirty-two national origin groups that came to the United States as immigrants during the great migration of 1880 through 1910.³ At the end of that thirty year period, there were enormous differences in the literacy rates, education, and earnings among these various ethnic immigrants to the United States. After three generations in the United States, these differentials have narrowed considerably, although they have not all been eliminated.

What Borjas found, interestingly, is that it takes about four generations or 100 years for the economic disadvantages of a relatively deprived group to be eliminated. Most interestingly, for our considerations here is that once African-Americans were finally allowed to ride the economic escalator that earlier groups were allowed to enter much earlier, their rate of economic improvement parallels very closely that of the ethnic groups that came to this country at the turn of the century. I found that similar pattern of improvement to be encouraging, although the problem is that it takes one hundred years for equality to be reached based on the experience of these other ethnic and national origin groups. The question then becomes are we willing to wait those extra forty to sixty years to have blacks attain economic equality through the normal processes, or is some more aggressive affirmative action program going to be implemented to help us reach that desired goal more quickly?

One issue that the United States has to grapple with in answering that question is the fact that so many Americans, at least in public opinion surveys, seem to express opposition to any sort of preference-based affirmative action. In 1990, a survey indicated that 61.4% of American whites were "strongly against," and 21.1% were "against" a policy of preferences to aid blacks in securing employment. Almost by the same percentages American blacks were "strongly in favor," or "in favor," of such a policy. So, we do have quite a substantial racial divide on this issue. One of the most disturbing findings from a study by Paul Sniderman and Thomas Piazza was that the intense dislike of affirmative action could actually engender ill will towards African-Americans.⁴ Sniderman and Piazza took a group of individuals and randomly assigned them into two separate groups.

3. See GEORGE J. BORJAS, *FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY* (1990).

4. See PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* (1993).

They asked the first group to answer questions about their feelings towards African-Americans, and they then measured the extent of negative opinions expressed.

Sniderman and Piazza began their interviews of the second group by asking for their opinions about affirmative action, and only after they had asked about affirmative action did they then ask about feelings towards African-Americans. Having been primed by the discussion of affirmative action, the second group had much more negative views of blacks as irresponsible and lazy than did the first group. So, affirmative action did have the capacity to engender some ill will, and, of course, the question is, was the first group simply masking their true feelings or was affirmative action itself engendering some of the ill will? It is somewhat interesting to note that there is greater enthusiasm and support for affirmative action for women in the United States, again according to public opinion polls, than there is for affirmative action for blacks, because on almost any criterion of which group is most deserving of affirmative action, African-Americans would be at the very top of that list. It is somewhat troubling, I think, that the public conception concerning affirmative action does not seem to match with the actual need. In fact, the intensity of the opposition to affirmative action is both alarming and somewhat puzzling.

Chicago economist Gary Becker who stated, "While I do not like group quotas and other aspects of affirmative action, I am puzzled by the hand wringing and anger of those who are opposed, especially some intellectuals." His view is there are so many much more substantial preferences that are provided—tax breaks to the housing industries, import quotas on cars, textiles computer chips, price supports for agricultural commodities—and why affirmative action draws all of this hostility relative to the reaction to these other policies is somewhat of a puzzle.

It is also ironic that so many white Americans seem to feel that they have been displaced from employment because of affirmative action, when the fact is that there are only 18 million employed blacks in the United States. Many of them are not in particularly highly coveted jobs. And my guess is that if you were to ask white Americans "have you been disadvantaged because of affirmative action for African-Americans?" many more than 18 million white Americans would say that they have been.

So, looking to the experience of countries such as India and South Africa, has the potential to provide very useful insights as to what has worked and what should be avoided. I have been enormously impressed with the ability of these other countries to tackle questions that would seem to be so much more easily addressed in this country. The degree of poverty in India and South Africa is so much more extreme, and in many ways the nature of the

problem seems so much more intractable than it does in a country as rich as the United States that it is somewhat humbling to see that our country has not been able to make the investments and the decisions that would help our most disadvantaged members.

In some ways, affirmative action may be a distraction from these larger issues of resource allocation; it is a form of racial justice on the cheap (countries that have much less resources than we do, may not be able to do anything more than affirmative action). Our country, being so much more affluent, needs to do much more than provide preferences. The U.S. needs to make substantial investments in the human capital of all of our citizens, and right now so many of our children are disadvantaged in fulfilling the aspiration of equal opportunity when they must attend terrible schools.

However, the investments that are required are quite substantial—probably beyond the capacity of South Africa or India, but within the capacity of the United States. And while affirmative action has the benefit of improving things in the short run for certain individuals, I think to fundamentally change the dynamics and lives of so many disadvantaged individuals in the United States, we really need to make the very large investments in education and the lives of our disadvantaged minorities if we are going to achieve racial justice.

JUSTICE B.P. JEEVAN REDDY: I will first make certain general observations before dealing with some of the points which have been put forward during the debate yesterday and day before. I take note of the fact that there is a raging controversy in this country about the constitutionality and justifiability of affirmative action. This controversy has arisen in the light of the constitutional and statutory provisions which not only guarantee equal protection of laws, but also prohibit any discrimination on the ground of color, race or ethnicity. There are two views, as you all know and which I need not elaborate. So far as our country, India is concerned, there is no room for any such controversy because the constitutional provisions expressly provide for affirmative action, both in favor of women and also in favor of disadvantaged groups among the population which include the former "Untouchables" who are now called "Scheduled Castes," the "Scheduled Tribes" (who live in forests away from the inhabited areas) and the other disadvantaged sections which are generally referred to as other backward classes.

These provisions are Article 15(3),⁵—women and children—and Article

5. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, art. 15(3), 1249 U.N.T.S. 13, 20 (entered into force Sept. 3, 1981).

15(4),⁶—disadvantaged classes, that is other backward classes. These articles permit the state to make “any provision” in favor of these aforesaid groups. The expression “any provision” has been understood at all points of time as including provision for reservations in the matter of admission to schools, reservations in the matter of awarding of contracts, licenses, reservation in the matter of elections to local councils, municipalities, and other representative bodies. In all these matters, quotas have been provided in favor of “Scheduled Castes,” “Scheduled Tribes” and other backwards classes, that is in favor of all disadvantaged sections and also women.

Since this is constitutionally provided for, there is no room for any controversy in India whether such affirmative action is warranted or is valid or is permissible. In fact it is mandated.

In India, service under the government has always been treated as a matter of power, privilege and authority. Such employment is looked upon with great respect and regard. It is for this reason that a specific provision was made in Article 16,⁷ namely clause (4), saying that it shall be open to the state to provide for reservations in the matter of employment under the state in favor of backward classes of citizens. The Constitution expressly speaks of quotas being created in favor of disadvantaged classes, what they called the backward classes, in the matter of employment under the state. And what is important to note is that the expression “state” is defined in very expansive terms. “State” includes not merely the governments at the center and the States, but also the judiciary, all statutory corporations, public corporations, local bodies like municipalities and other representative bodies, as well as corporations owned and controlled by the government.

The Indian Constitution (Article 14)⁸ speaks not only of equality before the law, but also equal protection of laws. It provides for both. It uses both the expressions, equality before law and equal protection of laws. The American Constitution speaks of the latter. Some other constitutions of the world speak of the former. Very few speak of both. The Indian Supreme Court has opined that the expression “equality before law” has to be understood in the light of the Preamble as well as Part IV of the Constitution. The Preamble to the Constitution speaks of social, economic and political justice, equality of opportunity, equality of status, dignity of individual, and fraternity among its citizens.⁹ More important, a whole part of the Constitution, Part IV, called the Directive Principles of State Policy, sets out

6. *See id.* art. 15(4).

7. *See id.* art. 16.

8. *See id.* art. 14, at 19.

9. *See id.* preamble.

the philosophy of the Constitution and the path to be followed by the State. Particularly Articles 38 and 39¹⁰ say that the state shall ensure that the wealth of the society shall be equally distributed among all, that there should be no concentration of wealth, and that there is an equitable distribution of the cake among all the people and among all the sections of the people. These are the express mandates of the Constitution and serve to explain and illustrate the meaning and content of the concept of equality in Articles 14 to 17.¹¹

It is in view of these provisions that the Indian Supreme Court has been holding that equality under our Constitution does not mean formal equality. You know what Anatole France once said, law in its majesty “forbids the rich as well as the poor to sleep under bridges.”—but why would a rich man sleep under the bridge?¹² So, this type of formal equality is not what is meant by the Indian Constitution. It contemplates substantial equality. That means that the State shall endeavor and take measures to bring about equality among individuals and equality among groups. Both are provided for. Articles 15(1) and 16(1) guarantee equality among individuals, whereas Articles 15(4) and 16(4) speak of measures to bring about equality among groups.

So, this is the way we have been looking at the problem. What it means is that even if there had been no specific provisions in Articles 15 and 16 for reservations or for special measures in favor of the disadvantaged classes, the very concept and rule of equality guaranteed by Article 14 would have required such measures. The court has said that these other articles, expressly providing for special provisions as reservations, are merely restatements of the very rule of equality guaranteed by Article 14 and that they merely make explicit what is implicit in the rule of equality. All this means that the state is under an obligation to take appropriate measures to help the disadvantaged sections.

Now, a criticism was heard during the debate—why this stress upon castes, why this distinction on the basis of caste groups? Why do not you go by the ordinary rule, i.e., the normal rule of have and have-nots, rich and poor? Why do not you have programs to help the poor as such? And why do you make a further distinction on the basis of “Scheduled Castes,” “Scheduled Tribes,” other backward classes and so on and so forth? The answer in my opinion is simple. If you read the Constitution, again I refer to Articles 38, 39 and the Preamble, the primary obligation of the state is to remove economic social inequalities and in particular economic inequalities.

10. *See id.* arts. 38, 39, at 25.

11. *See id.* arts. 14-17, at 19-21.

12. THE OXFORD DICTIONARY OF QUOTATIONS 292 (Angela Partington ed., 4th ed. 1992).

Helping the disadvantaged sections like “Scheduled Castes” and “Scheduled Tribes” is an additional and a secondary function which is imposed upon the State in addition to the primary obligation because of the particular historical context in our country. Historically, there has been oppression, not only by rich against poor, but also the upper caste against the lower caste. That is why the Constitution says, you must remove economic inequalities and that you must also remove social inequalities, that is caste oppression and caste exploitation. The primary obligation, to repeat, is removing the economic exploitation by rich of the poor. It is not as if the Constitution does not speak of elimination of economic inequalities. It is not as if it does not speak of helping the poor. It does that. It is the primary obligation. The other is the additional one. Helping the poor is the primary obligation and helping the disadvantaged groups and backward classes is a secondary and additional obligation.

Now regarding the mode of identification of the disadvantaged sections deserving reservations and special provisions, you have gone through the relevant portions of the judgment of the Indian Supreme Court in the Mandal case which shows how we have gone about the problem. I need not restate it. I have read the paper by Professor Loury about his way of thinking—how to identify the disadvantaged sections which call for and which require affirmative action. His thinking approximates to our concept of “creamy layer.” What we have said in essence is this: in India caste is an existing reality even today. Caste is a social group. Many of the castes, what are called the backward castes and “Scheduled Castes,” carry on manual and menial occupations like carpenters, washermen, fishermen, ironsmiths, fruit-gatherers and so on. They are all disadvantaged as a class. Low caste, poverty and inferior kind of occupation go together. Some members of the group, especially those living in the cities, may be very well off. But, by and large, they are disadvantaged. So, for finding the backward classes, there is nothing wrong if you start the exercise with the castes. You can take a caste, find out whether it is backward socially, economically and educationally, and then if it is so found, designate it as a backward class. Caste thus becomes a class, all the more so when you exclude the “creamy layer.” Similarly, not only castes, you can take occupations also, for example, rickshaw pullers, slum dwellers, pavement-swellers and so on. We have explained all this at length in the Mandal judgment.

I may briefly explain the concept of “creamy layer.” It refers to those persons among backward classes, who are well off, who are holding high positions and who can be presumed thereby to have overcome the social stigma of backwardness. They should be removed from these classes so that what remains is truly a backward class which is entitled to and which ought

to get the benefits of reservations and other special provisions.

Now, speaking of the ill will being created by affirmative action, it is undoubtedly true as a fact. We also see in India that there is backlash against reservations. There is a lot of resentment among the sections who feel they are adversely affected by these programs. Probably you must have heard that in 1990, when reservations in public employment were introduced by the central government in favor of "other backward classes," there was a hue and cry all over northern India; many young people, particularly college students, resorted to self-immolation by pouring petrol upon themselves. There were scores of such incidents. Large parts of North India were disturbed. Ultimately, of course, the Supreme Court took up the matter and its verdict has been more or less accepted all over the country. It has brought peace.

But the point is, affirmative action *does* breed some ill will. But the absence of affirmative action equally breeds ill will from the other section. The question is not whether it breeds ill will or resentment. The question is one of justice, fairness and what is called for in the national interest. The nation is comprised of several religions and/or racial and ethnic groups in societies like India, which is why they are called multi-cultural societies. All these groups together constitute the nation. If so, all these groups must have sense of participation in the governing structures. It cannot be the monopoly of one section or one group. If this is the ideal, if this is the concept of government, then the entire nation as such—including all groups, races and classes—must partake of the governance of the nation. In this sense, Articles 15(4) and 16(4) are neither anti-poverty programs nor measures of unemployment relief. They are meant to provide an equal voice to all groups and classes in the governing structures. It is a measure to provide equal opportunity to all disadvantaged groups.

Now, so far as women are concerned, the situation in India stands on a different footing. There are reservations or quotas in favor of the "Scheduled Castes," "Scheduled Tribes" and other backward classes. We call these social reservations "social reservations" or "vertical reservations." Suppose there are a hundred seats in a medical college. They are distributed 27% for backward classes, 15% for "Scheduled Caste," 8% for "Scheduled Tribe." In all 50% go by reservation and the remaining 50% go by merit. The reservation in favor of women is *not* social reservation. It is of a different character altogether. I will explain how the reservation operates.

Reservation in favor of women has been provided to the extent of 30% in the matter of admission to professional colleges in certain States. For example, in medical college admissions in the state of Andhra Pradesh (from which I come) reservation has been made to the extent of 30% in favor of women. Now, this 30% is not in addition to the 50% social reservations. This

30% cuts across the social reservations—and thus we call them horizontal reservations. The 30% reservation for women is proportionately distributed among the “Scheduled Castes,” “Scheduled Tribes” and other backward classes and open competition (general) categories. Once you prepare a tentative list of admissions based upon social reservations, you examine whether at least 30% women are provided or not in each category. If not, the list is adjusted by eliminating men in each relevant category. Thus, this 30% is not in addition to social reservations. This 30% would be proportionately accommodated in each of these categories. This is how we have been working out these social reservations. Therefore, there is no reason why reservation in favor of women should be looked upon as something evil or as something undesirable. Of course, even the reservation in favor of women can also create ill will among the persons affected adversely—though, may be, not to the same extent, as the social reservations.

Some of the decisions of the United States Supreme Court up to 1990—between 1954 and 1990—have indicated that if race be the basis of discrimination, race can also be the basis for affirmative action programs. But since 1990, there seems to be a shift in thinking. As a matter of fact, in *Bakke's* case¹³ four Judges said quotas (what we call reservations) are permissible. Four Judges said quotas are not permissible, while one Judge said that though quotas are not permissible, preferences like these provided by the Harvard program are permissible. Now, even those preferences have become suspect. These are social problems. There is bound to be more than one opinion on them. Honest and well-meaning men may differ sharply. These are not scientific issues. There can be no cut and dry answers. There is always room for more than one view. There is always room for controversy. There is always room for difference of opinion. The ultimate goal should, of course, be a just and fair solution consistent with the interests of the society. Each nation has to find its own path. I hope that as we have been drawing from your experience in several constitutional issues, you would also look to our experience and South African experience in deciding what is fair and what promotes the greatest good of the greatest number.

PROFESSOR SUNITA PARIKH: I will start out with India as well. There is a tendency in India to bemoan what reservations have become, to point to all the social conflict that seems to be caused by them, and the fact that the political costs of affirmative action or reservations divert attention from an even greater problem in India which is that of enduring poverty, especially in rural areas, and the persistence of caste discrimination in rural

13. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

areas.

What has been enlightening to me about this conference is that it has made me see the Indian situation in slightly more important optimistic terms than I have been used to doing. As M.N. Srinivas pointed out Saturday, I think, and probably yesterday as well, the reservations have helped to create, not by themselves, but have been part of helping to create a true social revolution in India. In the last 50 years, caste has not gone away by any stretch, but it is really been transformed at some levels into a different institution. It is been politicized in ways I do not think anybody expected when India became independent.

It is important to realize that in some ways, this change could be seen as more difficult to achieve than the eradication of racism or even just the acceptance of, or integration of African-Americans into white American society. We were used in the U.S. to talking about racism as the fundamental or social dilemma of American politics and society, and it is. But there are large numbers of whites, and there always have been, who had very little contact with African-Americans. Some of the effects of racism in the United States were indirect, and since the passage of the Civil Rights Act we have seen real differences in the integration of minority groups in different parts of the country.

In India caste was pervasive everywhere. And it influenced every single person's life at a very fundamental level. There was nobody for whom caste was an indirect issue. Even, I would argue, non-Hindus. And so as a result to transform caste, I think, is to really do something quite surprising and unusual. What we have done in India, is to take caste and make it, through reservations, an entre into political power. Because of actual competitive democratic politics, low castes, which are more numerous, are now politically powerful in ways that they never were before, and in ways that high castes cannot be, because they are not politically numerous.

The resulting social and political change is quite different from the United States. In the United States the effect of the passage and enforcement of the Civil Rights in Voting Act has meant that African-Americans in part, not the whole group, but in part have been admitted to the majority society club, but the rules of that club and the distribution of the power across society have fundamentally remained the same. African-Americans will talk about this, and say you act like white people, you hang out with white people, you do what white people are used to, but white people do not start acting like African-Americans or minorities, Tommy Hilfiger and Timberland and Harlem notwithstanding. So, quite crudely, as a political scientist, I have to say a lot of this has to do with numbers. You just have so many more low castes that they can dominate a democratic election in a way that it is difficult

for African-Americans to do, except in cities where there are large numbers.

But if I argue that in the United States we have not changed the rules of the game that much, just opened up membership a bit, in India I think we really have changed the rules of the game. And in some ways this change is very bad. Patronage is stronger in Indian politics, not weaker. Patron-client relationships have just been transformed; they have not been done away with. We have more corruption, not less corruption, because we have more people clambering for resources and fewer to give out.

Nonetheless, however much you deplore the absence of a rationalized, efficient, productive political system, you do have in India a political system which delivers benefits to groups that it did not deliver to before. And so there is no wonder, really, that there is been a big backlash against this, because we are talking about fairly severe social change. What I found interesting about talking to high caste and middle caste Indians, those that are not targeted by reservations, is that they use many of the same arguments that opponents of affirmative action uses in the United States. "Government is less efficient; it is unfair; we are privileging groups over individuals." All of these things are undoubtedly true, but as somebody pointed out in an earlier session, high castes and majority groups in the United States had affirmative action for a very long time. And while you may not in philosophical terms think that payback is the proper political strategy, it is not a surprising political strategy in democratic countries.

I want to turn for just a few seconds to the thought experiment that we did in one of our substantive sessions—when we were trying to think about governance and government—governmental employment and governance and what the United States could learn from India and South Africa. Virginia Dominguez had this wonderful question. It seemed very innocuous and it quickly became apparent that it was not innocuous. She asked me if we implemented Indian policies in the United States, what would American politics look like. And so we got up at the board and we tried to figure out how many people would be in Congress, and the President, the Vice President—what gender, race, ethnicity they would be. As we wrote on the board we saw quite a few changes. We would have a lot more nonwhite Senators and Congressional Representatives. We would probably have more nonwhites in ceremonial positions, like Vice President. And we would certainly have many more nonwhites at higher levels of the permanent civil service, the bureaucracy.

We had a lot of debate about what this would mean, would it really change politics? I do not think anybody really had a clue as to what the outcomes would be. I would like to stress one important consequence of having so many more people who are different from what we have now at

every level of government, and that is something we have in India. We would have a lot more visibility of nonwhite groups, and I do not just mean role models. We can argue about whether role models are important, whether they are practical, efficacious, but I just mean two different things. Visibility: if when you looked at Congress, when you turned on C-Span, if 60 or 70 or 80% of those members are not white, that would be a major difference from what we are looking at now. And if when you go into an office, and you are not just dealing with the clerks at DMV or in the Welfare Department, many of whom are non white, but I am talking about Assistant Secretaries and Foreign Service Members and people who we see as the administrative elite. Fewer of those would look the way they do right now. What would be important about that is that the majority Americans, of whatever stripe, class, race, ethnicity or gender, would have to deal with these people as their equals, or as their political superiors. That is really what has happened in India. And I think that has really made a big difference.

It makes many high castes angry to have to walk into a government office and have to deal with a low caste representative who has power over them. That infuriates high castes, but as Justice Reddy said, you have to expect this kind of social backlash. You are upending a social system. And whether or not we would get different policies, that the act of having to take seriously the idea that people that you maybe implicitly or unthinkingly have thought of as poorer than you, less well educated than you, in some ways less deserving of you, actually have control over your life, that is important. In contrast, in the United States, we can sit around and talk about diversity, we can talk about proper numbers, we can talk about how to make the world a better place, but we are not really talking about fundamentally altering the political and power order on the small level, on the personal level or on the public level.

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9:15 a.m. Session II

PANEL MEMBERS:

Professor John Bowen
Professor Linda Krieger
Professor Aaron Porter
Commissioner Pansy Tlakula

PROFESSOR JOHN BOWEN: I am John Bowen in the Department of Anthropology at Washington University and what I think is important in our concluding sessions is to move from very specific thoughts about comparing affirmative action programs back to issues of rethinking equality, in the global framework. The global framework (which of course extends beyond the three countries we are discussing here) allows us to look at the terms with which people think about equality, poverty, inequality, discrimination, oppression, et cetera. Obviously a broad mandate and I hope others pick up various parts of it.

I just wanted to focus on the different ways in which in different countries' political discourses have framed the issue of reshaping intergroup relationships. For most colonial and post colonial nation states, these discourses have to do with intergroup relationships, and quite explicitly and legitimately so in the legal and political terms of those countries—in contrast to the more political salient discourse of this country which focuses on individual rights.

Just to focus on those other countries for a minute: we can learn a lot by investigating what sorts of group intergroup relationship histories characterize them, because these histories strongly shape, in emotional, political, legal and cultural ways, current discourses, and often make country comparisons difficult. We learn a lot about these here.

In South Africa, of course, there is the colonial and post-colonial (but still pre-independence) history of apartheid, segregating white versus black but yet with an internal hierarchy among black, African, colored and Indian.

In India, by contrast, there is what one commentator termed three thousand years of caste hierarchy, a product of indigenous, cultural, religious and political thought reproduced in minutia within villages where local relationships of fear, subordination and labor are structured through the caste relationships. Rather than having a highly segregated society with townships and whole regions being set off for blacks or for whites, one has in India this microcosmic reproduction of the whole caste hierarchy-making social change extremely difficult and perhaps explaining the decision by Indian legal

leaders to settle on certain things the state *can* do, having to do with job reservations, et cetera.

Of course one has in the U.S., intergroup relationships despite the dominant political discourse focus on individual—rights and an important part of that history of intergroup relationships is that it is not just white versus other people of color (which certainly is the term of much current discourse) but there is a history of immigration and to some degree assimilation into white status by various other ethnic groups, identified and organized politically and economically as groups at points in their history: Irish, Italians, Asians, et cetera.

A recent book mentioned by one participant *How the Irish Became White*¹⁴ is indicative of the process that is the background for resentment by many whites against African-Americans and their struggle to achieve equality. It is not only the Irish. The similar processes are at work with Asians.

The distinctive features of African-American, Euro-American and other relationships (which have their roots in events we are all aware of, what Orlando Patterson has recently called “Acts of History” against African-Americans) is an important part of our current efforts. And it leads to the sentiments which were shared by all the representatives of all the countries here today: that these categories of group identity and intergroup relationship are the categories through which past discrimination has been inflicted, and therefore must be the categories through which equality is sought. Pace the emphasis on individual merit, rights, achievement, et cetera.

Now, this is a source of contradiction in our own society because of the difficulty that we have in inserting into a widely accepted politically vocabulary these intergroup relationships and the legitimacy of group intergroup discourse. But the necessity of thinking in that way comes from three (among many) goals of programs intended to seek equality as well as to rethink political and economic relations.

One of them is redressing current inequalities that are the result of past state-backed discrimination against groups. These policies must be addressed to those groups. The second is that stereotypes about group capabilities, capacities, proclivities, talents, et cetera, must be eradicated. A problem that puzzles many Euro-Americans is why the ambivalence or resentment by many African-Americans about blacks doing well in sports. It has to do with the very nature of group stereotypes, whether positive or negative. The very fact of assigning groups to certain roles and certain capacities is the problem

14. See NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995).

and that is why it is at the group level, in terms of group stereotypes, positive or negative, that these problems must be addressed. And, again drawing from South Africa and India, this is a general proposition about human social and cultural relationships.

And finally, the nature of the population, its diversity, its variety, its different histories must be recognized in the elite dominated processes that shape our nation. Again something I think the representatives from all these countries would agree is that if we go beyond talking about past injustices, if we go beyond talking about stereotypes and talk not about group relationship but what kind of democratic processes do we wish, what kind of economic relationships do we wish to have, we quickly find that when we examine notions of democracy, any notion that is viable when given sufficient thought involves the participation in deliberative discourses of people who do indeed have those different histories and are indeed recognized as coming from different parts of the country, speaking for, speaking to, returning to different parts of society, different levels, different areas, within society. And so even if we begin from a theoretical basis of what a properly deliberative democracy, democratic society would look like we have to address group shaped differences in the experiences of men and women from various backgrounds in the United States.

Three reasons why—even in U.S. terms but I think reinforced by the contributions from people from different countries with their own experiences of discrimination—we have to begin addressing these problems of intergroup relationships, discrimination, inequality at the group level, which is what rethinking equality in the global society does I believe, whether it is addressed in terms of political problems, legal issues or social science findings, must take seriously, and work at the level of, intergroup relations.

PROFESSOR LINDA KRIEGER: I am reminded as the conference comes to a close of a statement made many years ago by Rudyard Kipling after his own return from India to his native England. The statement he made was “what should they know of England who only England know?”¹⁵ This was my first exposure to international or comparative equality or affirmative action law and I find at the end of these three days that I am left with far more questions than I have answers. I suppose that is a good thing, but it is never a comfortable thing.

What I would like to do with this time I have right now is simply to

15. Rudyard Kipling, *The English Flag*, in *SELECTED PROSE & POETRY OF RUDYARD KIPLING* 23, 23 (1937).

collect from myself and share with you some of the insights that I think I got out of the conference and in particular from the Indianists among us. Most of the session I was in bore more directly on comparisons with Indian inequality in affirmative action law in South Africans. So that would be the focus of my remarks.

First and foremost I was struck by the many parallels between the Indian situation and our own. And in particular, I found remarkable how criticisms or concerns about the Indian reservation system are reflected as well in the American debate about equality and affirmative action. Dr. Srinivas in describing the criticisms of the Indian reservation system mentioned first and foremost the concern held by many progressives in India that preoccupation with the reservation system and controversy over the reservation system in India has caused many to neglect primary education, poverty, literacy and grass roots efforts at both integration and community economic development.

Accordingly, there is some concern that the reservation system in India has become symbolic and tokenistic and fails really to address the core problems that lead to so much suffering and ultimately inequality and intergroup tension in that nation.

Additionally, both Dr. Srinivas and others mentioned that the reservation system unfortunately provided a platform for extremist right wing political groups that they otherwise might not have. Third, and in particular, that the other backward classes category solidified a social construction that otherwise would not have become solidified and in fact has led to increased civil discord, increased identification within group membership at the expense of the building of bridges between castes and classes in that country.

Additionally there is some concern that the reservation system has given caste a kind of political currency that it otherwise would not have had and, therefore, again serves to reinforce intergroup differences rather than to break them down. It would be difficult to listen to this list of possible disadvantages to systems of reservation and affirmative action and not be reminded of the contours of the debate in the United States. But I was also struck over the course of the weekend by some very fundamental differences between the Indian situation and the situation confronting us in the United States.

First of all, I learned that there is in India quite widespread consensus about the reservation system as it pertains to the scheduled castes and scheduled tribes. This includes of course those formerly categorized as untouchables. This stands in marked contrast with the situation in the United States where paradoxically empirical research shows that many who would be willing to accord preferential treatment to women, to the disabled and to certain ethnic minorities feel that African-Americans are the least deserving of preferential treatment when in fact African-Americans have suffered the

most similar subordination to the subordination of caste as it existed in India.

Secondly, in both India and South Africa, the reservation system or affirmative action programs have been or are the product of a national constitution building process which was fundamentally majoritarian and fundamentally democratic. Whereas in the United States, unfortunately, affirmative action programs have never until recently been subjected to the rigors of democratic debate and vote and I think we are suffering the consequences of that now, at least in California.

A third and more difficult to describe difference between the American and Indian systems relates to an understanding on the Indian part, which I think we somewhat lack in this country, of the difficult inherent, difficulty inherent and reliance on formal models of equality and judicial proof as ways of addressing discrimination and other forms of inequality.

I was struck in particular by two laws, two Indian laws, one known as the untouchable, the Offenses Act and the other known as the Dowry Death Statute, in which violence or discrimination against previously subordinated groups are proscribed by statute and the ordinary allocation of burdens of proof, usually the defendant in criminal cases is presumed innocent until proven guilty. The plaintiff in the civil case has the burden of proof.

These have been shifted or switched, flipped under these Indian statutes in recognition of the practical difficulties and inherent in proofing discrimination where the plaintiff is a member of a subordinated group that does not have access to the legal system, does not have access to legal or strategic knowledge and where the evidence is uniquely within the control of the defendant rather than the plaintiff.

My field of American law, employment discrimination, has consistently over time failed to recognize the theoretical and practical difficulties inherent in individualized proof of discrimination in either the employment or by analogy the housing or education context and I think we have much to learn from India in this regard.

Finally, and I think most significantly, I was struck on the first day of the conference by something that is much more difficult to describe or even to sort of figure out what can be done with it. In both Sanskrit, the integral language of India, and Zulu, one of the main languages in South Africa, there are words; the word in Sanskrit is *dharma*, the word in Zulu is *ubuntu* which words mean although they are difficult to translate, law, justice, the way of acting in the world and that which holds up existence, that which structures or supports all life and in fact universal order. It is a word similar to the Hebrew word *habakka* which has a similar meaning and no doubt there are other words in other languages as well but I do not think we have one in English. At least if we do, I cannot figure out what it might be.

These words provide I think a normative framework for thinking about intergroup relationships and for thinking about the intergroup relationships between law and justice, for thinking about the relationship between the individual and the group that unfortunately we lack in our political culture. Fundamentally, as we go forward, I think our task is to struggle to find the American equivalent of these concepts. And to use the insights so gained to inform and structure our policy choices with respect to equality in intergroup relations and affirmative action.

COMMISSIONER PANSY TLAKULA: My name is Pansy Tlakula. I come from South Africa and I am a member of the South African Human Rights Commission. As we all know, South Africa is emerging from a painful history, characterized by racial domination, racial oppression and violation of human rights. We have now adopted a new Constitution which is based on two important fundamental values, being equality and human dignity.

It is our hope that with this new Constitution, we will be able to put our past behind us. The preamble to our Constitution does recognize our past, recognizes the injustices of the past and says that with it we hope to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights.

Our Constitution of course, like most Constitutions, outlaws unfair discrimination. It uses the word "unfair" and prohibits such discrimination on several grounds which are listed, being race, gender and so forth. It is unique because it also includes sexual orientation among those grounds, also pregnancy, sex and gender. And I think that was deliberate.

It also contains an affirmative action clause in the sense that it says that to promote equality, legislative and other measures need to be taken to protect and advance persons and categories of persons who are disadvantaged by unfair discrimination. So in that sense it recognizes the fact that groups of persons may be affirmed.

This is simply because of our history, where we come from. If one looks at our history, black people were oppressed by apartheid legislation which divided black people into three main groups—people of African descent, Indians and coloreds. In applying affirmative action in our country, if we hope to reverse the injustices of the past, we have to take this history into consideration.

In some quarters this approach is seen as perpetuating the stereotypes of the past. But in South Africa our past is based on those racial stereotypes and unless affirmative action addresses our history, then it will not achieve much for the majority of South Africans.

Our Constitution is also unique in the sense that it is one among the very

few constitutions in the world that entrenches socioeconomic rights. It recognizes access to water, to food, to social justice, health care, housing, environment and education. And of course access to these rights depends on the availability of resources.

The decision to include these rights in the Constitution took into consideration the effect of apartheid, that had subjected the majority of people to poverty, to squalor, to everything else that subjected them to unfair discrimination. It was a very deliberate decision to include these rights because if you have all these civil and political rights without socioeconomic rights in our country, then equality will remain meaningless.

These rights have not been tested in the courts of law but it is my hope that when affirmative action is applied, then it will be applied even in the realm of socioeconomic rights—so that when decisions are taken about access to these very important rights of water and food, those who were disadvantaged and those who were at the bottom will be affirmed.

And when we apply affirmative action also, I hope that women will not be treated as a homogenous group. African women should be given first preference because those woman were subjected to three forms of discrimination: discrimination on the basis of class, discrimination on the basis of gender, and discrimination on the basis of race. They among all South Africans were the ones who were worst affected by apartheid.

The majority of women in South Africa are women who still live under African customary law, which subjects them to discrimination that makes them perpetual minors under the guardianship of their husbands. These women cannot even own property, and upon the death of their husbands, they cannot inherit property from their husbands because in that system of law, only male heirs are entitled to inherit. Even if there is no male descendent to inherit, the system will go out of its way to look for a male heir, be it an ascendant or a collateral.

For South Africa to have meaningful equality, it must strive to attain substantive equality rather than just formal equality. If one looks at our Constitution, if one interprets the affirmative action clause in conjunction with entrenched socioeconomic rights, I must say that there is a commitment in our country to achieve substantive equality and social justice. Unless we achieve substantive equality for the majority of South Africans then, indeed, the Constitution would be a meaningless piece of paper for people who have fought very hard to be where we are today.

PROFESSOR AARON PORTER: My name is Aaron Porter from the University of Illinois. I would like to summarize and add to the previous conceptual points that were made. Since I am a sociologist and have been in a conference among many lawyers all weekend, I would like to make some

conceptual points with an eye toward a sociological understanding of intra- and inter-group relations. I will also speak about certain low social phenomena regarding affirmative action that is evident in India and South Africa and relate to similar concerns about affirmative action policy and the African American community in the U.S. In other words, I will compare affirmative action policy in India and South Africa to that of the U.S., especially regarding racial relations.

There are three main points that I would like to elaborate on as I reflect on this conference, all the issues of which are interrelated regarding how individuals deal with improving their life chances because of the impact of racial and gender discrimination. First, social categories have been talked about in this conference which undergird or speak to how individuals and a collective society deal with affirmative action in India and South Africa. I will use these social categories as ways to compare and contrast them with the U.S.'s case, showing key differences in our orientations toward dealing with similar problems. Second, in looking at the two countries along with the U.S., there are similar social phenomena or points of debate regarding who should benefit from social equality programs including debates surrounding the use of affirmative action for poor and middle class groups. This comparison makes the affirmative action issue a global one with a global context for concern. Third, as the debate occurs regarding who should and should not benefit from affirmative action programs, the key issues we should keep in mind are the manifestations of racial and gender discrimination in all three countries, and aims at losing sight of that problem.

It is very clear to me that after understanding a number of issues relating to global equality by using South Africa and India as points of reference, I think that a comparative approach to looking at equality of opportunity, affirmative action, or race relations is profoundly important. This conference has highly encouraged me of the importance of the cross-national, cultural, and comparative approaches, which can be used toward a better understanding and ways to deal with inequality issues. In fact, I agree with the notion that there are some things that the U.S. can learn and gain from looking at a different cultural and social context in reference to affirmative action. For instance, as my first major point outlined above indicates, social categories can be put into a sociological context. Sociologists tend to use terms (or social categories) to provide us with a better way to analyze a particular group, social phenomena or cultural activity that is occurring. That activity occurs with historical, political, legal, or social roots.

In India, affirmative action has a cultural dynamic to it. For instance, the term *dharma*, I believe, in India essentially means "how does one make sense of the earthly world," which sustains life, connects social interactions, and

ethics. It is also tied to the Zulu term, *ubuntu*, which means and calls for a duty for individuals to act in accordance to their responsibilities. What becomes relevant regarding these social and cultural descriptive categories are its connections to social action and policy. It seems to me that there is a communal, ethical, and cultural context for how social groups react to and deal with problems of social inequality in both India and South Africa. For example, in South Africa affirmative action is not an exception to the rule regarding policy, but it is an indispensable way to achieve equality under the law. Affirmative action therefore becomes the vehicle by which this can take place.

In the case of India, the Mandal Commission reported that equality of opportunity or affirmative action used in a *dharmian* context is a libertarian principle rather than an egalitarian one. I think that the latter principle reflects how the U.S. deals with affirmative action. Nonetheless, when you look at India and South Africa and compare those countries' current affirmative action policies to that of the U.S., I think that there is a profound difference occurring. This difference relates to the cultural and social dynamic in which India and South Africa deals with affirmative action compared to the U.S.'s push for a political orientation.¹⁶

The second key point, which I have garnered from this conference is the creamy layer effect, or who should or should not benefit from affirmative action policy in the context of the middle class. In fact, this concept, discussed at the conference, has profoundly affected my thinking about affirmative action in India and its comparative relationship to the African-American community in the U.S. in particular. In India, the term "creamy layer effect" or "creamy layer impact," which has been talked about throughout this conference, refers to middle and upper class group members, and whether or not this group deserves opportunities through affirmative action. This concern and current debate in India really reflects whether or not affirmative action should be used as a way to deal with discrimination, on the one hand, while serving as a vehicle to expand and then reproduce a middle class, on the other hand. Implicit in this debate is whether or not less fortunate group members are fully benefiting from such programs, and that the real problem is one of class culture, not discrimination. The debate over

16. The major theoretical point I am making here regarding affirmative action policy is twofold. First, the central reason why there is much tension over the implementation of affirmative action in the U.S. relates to the concern of individual rights which are sanctioned by the constitution and carried out through the mythical belief in a pure meritocratic social system. However, the major contrast between the U.S. and that of South Africa and India centers on the issue of how affirmative action operates in the latter societies which give high constitutional premium to group rights which operate within a national cultural context, even though individuals may challenge such an ethos.

the creamy layer theory is similar to affirmative action in the U.S. regarding how public policy is used and consequently its relationship to and among African-Americans.¹⁷

17. Race as a criteria for considering increased opportunities is a concept which leads to much debate especially regarding affirmative action. Many find ways to prohibit any abuses or unfair treatment at any level of the spectrum in regards to affirmative action. Some argue as in the case of India, South Africa, and the U.S., middle and upper class individuals, and consequently their children, receiving any benefits from affirmative action programs constitute unfair practices while causing red flags to go up against such programs. Because these kinds of opportunities regarding a continual process of middle and upper classes benefiting from affirmative action, this produces what Indian sociologists refer to as the "creamy layer effect." This is, affirmative action programs when helping the middle class individuals in a way that reproduces this group, some claim that racial discrimination is not being experienced or opportunities limited. Instead, affirmative action usage in this context becomes unfair and creates a form of discrimination in itself. In other words, when race is the central factor being used as a criterion for affirmative inclusion, a self perpetuating group such as middle class individuals benefits from this process, and the argument becomes that those in need of such programs are not getting the full benefits of it. Critics of affirmative action therefore argue that race should not be a criteria for programs which enhance opportunities for those who are blocked from the opportunities of a wider society. That is, social groups which reflect low economic, educational, and other social conditions are better reasons for affirmative relief programs. In this, members of poor groups who have been discriminated against like the "Untouchables" in India, poor black South Africans, and underclass people of color in the U.S. due to their social place or social status, in addition to their cultural experience in unison with historical and structural factors and dynamics which hinder their life chances. The argument further goes on to suggest that training programs and policies that are developed in the latter context will enable such groups to improve their plights, civil rights, et cetera, including a decent home to live, running in-house water, and electricity as the South African case portrays. This argument both in India's and South Africa's case is similar to the argument against affirmative action in the U.S. especially regarding the African-American community and the creamy layer effect.

In the U.S., critics of affirmative action argue that such programs have increased opportunities primarily for a black middle class while creating a polarization in the black community between a flourishing middle class and limited opportunities for poorer blacks or the underclass. For a detailed analysis, see the works of Wilson Julius Wilson, *THE DECLINING SIGNIFICANCE OF RACE* (1978); *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY*. (1987); *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996); see also REYNOLDS FARLEY, *BLACKS AND WHITE: NARROWING THE GAP?* (1984); GERALD D. JAYNES & ROBIN WILLIAMS, *A COMMON DYNASTY: BLACKS AND AMERICAN SOCIETY* (1989). In fact, since the children of middle class families professional opportunities are different historically than their parents, affirmative action that continues to benefit the children of middle class families causes what some may claim as professional inbreeding or the "creamy layer effect." See BART LANDRY, *THE NEW BLACK MIDDLE CLASS* (1987). The assumption is that racial discrimination has been eradicated for middle class blacks and that poorer blacks experiences relate more to class culture and not racial discrimination. For a critical analysis of this argument, see Joe R. Feagin & Aaron Porter, *Affirmative Action and African Americans: Rhetoric or Practice*, 21 HUBOLDT J. OF SOC. REL. (1995). Also for a thorough discussion on how blacks experience and document racial discrimination at various social strata including the public sphere, in education, and in corporate America including board room settings, see LOIS BENJAMIN, *THE BLACK ELITE: FACING THE COLOR LINE IN THE TWILIGHT OF THE TWENTIETH CENTURY* (1991); ROBERT BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (1990); ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993); PHILOMENA ESSED, *EVERYDAY RACISM: REPORTS FROM WOMEN OF TWO CULTURES* (Cynthia Jaffee trans., 1990); JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE CLASS EXPERIENCE* (1994); KESHO Y. SCOTT, *THE HABIT OF SURVIVING: BLACK WOMEN'S STRATEGIES FOR LIFE* (1991);

The third point I would like to discuss briefly as I conclude my remarks reflects how we should think about affirmative action and for us not to lose sight of the reality of racial and gender discrimination. When we read the Mandal report then think about how and why particular groups are defined in ways which will enable them to increase their life chances through affirmative action programs, or as the conference articles refer to them as programs of preferential treatment, we also think about characteristic factors such as socio-economic status in unison with historical circumstances of particular groups who are or will become eligible for affirmative action incentives. In other words, we consider cultural groups whose opportunities in life were limited or closed because of discrimination through the context of its historical and contemporary unfolding, in addition to other circumstances. In this context, the Mandal Commission came up with 3500 different categories—social groups which are for eligible for affirmative action incentives. That is a lot of categories for people eligible for affirmative action. But, if you have a billion people in the population, perhaps that group is not large.

How would this situation appear in a U.S. context? One of the puzzling things about this conference, as I observed and participated in many of the discussion sessions, is that we began to categorize people then talked about how new and old social groups might benefit from equality opportunity programs or affirmative action. Consider this point. If we look at the U.S. census and apply the Mandal standard, we will see diverse categories of people who might become eligible for affirmative action programs especially in the context of a multicultural U.S. society. As we categorize new target groups, it seems to me that we are beginning to socially construct or define new categories of people of color in ways which breaks this group down into more smaller groups while the white category in the U.S. census is left untouched. In other words, we find new ways to reclassify groups already classified. By doing this, the impression is given that the U.S. is a diverse society (including the workforce and educational institutions) or a multicultural society (which represents more than the reality of today's workplace and other business and social institutions). As we think about this expanded notion of multi-culturalism particularly by developing more social categories for people of color, we are at the same time socially constricting

BERNARD C. WATSON, *COLORED, NEGRO, BLACK: CHASING THE AMERICAN DREAM* (1997). In all cases, the essential problem is that of racial discrimination even after the dream occurs regarding increased opportunities for middle class blacks and social and environmental conditions for poorer groups. In the midst of racial progress, one must still be aware of how larger manifestations of discrimination occurs and de facto conditions re-appear, but operate in a different social, economic, and political contexts.

certain kinds of groups which really does not deal with the question of oppression, discrimination, or racism (We are merely creating new names with same faces without dealing with the social and structural problems of racial and gender discrimination.) In other words, as we socially constrict these new groups, on the one hand, I think that, on the other hand, we are deconstructing the notion of race and racism in the U.S.¹⁸ This also binds affirmative action efforts. One begins to wonder about whether or not a race problem exists.

One of the analogies that Glenn Loury shared with us reflects this phenomena, which has me thinking about the de-constriction of race concept. Loury gives the example of the mad bomber or mad ruler analogy to demonstrate the above point. He essentially calls for us to imagine our society as being mapped out in the form of a checkerboard. And the mad bomber decides to bomb all of the dark spaces on the checkerboard.

The question becomes how do you develop a fair and just society, which begins to take steps at repairing the damage that was done. In other words, how do you socially and legally construct policies, programs, and opportunities for equality of opportunity in a perceived color-blind society without looking at the map in your efforts to repair it? This is the position that the U.S. currently faces. If we are talking about creating policies for social change and social equality through affirmative action, then we must look at the map from which the destruction occurred. We must ask questions like what has happened or what has been done to improve this situation. Merely focusing on people of color and socially constructing new names with old faces on the map does not address larger structural questions. My concern is that in looking at issues of affirmative action in efforts geared toward finding race neutral ways to deal with this problem as depicted by the checkerboard example can undermine the real issue of race, discrimination, and oppression in societies facing these serious problems.

It is good to look at other cases in terms of how other countries deal with similar problems and social change efforts that lead to equality of opportunity. South Africa and India are good examples. It can also be problematic especially in the context of the U.S. with its political orientation and avoidance of the peace question as DuBois referred many years ago.¹⁹

DR. SUSAN UCHITELLE: My name is Dr. Susan Uchitelle. Dr. Bowen,

18. For a detailed analysis on the African American experience which reflects the de-construction of race, see MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (1994); JOE R. FEAGIN & HERNAN VERA, *WHITE RACISM: THE BASICS* (1995); FEAGIN & SIKES, *supra* note 17; LESLIE CARR, *COLOR-BLIND RACISM* (1997).

19. See W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (1903).

you said you really felt it was important to have some kind of plan to address this issue, whether you talk about it in a group level or talk about it in intergroup relations. And I am really wondering what you are thinking because I think often we have some kind of formal model, some principles inherent in the law I think over and over again at those group levels, especially interracial relationships do not go very far. So I am curious to know what you are thinking in terms of building a structure that might really be meaningful over time.

PROFESSOR JOHN BOWEN: I think if I had a good answer to that I would be on a jet somewhere right now.

DR. SUSAN UCHITELLE: That is one of the issues we have got to struggle with.

PROFESSOR JOHN BOWEN: That is right, right. My comments were directed towards recognizing the reasons why lying underneath programs that we already have developed in this country, there is an important truth about the need to take the history of intergroup relations seriously and not merely view various programs as based on some notion of individual merit, individual achievement, et cetera.

I do not think I have any new insights as to the programs to be defined. Perhaps others here do. It is rather, depending on our goal, if our goal is to, for example, eradicate stereotypes about the capacities of certain people or what certain people do or to get trained doctors or lawyers or others who come from different parts of society and are perhaps somewhat more likely although not certain to serve those parts of society or be able to listen to people from those parts of society, then we have to take their characteristics, the most salient characteristics in our society seriously and because of our own history, those are race, just as they happen to be caste in India.

Now, this legitimates although this is a very unpopular way to talk about these things. If this is our goal, this suggests that thinking about quotas and calling them such is legitimate. It is a political nonstarter for various reasons but, and hence once one talks about how to design a program and how to talk about it, it may not be the way to talk about such a program.

But just thinking about what the goals are leads us to take certain group oriented ideas seriously and not say that, well, because they emphasize group identity, et cetera, they are inimical to American ideas, individuals, et cetera. But on the level of specific programs, it is not the area I work in and so I would not want to delve into that.

DR. SUSAN UCHITELLE: Let me add one thing. I would like to hear what everybody said. But you touched upon something that I think is equally important. It has to do with really what are our goals in this country.

PROFESSOR LINDA KRIEGER: You have asked two questions that are

really the heart of the matter. The first question is what kind of program can be devised and what is the role of the law in that, in the construction of that program, in the design of that program? And then the second question really is what are our underlying goals, what are we trying to achieve with our equality policy or affirmative action policy to the extent it is going to exist?

With respect to the first, I think we have to recognize in this area as in others that the role of the legal system in resolving what are really complex societal and cultural problems is necessarily limited. And perhaps we have relied on the law too much up until now. But there are some things I think, some reforms if you will or some changes in existing anti-discrimination law that we have to make in order for the law to be used as a more constructive vehicle in the design of this kind of overall program.

First of all, our current antidiscrimination law, Title VII of the Civil Rights Act of 1964,²⁰ various state law equivalents, really lack an adequate theory for modelling, identifying and remedying modern forms of discrimination, by which I mean the kind of discrimination that results from the operation of unconscious stereotypes and other forms of subtle intergroup bias. Our antidiscrimination law is designed to address a kind of discrimination that is largely no longer existent. So that is the first thing. And that, if we can achieve only that in the next twenty-five years, we will have done a lot.

Secondly, although it is not entirely clear in the private sector context, the Supreme Court up until now has not permitted the government to use remedying societal discrimination, the legacy of slavery, to be blunt, as a valid purpose for an affirmative action program. Well, this is preposterous. This is the problem.

The legacy of slavery and other forms of de jure discrimination against other social groups is the history of intergroup subordination in the United States and for us to be as a culture, as a political culture, you know, not equipped to rectify that, I am at a loss as to what then we can do, if we cannot use societal discrimination as a justification for group conscious decision making.

With respect to your second question, I think that is much harder and as I said, I have struggled since hearing these words, you know, *ubuntu* and *dharma*, and thinking about other similar words what is our, what is the animating normative force of American society and the closest I could get—and this is really lame—but the closest I would get is *e pluribus unum*, this

20. See Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e-2 (1994)).

notion that somehow out of multiplicity, out of diversity and within the context of diversity we seek, we aspire to construct something that is also unified, that is both, you know, multiple and unitary. It might be helpful to rethink our anti-discrimination law and our affirmative action policies with this in mind. That is the best I can do but I think you are right, that is the question.

PROFESSOR AARON PORTER: I would like to add to what you said. I do think that we have an ultimate goal in the sense that in a perceived egalitarian society, we want the U.S. to reflect the human mosaic in which we live. The problem, I think, which you have touched on, reflects the question: How do we go about getting there? We have had good progress. Yet the issue of social justice through the legal process as an effort to redress some of the problems of the past with its correlation to our unfolding present has not fully worked.

The idea of particular groups in occupations, businesses, or in education does not necessarily mean that we have achieved that goal or created a diverse society in the U.S. The result may be that we might have tokens who are used to reflect a perception which creates the idea of diversity.

Another argument would be that if we are talking about a society in which the issue of equality is derived through everyone's involvement and usage of "democratic space," then the question becomes: How can we distribute social and economic and political resources in such a way that people from all walks of life meaningfully participate in the U.S.? In India, for example, even with the Mandal Commission's findings and recommendations, ways were found to make sure that the state and federal government is more representative of formerly disadvantaged groups. Then when that occurred, the question of the "creamy layer effect" became an issue. The bottom line is that the advances have not led to any great increase in the numbers which reflect disadvantaged groups in the professions or in education.

In the case of South Africa, I think that there is so much work to be done there, especially in terms of basic civil rights. In the U.S., we want this lofty goal, in which people of color are included meaningfully in positions of power and influence, in addition to the professions and in education and an improvement in inner-city areas. Again, we have made some progress, but we are not there yet in terms of the overall goal. When I think of these things, India, South Africa, and the U.S., I keep reminding myself of Jesse Jackson's phrase, "keep hope alive." Its getting harder every day, but I am still very optimistic in terms of how we actually accomplish the overall goal that we as a "diverse society" want to achieve. However, in efforts aimed at getting there, we must also deal with problems which reflect disadvantaged groups

while simultaneously dealing with serious structural and social problems regarding race and gender.

COMMISSIONER PANSY TLAKULA: Our goals are mentioned in our preamble: to improve the quality of life of all citizens of South Africa, to heal the divisions of the past and to establish a society based on democratic values and social justice.

MS. JILL HICKSON: I am a student at Washington University School of Law. I am interested in the Constitution. I missed this weekend, I was out of town. It is one thing to say that it is a democracy, but I have watched what is going on in law school. There is a complete separation between economics and democracy and politics and democracy. For example, I see some classmates in a basic labor course that the hierarchy between management and labor is allowed to exist.

We basically, take that as a premise and try to work with it as collective bargaining. But the idea of inequality or democracy in the economic system just is not there. It is not taught. I mean, we keep those totally straight and I am wondering how you are going to approach that in South Africa.

COMMISSIONER PANSY TLAKULA: Our Constitution entrenches socio-economic rights. There is a light at the end of the tunnel to integrate these issues. In South Africa our democracy is still so young that we have it all on paper and we have not translated it into reality.

Let me give you an example from my work on the commission. We have regulations within the defense force based on the laws that were enacted before the constitution came into existence. These regulations do not grant women equal employment benefits with men. Women employed within the defense force came to the Human Rights Commission to complain about the discriminatory nature of these regulations.

We took up the matter with the Minister of Defense. His reaction is yes, I do recognize the fact that the regulations are problematic, they are discriminatory. But I do not have the resources to bring women in line with men. So the question of resources also comes into existence to compromise the constitution so to speak.

MS. JILL HICKSON: I do not have a solution myself. I just watched that the principle, it is very prevalent in the political side and people, everyone understands discrimination is wrong in the sense of civil rights but then when it comes to the economy, this overwhelming idea of capitalism, you know, the best, most qualified sort of argument comes more into play than it would ever be able to allow to exist in a political spectrum.

COMMISSIONER PANSY TLAKULA: I think also our hope is in the fact that our Constitution applies both in the private and the public sphere; that will give us an opportunity to address the imbalances and the

discrimination that occurs even in the private.

MR. AMON DORIAN: You mentioned, the young student suggested that democracy and economy are different. *E pluribus unum* in a democratic society may be one for all and all for one but on a dollar bill is the only place that I recognize that it is found. It seems to me one out of many in a capitalist society. So that when you want to discuss socioeconomic affirmative action, not necessarily so much in this country but I was wondering with respect to South Africa, the only example of socioeconomic affirmative action I can recall might be, one example, the Cuban example where they just took the land from the former capitalists and turned it over to the peasants.

Now, I know that you have this Constitution and this paper but there is a Constitution in this country also. Though, I mean I disagree that the legacy of slavery is the reason why we are here or at this point today because prior to American slavery, you had the whole idea of white supremacy marching through west to east and then concluding themselves to be the supreme beings on the planet.

After all, the founders and the authors of the American Constitution, Thomas Jefferson in his own writings in his Virginia notes suggested that he was, he directly stated that he was a white supremacist in his own writings along with George Washington and some other co-horts.

So when you suggest that you are interested in socio-economic affirmative action, what form do you see that taking place in some time when the other gentleman there suggested this group analysis and this group push toward affirmative action. How do you see this group push as opposed to this, what we have today in this country, this individuality of individuals who seem to make it or make money and so forth and those people are pushed on that basis and setting the examples of what can be done in this country when those are only examples and those things can not be done as a general rule?

COMMISSIONER PANSY TLAKULA: To take the example that you gave of land. What has happened in South Africa is that people who were dispossessed of their land by the apartheid laws, through a negotiated settlement, were given back as a group the land that was taken away from them.

But my idea when I talked about affirmative action and socioeconomic rights was that when measures are taken to advance those who were previously excluded, then these measures should target socioeconomic rights: housing, health care, water. For all these needs, preference should be given to those who were previously disadvantaged.

* * *

10:15 a.m. Session I

PANEL MEMBERS:

Professor Garrett Duncan

Professor Joshua Aronson

Professor Gerald Torres

Professor Karthigasen Govender

PROFESSOR GARRETT DUNCAN: Good morning, my name is Garrett Duncan and I am a faculty member here at Washington University, in the Department of Education and the African and Afro-American Studies program. I have the task of introducing our guests today, and was told if time permits I might be able to say something, but briefly, so I will allow that possibility by going ahead and introducing our panelists.

To my immediate right we have Professor Joshua Aronson from the Department of Educational Psychology at the University of Texas.

And to Professor Aronson's right we have Karthigasen Govender, who is a lawyer and a member of the Human Rights Commission in South Africa.

Our third panelist is Professor Gerald Torres of the University of Texas Law School.

PROFESSOR JOSHUA ARONSON: I am a social psychologist by training, and one of the things that I have not heard much discussion of is the role of public opinion in affirmative action. It seems to me that public opinion in this country is what has turned in the affirmative action debate. We used to be quite supportive of it, more so than now, at least. I am left with questions about India and South Africa, how they have dealt with public opinion and how they are going to deal with it in the future.

One of the things I do as a social psychologist is measure the attitudes of people, and I am struck by something that a student wrote at the University of Texas, where, as you know, affirmative action is very much on the debate table at the moment. I was measuring the student's attitudes about racial groups and unsolicited she wrote, "Stop the sympathy." "Stop the sympathy," as though it were bad thing to show sympathy towards other groups. And yet it was unprovoked by any discussion of affirmative action, merely asking for the attitudes about race. As somebody who has been trained in social science, I know not to make too much out of a single data point, yet at the same time I do feel that there is some degree of sympathy that has waned in this country towards African-Americans in particular, and

the question is why. I suppose there has been a tide in general to look at people with less sympathy a la the Menendez case.²¹ We have used the law a lot to argue for situational explanations for behavior that we do not like, as with the Menendez brothers. And I think that this sort of thing is creating a tide of apathy towards people who are less fortunate than ourselves.

But I think one of the other reasons that sympathy is waning in this country is that there are not great advocates for it the way there used to be, like Martin Luther King. I think one of the reasons that he was so powerful is that he got people very much in touch with the best part of themselves, the best part of the American culture, too. He made people see that in order to live up to the "our creed," the thing that we think we believe in so much, we have to be sympathetic towards people from other races and treat them equally.

We have been charged in this country to make a compelling case for affirmative action, and I think that there are three points that people generally miss when we talk about affirmative action. I have been thinking about lately, and we have not really talked about in this conference. One thing that people forget is that we lack cultural authority without diversity. And by cultural authority, I mean, the ability to make decisions stick, decisions that seem fair because they are made by people who are representative of people in the country. One need only to look at history, very recent history, to get a sense for how important that can be. The nondiverse O.J. Simpson verdict. How well did that go over? The nondiverse Rodney King trial jury. How well did that verdict go over? The all white male Senate committee, and that is the one I remember first thinking about this, I remember thinking how can these all white male senators adjudicate this process where a woman is claiming that she has been sexually harassed? They lacked the cultural authority to make the decision. What people lose sight of is what a valuable thing it is to have diversity in government. And so they should overlook the apparent inequality that may need to take place in order to achieve that diversity.

The second point that people miss, I believe, is that the quality of most endeavors are improved by diversity, for example, my own field of social psychology. It has an interesting, short history. It is about sixty years old, and for the first twenty or thirty years, there were virtually no women in this field. Then the influx of women came in, and it has never been the same since. The

21. Erik and Lyle Menendez were tried twice and convicted of murdering their parents, Jose and Mary Menendez. See generally *People v. Menendez*, BA068880 1996 WL 363705 (Cal. Super. Trans. July 2, 1996); *People v. Menendez*, BA068880 1996 WL 121110 (Cal. Super. Trans. Mar. 20, 1996); *Menendez v. Superior Court of Los Angeles County*, 834 P.2d 786 (Cal. 1992).

breadth of social psychology, just as an example, has gotten much better. And, it seems to me that if we can make that point for psychology, we can probably make that point for a lot of different endeavors. And we should make that point. Again, I do not think it is hard to make a compelling case for diversity.

And, finally, people need to be reminded that affirmative action for white people has been going on quite a long time. People on this panel have reminded me of that, of legacies in college where sons of people who went to Princeton University, for example, can have low SAT scores and low grades and still get in to Princeton, because they are thought to be valuable to the school. Well, if that can be done, people should be told, then affirmative action for minorities can be done.

So, to sum up, I believe, and I do not want to use this word so much, but the “packaging” of affirmative action has been really lousy in the past two decades. Before, we had people like Martin Luther King appealing to people’s sympathy and sense of fairness, and now we have a much more divided, “message dense” environment where slogans like those of Ward Connelly get through and form people’s opinions. But I remain very optimistic that we can do a lot to sway public opinion. Because I do think, deep down, people can be very sympathetic, they just need the issues framed for them in the proper way.

PROFESSOR GERALD TORRES: My reflections on the events of the last couple of days really focus on the problem of framing. When one listens to the South African model described, or to the Indian model described, and then compare it to the American model that has been described, you see clearly that there are different narratives about equality. The narrative frame within which the discussion about preferences occurs has a lot to do with underlying etiology, but it has as much to do with telling a story about the group for whom compensatory or diversity rationales or educational rationales are positive.

An example of the power of this can be taken from my own university, the University of Texas. I would like to take someone from South Africa on a tour of the University of Texas. I would take them to tour the monuments on the university. On this tour you would find a couple of interesting things. First, you would find the monuments to the Confederacy. At the main entrance you must pass a giant fountain dedicated to the heroes of Confederacy. But the story that is told by these monuments is not the story of the Civil War as it is learned outside of the South. It is the story of states’ rights. It is the story that has direct lineage to the Alamo, that has a direct lineage to the struggle for freedom that defines Texan identity. The story that is told is of the defeat of these valiant soldiers in the struggle for freedom,

identified as states' rights, as opposed to the struggle against freedom or, the struggle to preserve slavery. So it is an interesting narrative frame to discuss the relationship between African-Americans, for instance, and white people at the University of Texas.

These memorials are juxtaposed with the monument to Lyndon Johnson, the largest building on the campus, the Presidential Library. In that library and museum you find a monument to the man who brought Texas into the twentieth century. But President Johnson also brought the South into the twentieth century through the passage of the major civil rights acts. He is celebrated as a Texan and a national hero. But the monument to this hero is not seen as disjunctive with the monuments to these other heroes. It is all part of the same story. So something like the *Hopwood* opinion²² has to be understood within a frame that has untethered the moral basis for condemning the inequality that people observed. Because the inequality between whites and non-whites in Texas is understood to exist not as a residue of a corrupted or degenerate system, but as the result of private orderings that have occurred over time within the framework of the creation of the Texas Republic and the Texas nation. Do not forget that Texas is a kind of nation. Thus this story makes it hard to then use the narrative of redress, which you see in South Africa, as a compelling moral justification for things like affirmative action in higher education because the damages have been paid. The damages were paid in the blood of the sons of Texas who died in the Civil War. You understand that when you visit the memorials to the fallen heroes of the Confederacy. So, the idea that there needs to be additional compensation paid to victims of slavery or victims of discrimination is not only not within the framework, but seen by some as outrageous.

When affirmative action is conceived as a proxy for information that we do not have, and you can look at both the Indian and South African models to understand how that proxy functions, what you discover here is a rejection of that justification, because culture is understood as cause, not as consequence. So, if African-Americans, and Mexican-Americans, are performing less well according to traditional tests, that data is understood to say something inherent about the cultures themselves rather than reflect additional information about the cultures that have emerged from the system that produced them. Culture is not seen as an asset but as a liability in Texas.

Finally, the idea that it is possible to create a dominant justification for affirmative action still has some currency in Texas. I see that justification

22. *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2580 (1996).

mainly in the Indian model and not so much in the South African model. The justification is based on the idea that the only way to break down stereotypes in isolated communities is to bring them together at all levels of society. Now surprisingly this justification, of course, has no legal basis for forcing the university to act to adopt affirmative action; in fact, it is prohibited. But it does have political valence in the state, because the leadership of the state, especially the white leadership, recognizes that the future of Texas is not as a white state. It is understood that if Texas is going to prosper economically its future is tied both to Mexico, which is a foreign state, but also to building a non-white elite that is congruent with the values of the current dominant white elite. So the justification of breaking down stereotypes is the narrative that is the one most commonly found in public discourse in Texas. It differs from both the South African model and the Indian model.

One last word about the South African model, then I will stop. One of the things that I found in the discussions was a confusion that occurs in this country as well, but we have somehow isolated it a little bit differently, and that is the distinction between justifications and rationales that are produced under constitutional adjudication and justifications and rationales that are produced under administrative law adjudication. So that what appear in South Africa as constitutional problems would appear in this country as administrative law problems. Solving an administrative law problem with a constitutional principle risks destabilizing the constitutional principle, because administrative law is really about just how you make government work, not why you make government work. That tension that I found in the jurisprudence as it was described to me this weekend is both interesting and troubling for the long-term health of the legal order.

PROFESSOR KARTHIGASEN GOVENDER: My name is Karthy Govender, I am a lawyer from South Africa and a part-time member of the Human Rights Commission. Let me start off by saying that one of the advantages of coming last, in a sense of being the last country in Africa to be liberated, was the fact that we were able to look around, especially to the countries north of us, and see what did not work, and in most instances we are told how not to do it as opposed to how to do it. And so in drafting a constitution for South Africa, we were able to have regard to some of the great constitutions of the world, which included the United States, Canada, of much more recent vintage, Germany, but perhaps more importantly the Indian Constitution.

In the final analysis what we did was we drafted a constitution for our conditions. And I think that that is crucial, because one of the experiences of post-colonial Africa was that constitutions that were the bequests of the colonial powers never worked. And in doing so, what we did was we sought

to encapsulate a vision of the type of society that we wish to aspire towards. What we also did in our constitutional document was we sought to capture and almost ossify a sort of social memory—a comment that came out in the last few days—of the sort of society to be moving away from. So, there is not the lapse of social memory which the American society seems to be laboring on at the moment. It is there in our constitution. It is there for everyone to reflect upon and to remember.

The South African Constitution is premised on the principle of equality. That is the founding, the core value in the constitution, and it is very easy to understand why, because the previous constitutional orders prior to the interim constitution were premised on inequality. And so when we drafted, we drafted in reaction to the situation we sought to escape from.

The previous constitutional orders were based on representation in separate institutions coupled with white domination. The social fabric was based on segregation coupled with white domination and white supremacy. The liberation struggle was waged against those ideas. It is, therefore, not surprising that the principle of equality is the founding value in the constitution.

The principle of equality represents the decisive break with the past. So, when South Africans talk about equality, it represents this sort of cumulative desire to break with the past and establish a new society. When one interprets the South African Affirmative Action Clause, the South African Equality Clause, it has got to be seen in that context.

Now, our constitutional order does a number of things in order to bridge the gap that we inherited. Let me just for a moment talk about this gap. There is something called the genie coefficient, which measures the disparity in wealth and the indications of a quality of life. So, for example, it measures the disparity in the economic world, the health enjoyed by the different citizens, the education and the other indicia of the quality of life. And the genie coefficient indicates that South Africa has the greatest disparity amongst all the countries that have been surveyed.

So, the need to bridge this chasm becomes more than a moral issue in South Africa. It is a crucial question and the way I would like to describe it is that it becomes a question of constitutional survival. And what one has to do in a South African context is to say that this is what we are seeking to achieve. If we do not achieve this, or if we do not work towards achieving it, the constitutional order is in jeopardy. What we need to then come up with, having accepted that, having accepted the social memory which is encapsulated in our document, is to say to people, “If you reject this option, what do you have as an alternative?”

What the constitution has presented is this matrix of measures. My

colleague spoke about socioeconomic rights. That is vital in our context. Certain socioeconomic rights, like the right to education, basic education for everyone, the right of nutrition and shelter to children, are protected as any other right, like the right to free speech. Other socioeconomic rights, like the access to housing, are protected as access rights. People have the right of access to housing and an obligation is imposed upon government to work towards the realization of that objective. The Human Rights Commission is required to evaluate government endeavors every year in order to determine whether there is a movement towards the realization. An affirmative action then is part of this matrix of moving towards a society that is less divided and less unequal.

What we have in the constitution is a constitutional imperative to achieve equality, and you see that in a variety of clauses. Firstly, the Equality Clause is the first substantive right in the Bill of Rights.²³ You see it in what we call an interpretation clause. That is an imperative to judges as to how to interpret laws. They are told to interpret in a manner that promotes the values of an open and democratic society based on equality, dignity and freedom. The preamble²⁴ to the Constitution recognizes the injustice of the past and promises an endeavor to bridge that. So, we have a directive to our judiciary to recognize that equality is fundamental to the new order, and a directive to the executive and the legislature to work towards bridging that equality.

What we have done, if I could turn quickly to our Equality Clause, is firstly we protect the right to equality. Secondly, equality is described as the full and equal enjoyment of all the rights in the Bill of Rights. Now, what that is, in short, is a commitment to substantive equality. And, as I mentioned in our discussions during the week, that amounts to the right to be treated equally, being used in a sense as a sword in order to achieve something as opposed to purely defensive mechanism in order to prevent a violation of the right to equality.

We then have to have the right against unfair discrimination on the basis of certain specified grounds.

Fourthly, we have the Equality Clause applying horizontally. In other words, the Equality Clause can be used against private individuals and juristic persons.

And the fifth provision is basically a provision of proof that if discrimination is proved on one of the grounds listed it is deemed to be unfair unless the party that is relying on it can prove that it is fair. Now, if one turns

23. The Equality Clause found in the Constitution of South Africa is Article 9. *See S. AFR. CONST. § 9.*

24. *See S. AFR. CONST. preamble.*

to affirmative action, looking at that paradigm, it may be argued that it is discriminatory. It may be argued that it discriminates against white males in the sense that it does not afford the same privileges to them. But the way we drafted our Constitution is that affirmative action is seen as essential to the attainment of substantive equality, because equality is defined in terms of a full and quality enjoyment of all the rights. The end result is that affirmative action is not seen as an exception to the principle of equality, but is seen as an important means of achieving real equality.

We have had a few cases interpreting the Equality Clause, two in particular I think have been unsatisfactory. They have been both lower court judgments. One case is unsatisfactory because it tends to adopt, perhaps unconsciously, Justice Powell's analysis in the *Bakke* case.²⁵ That approach is unsatisfactory because we put into our constitution enough provisions to ensure that it is interpreted in accordance with our values as opposed to the values that pertain to the United States. The other case is unsatisfactory because it is far too deferential to the executive. What affirmative action programs have to do is to ensure that they are designed to achieve a particular goal. And what the government has to demonstrate is that the program is actually constructed so to achieve that goal. That is the test. It is not Justice Powell's test, nor is it for the government to say this program is simply aimed at achieving affirmative action and that is the end of the inquiry.

So, at the end of the day we have the constitution in place. It is a document which I think is highly progressive in this regard. The difficulties that face us now are the real difficulties of translating the rhetoric in the document to the reality on the ground, and as members of the Human Rights Commission we are finding that that is incredibly difficult. We had a situation that we had to decide very recently where a female teacher was not given the same housing subsidy as her male counterpart, a fundamental violation of the principle of equality. We went to the administration concerned and we pointed this out, and they said to us that if they were to give female teachers parity in housing subsidy immediately, that would cost the government something like eight million for rent. The problem is that in about 40% of our schools, we have neither running water nor electricity. And the government department asks us to make the choice. Such problems that we inherited demonstrate the difficulties that we have in realizing these rights. What we are saying, and it is sometimes unpalatable to some people, is that during the transition period that we are engaged in now, that there should be a measure of appreciation, that we should allow a certain degree of

25. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

latitude which we will not allow when the transition falls away.

PROFESSOR GARRETT DUNCAN: Before opening the floor for questions, responses and contributions—we do have a few minutes for discussion—I do want to pose two questions, so my voice will also be on the record. I am an educator and my research orientation, the way I look at my work, is through the lens of cultural psychology. I have two questions involving the issues of equality, and basically they are these:

How do we rethink equality in the United States, in what is fundamentally a white supremacist, patriarchal, capitalist society?

Also, how do we rethink equality in the United States in a post-industrial society, that is, within an economy that turns on the flow of information and the manipulation of symbol?

These are questions that I have. They have been addressed, sometimes deflected, but I think they are very important to consider. Now, I would like to open the floor, not necessarily in response to my questions, but perhaps to respond to the panel or to contribute something of your own for the record. And when you do speak, please clearly state your name and your affiliation for our reporter.

PROFESSOR JOHN DONOHUE: I am John Donohue from Stanford Law School. My question is for Professor Govender.

You alluded to this tension between the need for resources and the demand for equality cutting very palpably in certain cases against what the aspirations for equality might demand or suggest. And I wonder how much tension there is in a country that has such a substantial amount of poverty in the day-to-day actions of the Commission. Does that problem come up all the time, that you just do not have the money to go ahead and pursue these demands?

PROFESSOR KARTHIGASEN GOVENDER: Yes. Very often it is dictated by the lack of resources. I think there is a Canadian judgment which says something to the effect that to administer to inconvenience is not a sound justification for violating rights, for not respecting rights. I think in our context we have to be realistic about that. And, what is tending to happen now, and just as a slight derivation, is that the major pressure on the constitutional order in South Africa is not coming from right wing activity, as we anticipated it would, but strangely enough it is coming from the crime rate that we have at the moment. People are saying why do we have to pay for representation for these criminals? Why do we have to provide them with legal service? Can we not use that money and provide it to social services? And then your woman in the education case will have their parity, and they are more deserving than the guy that shoots someone. So in a sense it is informing the debate quite largely, this lack of resources and the inability to

adequately use our resources.

Of course, the other problem is there is a massive disparity in the allocation of resources. Schools are the most obvious example—universities, various institutions. That history also accentuates the difficulties that we experience at the moment.

One other point is that the government is committed not to adopting any of the socialists' ideas that some of the African states adopted with nationalization. We have a government committed now to a privatization policy, and so the quick fix solution of let us take and give is not open to this government either, simply because the policy had proven not to work in the other parts of Africa.

DR. SUSAN UCHITELLE: Let me follow up on that because it is a crucial issue. It is always the choices of where you provide resources and in a case like this, I have been to South Africa and visited schools and I know the schools are in dire shape, there is no doubt about it. But so is that equity issue of providing certain basic equal resources for men and women, what we really believe or want, or some of both, so that access to equity is not what falls behind, particularly when you are beginning to start. Perhaps you are going to have to build a few less roads. It was wonderful to fix up the prison that Mandela was in, it is a wonderful tourist place, but is that necessarily the right priority over beginning to implement the concepts of your constitution at a critical time? That often becomes the excuse we hear over and over again. You do have competing compelling needs, I am not questioning that at all. But then, beginning to make those decisions with limited resources about how do you spend those resources if you are going to really implement the equity issues you are talking about.

PROFESSOR KARTHIGASEN GOVENDER: Let me just say in respect to the teachers, the issue has been resolved, fortunately. It has been resolved by staggering the pay increases and allowing parity. It is a decision which obviously involves balancing different priorities. The prison issue is seen as a major boost to the tourism industry. We need to bring people to South Africa for a variety of reasons, and our tourism industry is seen as fundamental to the economy of the land. The argument runs along the lines that if you boost that, if you have a flourishing economy, then you can achieve the other things easier. But, there is no doubt that if you do what we have done, and if you accept that equality is the defining feature, and you do not respect it in practice, then you run contra to the constitution itself. And if you are doing that in the first few years of the constitutional order, when the constitution is really the most important document, then what happens later on if you make exceptions all the time? But in a society like ours, these difficult decisions have to be made, and very often they are made in terms of things people do

not agree with. When you have these choices, I think what we normally say is that if there is a sound basis for the legislature, the executive's decision—because they are the elected representatives—we afford them that opportunity to make the decision.

PROFESSOR JUDY KOFFLER: My name is Judy Koffler and I am a visiting scholar at Washington University School of Law. These are just some general reflections. I heard in the earlier session across the hall lots of folklore, myth and symbol, manipulation of symbols. Your speaking, Professor Aronson, about “stop the sympathy” goes very well with the idea that is in the background here, even the foreground of cultural memory. The image that is coming to mind—this is impressionistic—and connects with Professor Torres' comment about corrupt and degenerate social order. It is very bleak. One gets the notion of a dead-end American culture in which we are suffering from a kind of Alzheimer's. This is what is wonderful about the comparative approach, psychopathology of false memory, because a culture that fabricates a false memory is going to have a real hard time, or is going to disable itself from conceiving of a future, of a realistic future that can alter and in some way profoundly address the continuing grievances. Perhaps that is another level on which we need to start thinking of these things. But as one who has trained law students for over twenty years, and is at a point in my career—if it is not terminated already—where I think, my God, what kind of students have I turned out, who lack the critical capacity for thinking through such concepts or myths as “de facto” and “de jure,” I am profoundly troubled at the limitations of my own teaching of constitutional law. I am wondering what rectifications are available to you as intellectuals and scholars in terms of addressing this problem of turning out law students without the more refined intellectual and critical capacity to think through these things.

PROFESSOR GERALD TORRES: One, there is a book that has just come out by David Shipler, about how white people and black people talk to one another. One of the interesting insights that comes out of that book is that the black people in this country seem to have a deeper memory of history than white people, so that current events get related to historical events much more commonly in black discourse than in white discourse. The discourse of white culture is essentially “make it new.” The present exists kind of on the top of history but the roots do not necessarily extend very deeply. So, I mean, if that is true, then you have got to approach teaching with recognition that the uses you make of history are going to be taken differently by each person in your class. Now, at the University of Texas it is not really a problem anymore, because I only have a couple of people of color in my first year property class. So, I can relate to the class as white Texans, I guess, and then try to figure out how to talk about history with them. So that is a problem.

But part of our obligation is to figure out exactly how to have that discussion and to make it rich and communicative in a dialogic sort of way. But that is the hard thing.

If I can go back to the point about administrative difficulty with equality principles; is Texas actually facing this problem? Texas is under an obligation to equalize K through 12 education. It is been under that obligation for about a decade, and all of the politicians are very clear that there is not going to be any "Robin Hood" solutions. There is not going to be any taking from the rich and giving to the poor. When they look to California, what they see in California is the *Serrano* decision,²⁶ which essentially required equalization of educational opportunity. The way California responded to that obligation was to eliminate property taxes as the principal basis for funding K through 12 education and to move to property tax plus general revenue funding. That resulted, at least the analysts tell us, in Proposition 13,²⁷ and the basic rejection of a commitment to public education in California. So, if you look at California and see one potential future, that California reality makes you very cautious about how you improve the schools that are less well off in Texas, especially where you are not willing just to take from the rich and give to the poor, or you are not willing to assess more taxes.

What the debate has foreclosed because it has focused on money is the other question, which is, what does an equal education mean? Does it mean that if there is a computer in this room there has got to be a computer in that room? Or is there some measure of outcomes that we can start to talk about and ask: how do the schools get to those outcomes? We can answer the question of what it means to provide equal opportunity, and we ought to encourage whatever techniques produce—generally equal outcomes across the state. But you know, the problem is, the "Robin Hood" idea, the idea that you can equate education with money, that an equality principle can be translated into a money principle, simplicities, forecloses an entirely different rich discussion. Just like having people who do not respond to history in a way that, say, I respond to history, precludes me from—or requires that I think about that discussion in a new way, as well as trying to get them to think about it in a new way.

PROFESSOR GARRETT DUNCAN: You know, as you spoke, I was reminded of how important James Baldwin is to my work as a social science researcher. I was reminded specifically of his talk to teachers that was

26. *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).

27. CAL. CONST. art. XIII.

published back in 1964, and is just as relevant today. I think of how his work resonates with my students; however, at the same time, it makes me incomprehensible to my colleagues. I am a social scientist with ostensibly more latitude than you would have in legal education. My question to you is what risks do you take when you include and speak in different terms that may not be established within your field?

PROFESSOR JUDY KOFFLER: Well, I have always thought that legal training was to quote Thurstin, "training incapacitates." By the time they are in their third year, they are certainly incapacitated from thinking more broadly, and indeed, if they have ever had any training in history—which fewer and fewer students seem to have—many students in my most recent teaching years got out of college without reading a novel. The first time they read a novel was in my law literature course. Never read any history. Did business or computers or something like that. Have very little training, had very little capacity. So, if they were not incapacitated when they started law school, they certainly are incapacitated when they finish, when they think only in narrow little terms of West key number syndromes and *de facto* versus *de jure*. It is a real serious question that goes to the very foundation of so-called legal education. Why are law schools built on the edges of most campuses?

PROFESSOR CLARK CUNNINGHAM: Clark Cunningham, Washington University School of Law. I very much appreciate the fairly consistent theme, certainly highlighted by Professor Aronson, and very succinctly by Professor Duncan, focusing on the largest issues in stake in seeking equality. But, I also think that perhaps one lesson we can learn from India, which has the longest history of trying to actually implement these high ideals, as Justice Reddy said uprooting caste turning the society upside-down, is that the details of administration are very difficult, and have occupied a great deal of energy in India. So I ask Professor Torres to be more explicit about what he meant by the confusion of constitutional law principles with administrative law principles. If you could be a little more explicit what that means both in America and what he hears from the South African continent.

PROFESSOR GERALD TORRES: One example is the edict freeing women who are convicted—women who had young children—the order releasing them from prison.

PROFESSOR CLARK CUNNINGHAM: In South Africa.

PROFESSOR GERALD TORRES: Yes, in South Africa. The male response was, "Wait a minute, I am a father. You just released all the mothers. Release me. You have an equality principle. I want to be released as well." To that request the Judge is thinking, "If I release 25,000 criminals,

some of whom are violent criminals, on the streets, this court would not stand." So the justification is that there is a rationale that somehow allows you to treat men and women differently, rather than saying to the appointed commission that the reason we have released women is the following: in this culture they are the predominant care givers. If they are separated from their children it means their children are going to suffer, and the punishment ought not go to the children. It ought to go just to the miscreant. So we will give them relief.

On the other hand, continuing to release women on that basis reinforces the stereotype in South African culture that women ought to be the principle care givers. So that to reinforce that stereotype also then jeopardizes the equality principle.

What the court could do is to ask: to what extent are there male criminals who are functionally women for purposes of this principle? That is, if you can make the case, that, yes, I am a man, but I am the principal caregiver for my minor children, then the court would have to take that into account and you would be functionally a woman for purposes of the application of the equality principle. You could then say the equality principle remained intact. Disputes will be resolved by creating an administrative procedure to apply the equality principle. But we are not going to say that the equality principle does not apply in this case. It applies and this is the way it is going to apply. Thus you leave the principle intact and create a mechanism for adjudication.

Similarly, in schools, the idea is that you have got to equalize schools, but if you are only measuring dollars, if you are not willing to equalize dollars, then you stand at risk of jeopardizing the principle that led to litigation to begin with. But if the question is within the social context within which we find ourselves, what is the technique that would best allow us to satisfy the equality principle where we know we cannot satisfy it just by writing a check? The universal equivalent does not produce equality. So that might mean we are going to allow an administrative committee to come up with a solution, even if it is a long-term solution, that allows us to continue to evaluate the question of equality between the schools along vectors other than just the checkbook.

For instance, in Peru, the coefficient of inequality is highest in Latin America, and perhaps the highest in the world. If you extract indigenous people, the social inequality in Peru is less than the social inequality in the United States. But, of course, you cannot extract Indian people. So then the question is how do you integrate Indian people into the booming economy in Peru? You could do it just by locating factories in Indian communities. You could do something like that, but not if you want to preserve the Indianness of the people there, and allow them to integrate themselves into the economy

on their own terms. So the way to maximize both ends was to discover that the Indians who were most successful were those who were able to take technology and use it. What factors enabled that adaptation? A short-term solution to educational inequality in Peru turns out to be insuring that, at minimum, Indians get five years of education. If Indian people were in school at least five or six years, they were able to adopt technological changes that allowed them to enter into the broader Peruvian economy in a way that changed the economic growth of that community within a cultural framework that was basically indigenous.

Now, to say that that school is not equal to the best high school in Lima is, of course, true. But, in fact, putting the best high school in Lima in this Indian community would not produce the greatest amount of equality in the short-term compared to, say, putting in a lot of schools. So there are administrative solutions that allow you to keep the equality principle intact recognizing that it has an obligatory function and a temporal dimension. The discussion I heard is that there were applications of constitutional ideas that jeopardized the principle of equality. That jeopardy is unnecessary. By adopting a kind of a *Chevron* approach,²⁸ which means, we are going to give substantial discretion to the agency, if the agency can come up with a constitutional rationale within the legislative framework that we assign to it, we leave that administrative decision alone.

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28. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

10:15 a.m. Session II

PANEL MEMBERS:

Professor Lani Guinier

Professor Jack Knight

Professor David B. Oppenheimer

Professor Karen Tokarz

PROFESSOR KAREN TOKARZ: I am Karen Tokarz and I am an Associate Professor at Washington University School of Law. Those of us on the panel view this session as a progressive discussion of the last session. Some of the participants in the last discussion, as well as other conference participants who were in different sessions, are here and interested in joining in this discussion. We will try to address some of the questions raised in the first session as we progress into this session.

As a number of the previous panelists have suggested, discussing equality and affirmative action this weekend in an international, interdisciplinary, comparative manner has helped all of us to re-vision how we think about equality and how we think about affirmative action. For me, it was particularly provocative to start with the initial question of what are our goals for affirmative action. What is it that we actually hope to achieve through the equality and affirmative action policies that we have in our respective countries?

In the United States we never seem to question the underlying basis for affirmative action. We discuss it in our law classes, in litigation, and even in the public discourse, as if everybody has some mutually understandable, mutually agreed upon understanding of the goals for affirmative action. I think it was pretty clear to all of us as we began comparing equality and affirmative action in the three countries, that there are a number of different goals for affirmative action, some of which can be harmonized and some of which are actually competing.

For example, is the goal of affirmative action to compensate individuals previously discriminated against? If so, what happens when the societal institutional memory begins to fade? Obviously the awareness and the poignancy of apartheid is much more vivid in South Africa than the legacy of slavery is here in the United States. And as the institutional memory begins to fade, you have individuals in subsequent generations questioning, "What responsibility do I have, what role did I play, in the underlying issue that precipitated today's affirmative action?"

Another goal of affirmative action might be to achieve representational

politics. And if so, what happens when the representatives are simply tokens or when the representatives do not advance the interests of the groups who were allegedly in need of affirmative action? The example that was raised was Clarence Thomas. There are some who are concerned that although he may have advanced through affirmative action, at least for some people he does not represent the interests of those who initially might have had a claim to affirmative action.

Another goal of affirmative action might be to remove existing privileges, to eliminate the perpetration of existing privileges. If one sees the goal as this, then it may require us to redefine our existing notions of merit, to scrutinize the traditional tools of merit or performance such as SATs, and to recognize that our traditional notions of merit incorporate some less criticized or less obvious privileges such as “legacy admits” and wealth. If one starts looking at existing privileges at a more rudimentary stage, one can see that there are questions about all kinds of preferences, not just the more controversial forms of affirmative action.

Another possible goal of affirmative action might be social justice and equality. Is the goal of affirmative action to produce a true egalitarian society? That is an even broader vision of what affirmative action is and precipitates different kinds of remedial measures than the typical debate usually encompasses.

It seems to all of us, I think, that to evaluate affirmative action honestly necessitates a critique of the underlying system, whether in the United States or India or South Africa, and requires us to rethink what we are talking about when we talk about merit and excellence, when we talk about preferences, and when we talk about the ultimate goals of equality.

Lani Guinier has suggested, for example, that perhaps it is possible to challenge the SATs or to challenge “legacy admits” under California’s Proposition 209 because in fact these vehicles do not predict merit and performance and, in fact, they actually constitute racial preferences—preferences that may in fact be outlawed by Proposition 209. “Legacy admits” are a known preference and there is a known white-based preference in SATs.

So whether one could challenge it, I think Professor Guinier’s point was meant to be a little bit facetious. However, it is not so far-fetched to see how such challenges might arise in my area of employment discrimination. There is no question that one could challenge an ostensibly facially neutral employment criteria under Proposition 209, which is an outcome oriented statute as it is framed.

The only outcome that would withstand challenge under Proposition 209 would be a demographically correct outcome. Any outcome that deviates

would suggest a preference. It was that kind of insight that the conference helped all of us to gain, i.e., to re-vision the question and start at a different point, and in that way I think it was very beneficial for all of us. Who wants to go next?

MR. FURFINE: My name is Furfine. Could you restate the point about Proposition 209 being outcome oriented?

PROFESSOR KAREN TOKARZ: Sure—I will let Lani Guinier respond. She is the one who raised this point.

PROFESSOR LANI GUINIER: I have done some work personally looking at the correlation between LSAT scores and first year grades of students at the University of Pennsylvania Law School. I am also familiar with other research in which SAT scores were correlated or used to predict first year performance in college. And it turns out that those relationships are actually more than modest; they are weak.

One of the researchers who has helped to draft the LSAT admitted that the LSAT is only nine percent better than random in explaining the variance in first year grades. Our findings at Penn were that it was fourteen percent predictive of first year grades as opposed to nine percent. But it is still a very weak relationship. It does, however, have a strong relationship with parental income and with race; that is, within each race and ethnic group, LSAT and SAT scores go up as parental income goes up.

In addition, the actual relationship between parental income and SAT scores is almost as high as the relationship between SAT and first year grades. So we are using a test to predict performance that actually fails to tell us what it is we think we want to know but we are also using that test despite the fact that it correlates with parental income and with race.

Under Proposition 209, the State of California has been forbidden from using any kind of admission criteria that constitutes a racial preference, that is, that prefers one race over another and relying on the SAT or the LSAT as an admissions criteria could arguably constitute such a preference. That is, it is an admission criteria that is an indirect proxy for race that is being used even though it does not explain much of the variance in first year grades, not just for people of color but all students in first year.

MR. FURFINE: So the point being made here is that in eliminating racial preference in their state, in effect that they are accepting these test scores.

PROFESSOR LANI GUINIER: It is basically a way of suggesting that a law banning racial preference does not mean using a so-called quantitative measure that correlates with race. It means you have to use a measure that is inclusive of all of the racial groups within the demographic community and any measure that is not so inclusive constitutes a racial preference because it is preferring one group over another without necessarily being functional,

democratic or valid.

MR. FURFINE: Thank you for the help.

PROFESSOR JACK KNIGHT: Could I just add one point on that? There are similar studies that are being done on the GRE in terms of graduate education and again the studies I am familiar with suggest they are a reasonably good predictor of first year grades but they do not predict whether people are going to get a Ph.D. or not or how well they are going to do after that in terms of that.

PROFESSOR DAVID OPPENHEIMER: I am David Oppenheimer from Golden Gate University in San Francisco in the heart of the Proposition 209 debate.

I had the privilege of being involved in many of the public debates over Proposition 209 and frequently in those debates one of the topics that was argued was the legacy of Martin Luther King. The proponents of Proposition 209 loved to quote Dr. King from his 1963 "I Have a Dream" speech to the effect that he had a dream and that we should all share a dream of a society in which color or race is irrelevant and in which our society is colorblind.

In one of those debates with a political scientist, I mentioned that Dr. King had also had a vision of affirmative action, that he was one of the original proponents of affirmative action in the United States and that he had developed that vision in part from a visit he made to India at the sponsorship of the Ghandi Society, a visit which he made in 1958. The response to this the very conservative political scientist was to become almost apoplectic; he said "My God, India, not India."

"India," he argued, "is the model of what we do not want to see in the United States. India has developed into a system of patronage, race based patronage by political party in which almost every group has a claim on affirmative action and everyone is fighting each other over what quota they should be entitled to." From what I have learned here this weekend, he clearly overstated the case and stated it with a spin and a twist that reflected his own political values and political objectives.

But I do think there are some obvious parallels between the United States and India that should urge upon us a certain caution. India embarked on a program initially directed at the former untouchables, those castes that had suffered the greatest oppression in Indian society and that were at the heart of the program in Indian democracy, as I understand it, to become a casteless society. There is an obvious analogy with the treatment of African-Americans in the United States.

India's program has grown to include a majority of its population as at least the potential beneficiaries of reservations, the Indian term and concept that closely resembles affirmative action in the United States. So have we in

the United States, in that affirmative action in the United States is now potentially available to racial and ethnic minorities including both men and women, and in addition to that, to white women.

In the Proposition 209 debate, we had great hope that Proposition 209 would be defeated by white women, who would see their own interests as lying in the continuation of affirmative action programs. These programs have benefitted white women more than any other group, in education and in business and contracting.

That did not happen. Although the largest demographic group to vote in favor of Proposition 209 and against affirmative action was white men, who voted at a rate of about 75% in favor of the proposition, it was also the case that white woman voted by about a 55% to 45% or 57% to 43% vote in favor of eliminating affirmative action.

Although the ultimate result in Houston last week was different in that in Houston affirmative action programs were continued, the proposition was defeated, the white vote in percentage terms was identical to the vote on Proposition 209. Again, not only did white men vote very heavily in favor of the proposition to end affirmative action, about 75% to 25%, but white women there voted about 55% to 45%. The difference in Houston then, or at least one difference in Houston was the demographics of Houston; that there were more minority voters.

One of the questions that arose in the Proposition 209 debate was whether affirmative action would be a more fair system of challenging privilege and of remedying inequality if it were based on class rather than race and ethnicity and gender. That of course is central to the Indian debate, as I have discovered in the past few days.

It seems to me that going back to Dr. King for a moment, one of the things that he was saying near the end of his life in organizing the Poor People's Campaign and the March on Washington that was to occur (and did occur but after his assassination in 1968) was that the only way to produce social equality and economic equality in the United States was to expand the civil rights movement to include not only blacks and other racial minorities but also to include the poor.

I think there is an argument that we need to consider about whether affirmative action should include class as well as race, or should include considerations of class of parental education, of other indicia of a lack of privilege, when we talk about how to create a meaningful model of equality.

I think the idea of simply substituting class for race has been demonstrated in a series of studies to be a very bad idea, one in which we would continue the oppression of people of color. However, the addition of those who also lack privilege despite being white because of reasons of

socio-economic class I think is an important consideration, something that we should be considering.

It also produces perhaps a more vigorous electoral majority in support of such a program. But I think in order to make that move, we have to go back to something that Lani Guinier was talking about a few minutes ago. This question of how we measure merit. We may have to completely rethink our definition of merit and our measure of merit before we can begin to challenge effectively the current existence of race privilege, of gender privilege and of class privilege.

It is on this question that the contributions of the social scientists who were at this conference have been so important. I hope that their work will be more broadly discussed here and more broadly broadcast within the United States. They are demonstrating that the tests that we use that we equate with merit are not measures of merit; we know that now, we know it through the example that Professor Guinier was describing in terms of the University of Pennsylvania study that she conducted, as well as other studies that have been conducted on the SAT, on the GRE. I understand that one thing that is come out of this conference is an agreement by a few of the scholars here to work on a study of the LSAT.

It is critical that we reexamine how we go about measuring merit if we wish to create a democratic majority that supports programs that remedy discrimination and that challenge race privilege, challenge gender privilege and challenge class privilege.

PROFESSOR JACK KNIGHT: My name is Jack Knight. I am in the political science department here at Washington University. The perspective that I came with at the beginning of the three days was to think about commitments to equality in terms of what does it mean to have a commitment to equality. One of the nice things about the conference was that it allowed me and, I think, others to think a little more about what the real and practical implications are of such commitments. So I commit from the perspective of thinking about affirmative action as a mechanism that might be used for achieving goals, presuming that you do have such a commitment.

Much of the discussion, as somewhat appropriate given the fact this is a law school, was to focus on formal rules and formal institutions. But one of the things that I think became apparent, and that we were reminded of often during the three days, was that the efficacy of these legal mechanisms is really contingent on political and economic conditions and I want to talk just a little bit about that.

This becomes especially clear when looking from a comparative perspective, because the comparisons here ought to be about the legal institutions but also about political and economic contexts.

Clark Cunningham, in the weeks prior to the conference, was talking to many of us and suggesting that one of the important things he was looking for was to try to find out what can the United States learn from the comparative perspective. Those of us that think about it primarily from a U.S. perspective have learned a lot.

Two legal mechanisms were important to me in thinking about most of these issues, one from each of the two countries. One idea came from the reservations system in the Indian framework, the legal guarantees that certain percentages of positions in legislative bodies and in government bureaucracies would go to previously oppressed groups.

The second mechanism was in the South African Constitution, section 9(2), which talks about the importance of substantive equality. Section 9(2) explicitly talks about the full and equal enjoyment of all rights and freedom.²⁹

Now those are two sort of legal mechanisms that we do not see quite in the same form in anything that I am familiar with in the United States. And so it was interesting in terms of some of the earlier discussions we had that the legal argument often took the form, especially from people that focus on the United States, we cannot do those things here, the Constitution prevents us from doing that kind of thing.

And so we talk about it in those terms as opposed to asking the political question: which is, why can we not do them, and why is it that we do not have those particular types of institutional mechanisms? I want to suggest that that question really calls attention to both the political and economic context.

From the political context it really causes us to ask the question why these rules and also why these interpretations? Why do we get certain types of interpretations from the courts in our society as opposed to various other societies? It really causes us to think about differences in political environments as to the realities of political competition and of political ideology, in terms of the beliefs that tend to dominate in different societies and manifest themselves in discourse in certain types of rhetoric.

Our discussions suggested for me the importance of thinking about political rights and political institutions beyond mere elections. Elections and representation are of course important, but our discussions also raised a whole set of questions about how you bring groups in to participate in the political process through the bureaucracy, through government employment and similar approaches.

29. See S. AFR. CONST. § 9(2).

It is also important to think about the economic context. To talk about the difference between formal principals of equality and the actual and real enjoyment of those principles raises important economic questions. Some of the discussion, quite interesting in terms of the South African Constitution, also briefly mentioned in the first session this morning, was that the section 9(2) says full and equal enjoyment of all rights and freedom. But in fact as the courts have started to interpret this provision, the courts have had to acknowledge that even though it is on the books, the economic resources are not available to make good on that promise in many contexts.

The South African experience thus really suggests that there are some hard questions to be asked, if in fact we are really committed to the idea of equality and to deal with the legacy of our history in various contexts. For instance, if you think in terms of making good on section 9(2), unless you have a situation where there are enough resources in the society where everyone can be guaranteed them it is going to raise questions about redistribution.

Now those are tough questions and they do not have easy answers. Those are political questions but nonetheless they seem to be at the forefront of thinking about equality and our commitments to equality and the efficacy of the legal mechanisms that we propose.

Those were some of the issues that I think are important to keep in mind. It seems to me that future analysis on issues of affirmative action inequality, both political and social—has got to take account of all these perspectives: the legal, the political and the economic. And if we are committed to these goals, as I think many of us are, we are going to have to be more creative in thinking about the mechanisms, legal and otherwise, that we use in our efforts to try to instantiate them in society.

PROFESSOR LANI GUINIER: I thought one of the virtues of coming to St. Louis was the opportunity to talk not only to people from other countries with other histories and other constitutional conventions but also to talk across disciplines, even within the United States. And it was very helpful for me for example to hear from Professor Bowen who hails from Washington University when he started to try to discuss the goals of affirmative action and he identified three important goals. And I thought by following up and adding a fourth that we might break through the polarized and somewhat artificial discourse that we have been having in this country about affirmative action and instead try to start a bigger conversation. We might begin that conversation by asking first what are the goals that we are trying to realize and then we could strategize backwards to ask what is the best way of realizing those goals and what is the relationship between affirmative action and those goals.

The three goals that Professor Bowen identified were number one, social justice, the idea that we should provide redress for what Orlando Patterson calls acts of history. Glenn Loury was here and he came up with this metaphor: if you had a checkerboard and a mad bomber became president of the United States or somehow assumed political power and decided to bomb each of the dark squares on the checkerboard and bomb them into oblivion, and then the question is if a more benign regime were to take over from this mad bomber, what would the responsibility of that benign regime be to redress the acts committed by this mad bomber if the dark squares have been obliterated and the white squares have been left intact.

And so this notion of social justice is essentially the notion that a benign regime has an obligation to compensate and make whole the victims of prior acts of destruction and that it makes sense to focus on the dark squares, not just all of the squares because those are the ones that were actually targeted. So that is the social justice goal.

The second goal that he mentioned was that in some ways affirmative action is a proxy for merit because in many instances we do not know what true merit looks like because the traditional proxies that we use—such as aptitude tests—fail to predict adequately who is going to do well. And so affirmative action becomes a more individualized, whole person assessment to find true merit. So it is not a deviation or an exception from merit, it is simply another way of looking for merit when the conventional criteria fail.

The third point he made is that affirmative action is important to break down negative stereotypes, to try to change the way people in the future think about the people who were either born in those dark squares or were born of parents who lived in those dark squares. These are the people who have been socially and economically disadvantaged over time. This third argument is that affirmative action is necessary to overcome the stereotypes or the incapacity of those who have privilege to acknowledge the humanity and the capacity and the merit of those who have been born to less privilege.

Now, I could go through and interrogate each one of his goals but I would first like to add the fourth goal which I think is essential and that is the goal of democracy. The fourth goal is the goal of trying to figure out a way of distributing scarce social and economic resources, to figure out a way of distributing scarce social and economic resources such as access to a higher education, such as access to quality K through 12 education, such as access to good jobs, such as access to promotions; that is, how do we distribute these scarce resources in a way that is fair and is functional and in a way that is done democratically. Democratically means all of those who have a stake in the outcome get to participate in the discussion as to how we are going to get there.

If you put all those goals on the table, I think that the second goal, this idea of proxy for merit, that affirmative action provides us information that we would not otherwise have because of the failure of conventional indicators is actually a way to get to what David was talking about in terms of expanding the constituency for affirmative action and really making affirmative action more consistent with its capacity to realize all four of these goals.

My point is to not think of affirmative action as a set of exceptions from the norm, that is, a set of deviations from conventions that are otherwise acceptable. Instead I suggest we think of affirmative action really as a way of realizing democracy, realizing social justice, realizing a space for people to interact differently in a multiracial society and that we do so by identifying true merit. True merit means functional merit. It means identifying those people who can actually do the job that we want done and who can do the job in a way that builds on the capacity of other citizens and that can bring us into the 21st Century where we are a society that is capable of, not only of teaching all students but of realizing the contribution that all citizens have to make to the society.

Now, what do I mean? I was on the Special Admissions Committee at Penn for a number of years which was the committee that was set up to look at, and this is past tense, the credentials of people of color and disadvantaged whites. I think what we did in that committee is the way the University of Pennsylvania Law School should be admitting everyone, not just the students of color or the disadvantaged whites. The challenge is to take from the margin to rethink the whole, not just to take from the margin so that you can add the margin back in but to take from the margin to rethink the whole.

What does this mean? Well, in this committee everyone had to look at the entire file. That is a revolutionary act in law school admissions. That is, all of the faculty had to read not only the test scores, not only the GPA but we had to read students' letters of reference. We had to read their personal statements.

We had students on the committee who read a redacted version of the file, that is, the names and identifying information was eliminated. Then we all voted on the files that we read and if all of us on this committee agreed to admit somebody, they were admitted. If all of us agreed the person was not of interest, then they were rejected.

But there was a very large group of people on which we disagreed. Some of us thought they should be admitted, some of us were indifferent, some of us thought they should be rejected. And we sat down and had a conversation. And we had to talk about why we thought this particular person had something to add to the law school, why this person should be a lawyer, why

this person would not only do well in law school but would make a contribution to the society, why this person would be a leader that Penn might be proud of.

In this conversation we did not always agree but ultimately we came to some closure. And to me, that is the process, that is a democratic process for not only selecting students to become law students, selecting applicants to become law students but it is a democratic decision-making process for doing what I said was the fourth goal, one of our most important goals, and that is trying to figure out how we distribute scarce social and economic resources in a way that is fair and functional.

And to do that, you have to understand what is the goal of legal education; why are people coming to law school; how do we best educate those people to become the lawyers that we have decided we want to train. Only after having had those two conversations, the first—what is the goal of legal education and the second—how do we best educate people to do whatever we think lawyers should be doing—only then can we have a conversation about who should be admitted.

I think it is when you link those three conversations that you start to realize affirmative action is not merely a proxy for merit when conventional criteria have failed but that affirmative action is a way to rethink admissions criteria that affect everyone. Using our experience on special admissions we can see the way in which affirmative action has encouraged the decision maker to really examine the capacity of the individual to perform over time and in context. That approach represents one that we could all follow in terms of selection, admission, teaching and matriculation for everyone. This is the insight from affirmative action and this is the insight when you use information from the margin to rethink the whole.

Conventional criteria fail not only to predict the capacity of those on the margin; they fail to predict the capacity of all students. That was the conversation that we were having earlier. These criteria fail because they are measures of a single dimension of excellence which is what some might call analytic ability. Others might call it the capacity to engage in quick strategic guessing with less than perfect information.

Now, you may say that is also related to analytic ability and I am not going to quarrel with you. But the point is whether you call it analytic ability or quick strategic guessing with less than perfect information, it is not all that there is to being a good law student and it is certainly very little of what there is to being a good lawyer, particularly the quick strategic guessing with less than perfect information. My view is if you do not have perfect information, do not guess; find out the information.

And to do that, you need other kinds of skills, you need tenacity, you need

persistence, you need to be focused, you need the capacity to integrate perspectives from different viewpoints. So you need a creative intelligence, you need practical intelligence. None of that is being tested by the conventional criteria when it is preoccupied with aptitude as opposed to opportunity and the motivation to take advantage of opportunity. And that is why those criteria have such a weak relationship to success in life.

I will close with one, actually two examples. Harvard did a study of three classes of its graduates over a thirty-year period to see what it was that correlated best with success in life. And they measured success in life as financial satisfaction, professional satisfaction and contribution to the community.

They found there were two variables that correlated with success in life: low SAT scores and a blue collar background. Their conclusion was that what really predicted success was motivation, was drive, was the student's capacity to take advantage of an opportunity and do something with it. And low SAT scores and a blue collar background for them were a proxy for that particular set of criteria.

The second story I wanted to tell you is that the army gives an intelligence test or a battery of aptitude tests to new recruits. And in 1976 the army had a calibration error in the way in which they evaluated test results and 300,000 recruits who had failed the test were inadvertently admitted to the army. 300,000 people failed the test but because of this calibration error, they were given credit for having passed the test and admitted.

They then tracked the history of those 300,000 people that failed the test and they found that the people who had failed the test performed virtually the same as those who had passed the test. They had virtually the same reenlistment rate, same promotion rate. In our pursuit of efficient and quantifiable measures, we have abandoned our commitment to excellence and instead we have called excellence something else. It may be that excellence is class, it may be excellence is race, it may be quick strategic guessing with less than perfect information but it is not true excellence when, if you follow my point, you strategize backwards from what it is we want people to do when they become lawyers, when they become doctors, when they become citizens of the United States. And I would hope what we want people to do is to be good problem solvers, to be good public and private problem solvers, to be able to work in teams, to cooperate with others, to be able to take advantage of the resources that others bring to bear.

That is what I think was one of the virtues of this conference—providing us the capacity to cooperate and brainstorm across disciplines in a way that I think suggests an optimistic view of the future. No one here was considered “the expert” who was going to make pronouncements from on high that we

would all have to bow down to and accept. But it was through the process, through the deliberative process, through the brainstorming and really putting different perspectives on the table that I think all of us and all of our thinking were enriched.

PROFESSOR BARBARA FLAGG: Professor of Law, Washington University School of Law. Two questions about the admissions model. One is in this model, do you have in front of you the test scores ideally, extrapolated from the reality.

PROFESSOR LANI GUINIER: Well, when I was doing special admissions, I was not preoccupied by the test scores although for the purposes of our conversation, test scores were only problematic for those people who did really, really poorly on the test. In other words, the tests may have some value. And I am not a psychometrician so here I am doing some quick strategic guessing with less than perfect information, right. I think that the tests have some value as bands. That is, you pass the test or you fail the test or you are a strong test taker or you are a weak test taker. And that is essentially what the score tells you. This person is a strong test taker.

What I did look at and what we did look at in the committee is the SAT scores for students who had weak LSAT scores. If somebody came to college with weak SAT scores and then performed brilliantly in college, not only were they a poor test taker but it was clear that they were a strong performer and that this performance allowed us to then pay little attention to subsequent aptitude test results. Their actual achievement over time was considered more reliable than their performance on a single test.

PROFESSOR BARBARA FLAGG: As I extrapolated from this to sort of idealize this decision-making process, I think it would be fun to not have them at all. And the other thing that occurs to me is that it matters immensely who your panel of decision-makers is and so you need to think about procedures for selecting your decision makers. Because the process even if we throw out the test scores and eliminate that, the process is going to, the success of it as a democratic enterprise is going to depend on who is reading the files.

PROFESSOR LANI GUINIER: You are right. It depends on who is reading the files *and* what the goal for the school is. You need to worry about both because that is a way of holding accountable those people who are reading the files. If they produce a class that does not seem demographically rich, that is not filled with potential leaders, that is only looking at one very shallow or thin layer of intelligence, then no matter who the decision makers are, they have to be held accountable. I think you are absolutely right that it is worth interrogating.

On the other hand, if you have no confidence in the decision makers,

another alternative is to go to a lottery. I admit a lottery would be arbitrary. In some instances, it would perhaps be wrong but no more arbitrary and no more wrong than what we do now. And the advantage is at least it would be honest that it is arbitrary so when people are not admitted, they would know it is because they are not lucky as opposed to that they are poor.

PROFESSOR BARBARA FLAGG: In fact, most schools like the University of Pennsylvania use a lottery, in the middle anyway. They call it something else, they call it sending it to a small subcommittee but since the rules of the game are that you do not know what subcommittee you will get and who you will be in with, it is a lottery, for the vast middle.

PROFESSOR LANI GUINIER: I agree with that. There is also the third option which is something that they have done in Texas where rather than use test scores they have actually decided to admit all students from all over the state who graduated in the top ten percent of their high school class. And that is a way of rewarding those who are strong academic performers without requiring any additional information about test scores. And the ten percent plan is very democratic because it is representative of all of the high schools. While the high schools reflect the unfortunate segregated history of Texas, it is at least a way of reproducing the diversity of the state in I think a very democratic fashion.

PROFESSOR KAREN TOKARZ: Questions from anybody who has not already raised a question today? Dorian has a question and then we will come back to you.

MR. AMON DORIAN: Amon, also known as Dorian. Why do you assume that the purpose of affirmative action was some lofty goal when at the time that the legislation was passed it was a result of the hostility coming out of the black communities at the time. Therefore, if I have to be defined as a pawn, then it was to stop that black pawn from becoming a queen to attack the king and thus checkmate.

So affirmative action was not a program initiated out of some egalitarian motive but to quell or accommodate those who were raising complaints about the status quo at the time. And then if we assume that that was a forced position because the legislators or the status quo felt they were backed into a corner, then why do we assume now that it continues to have some progressive goal in mind?

For example, I was a student here at this law school and I was practically the only voice at the time that the question of teaching white supremacy was at this very university. And the quota system that removed black students from who were already accepted no matter what criteria you used, who were already accepted by some type of a social political grading structure that eliminated the vast majority of black students who attended Washington

University at the time.

To say this, to say that affirmative action appears to me as it is used now to be just a ruse to give us the impression according to Anthony Downs with the Brookings Institute now, who was on the board of the Urban Institute, who was the founder of the reported National Advisory Commission on Civil Disorders, that it is to provide the appearance of progress while something else is going on at the same time. And that is for all three of you up there.

PROFESSOR JACK KNIGHT: I will start by saying that I do not think that we all assumed that affirmative action necessarily has those lofty goals or at least that is part of what I was trying to emphasize by saying that I came to the conference thinking about the commitment to equality and seeing affirmative action as a tool or a mechanism that might be used for people that have that commitment.

If political actors have commitments to goals in a particular way, there are legal resources and other types of resources that might be used in that regard. I do not disagree with you in terms of the idea about that affirmative action was a result of a political process in a particular way and political competition. And if it is going to be maintained or used as a resource to pursue various types of goals, it is going to be within a political context. That was one of the things I was trying to emphasize, that you need to talk about the legal mechanisms in these other contexts also.

PROFESSOR DAVID OPPENHEIMER: I think there were a variety of motives among those who proposed the initial affirmative action programs. Some of them were lofty and others pragmatic and others probably intended to prevent real social change as you have suggested. I think there was probably the whole gamut. But my own support of affirmative action does not have to do with the history of affirmative action but with what I perceive is the need for affirmative action today as a remedy for existing discrimination.

If all we have in response to discrimination in American society is affirmative action remedies, then I think we agree, that it is a failure because it makes the problem look like it is gone away when it has not. However, to the extent the affirmative action is truly a proxy for merit, I think that is less true. So I think it really depends on what we view as the justifications for affirmative action.

But clearly, the problems of inequality in our country require massive change. And affirmative action is simply one of the tools that we ought to be using to engage in that change.

PROFESSOR KAREN TOKARZ: You have another question?

MR. ALAN FURFINE: You used the term "scarce" repeatedly as a point of resources. I am a little surprised in our society that we consider those

resources you are identifying that I recall abundant you would identify as scarce. If you apply that to those resources in the United States, there are lots of colleges. I am a graduate of this one. But getting into school to solve a potential problem there as I recall we impose on each of my five the obligation to apply to no fewer than four schools as a method to ensure getting into at least one institute. Could you address that question of scarce?

PROFESSOR LANI GUINIER: Well, it is interesting, first of all, each application to a college as I understand it costs money. What I am talking about is the availability of those resources to the average family. And if you think that the average American family makes about \$30,000 a year in terms of income, access to higher education is not only a scarce resource, it is almost unavailable unless there is some subsidy. And subsidy generally comes in terms of public institutions of higher education. And that is really what's becoming increasingly scarce.

If you look, for example, at California, in 1994, California for the first time was spending the same amount of money on its higher education system as it was on its prison system. And by 1995, California has started spending more money on prisons and less on the construction of institutions of higher education. And I could go through chapter and verse that the money that used to go to subsidizing higher education and making California one of the premier university systems for higher education is now being diverted to prison. The three strikes and you are out law means that the amount of money to keep a nonviolent offender in prison for the rest of his or her life could pay for about 200 community college students to attend community college.

Jesse Jackson did an informal study outside of Chicago where he went to Glenbrook South which is a suburban high school that spends \$11,000 per pupil per year, has a ninety-eight percent high school graduation rate, has janitors who make about \$45,000 a year, 24 hour janitorial service, carpeting on the floors, every student is assumed to be able to learn. And one of the guides on Jackson's tour said if somebody is having trouble, then they just lend that student "the brain of a computer." They give them the computer and essentially let them have access to the computer to help them work out problems. Okay, that is \$11,000 per year. Jackson then went from Glenbrook South High School to the Cook County Jail where you have a predominantly black and Hispanic population and instead of a ninety-eight percent graduation rate, you have a ninety percent high school dropout rate. You have ninety percent of the inmates at the Cook County Jail functionally illiterate and yet, Cook County is spending \$22,000 a year to keep these people in jail.

So to me, that is a decision about how do you allocate resources. And it is

a decision that is making certain resources more available, that is prison cells, and other resources less available, community college, junior college and access to a quality four year education.

And the reason I think that is a crisis in a democracy is that particularly given the changing economic future of the work force, it is becoming increasingly necessary, critical, to have a college degree in order to have a job that can help support a family and provide what we would consider a decent livelihood.

And so access to college education becomes a means of access to a livelihood. And in our democracy, citizenship is not just a function of who votes but it is also a function of your status and your identity and if you are not employed, you are considered in some ways less a citizen. And so this then becomes an issue of access to citizenship opportunities.

So all of this is about distributing resources and trying to decide who should get which resources. In some ways this is a response to the earlier question. I agree that affirmative action has been a distraction from this bigger conversation, that we should be talking about distributing these resources in a way that puts on the table how Americans are tracking some kids from kindergarten to college and other kids from kindergarten to jail and how dysfunctional that is, not only for those who are being tracked to jail but also how costly it is to the taxpayers who are having to subsidize this at the back end.

Because race camouflages all of this and because we look at the people going to jail and we see that they are predominantly people of color, we say well that is where they belong, because that is how we have been conditioned to think in this country rather than to open up the conversation to say what is it that we should be doing to open college education and higher education to all Americans who have the motivation and want to take advantage of the opportunity to better themselves.

PROFESSOR DAVID OPPENHEIMER: Let me add something if I may. Another way to look at this question of scarcity is to look at law schools, where there are approximately 40,000 spaces each year for new law students at law schools approved by the American Bar Association. This year there will be about 60,000 applicants for those 40,000 spaces. A few years ago there were a hundred thousand and the number tends to rise and fall between about 60,000 and 100,000 over the past twenty years.

That means that many, in some years the majority, of those applying to law school will not be admitted. That makes admission to law school a scarce resource, or at least an allocated resource, in which many will be disappointed.

A very comprehensive study was done of the class that applied to law school in 1991.³⁰ Three thousand four hundred of the applicants accepted that year were African-Americans, which was similar to the percentage overall of all applicants who were accepted.

But in the absence of affirmative action, fewer than 700 would have been accepted, of whom half would have been accepted only at one of the traditionally black law schools. There would have on average been one or two black law students at each of the remaining A.B.A. law schools in the United States if the kind of affirmative action programs that are now being dismantled in Texas and California were eliminated in all states.

Those black law students who were admitted graduated at almost the same rate as white students despite the fact that they were much less affluent and therefore had many fewer resources to bring to law school. They passed the bar at a slightly lower rate but again one that reflecting their affluence and therefore the resources they had available. They have gone on to practice law in all fields. There is every reason to believe that they were in fact as qualified as the white applicants who were admitted to those law schools.

What is also interesting and sometimes gets forgotten in the discussions of school admissions is that the 3,000 or so black law students who were the recipients of affirmative action and therefore admitted to some law school are dwarfed by the well over 6,000 white law students who, based on their LSAT and GPA would not have been admitted to any law school, but who were admitted. That is, most of them were "legacy admits." Most of them were recipients of affirmative action programs for the wealthy and powerful. Those programs operate, have operated for a long time, and continue to operate with much less attention than the affirmative action programs for minorities that have been the focus of so much debate in these last few years. So that is another place where the allocation of resources and affirmative action need to be discussed together.

MS. JILL HICKSON: I am really interested in the question that you mentioned about equality but particularly on the teaching of it. I am in law school now and I am a little concerned that all of the issues about equality or only rethinking equality are only being discussed in classes such as civil rights or First Amendment. But in any of the more economic courses, corporations or tax or labor or anything like that, there is no discussion of the idea of equality in the economy.

There just seems to be this idea that if you can get equal access to

30. See Linda F. Wrightman, *The Threat to Diversity in Legal Education*, 72 N.Y.U. L. REV. 1 (1997).

education or whatever, then that is automatically going to trickle over into economics. And I wanted to know, I just cannot imagine that in the civil rights movement or in the 1960s, this idea of rethinking equality in all realms of law or anything else was not discussed and I just do not know why they were implemented or what happened.

MR. AMON DORIAN: They did not have any intention of doing it. That was not the goal. The goal was to satisfy the big mouths who caused the trouble so that the trouble would not get any larger. The fact that you get out of law school does not transfer into the economic sector. When you come out, you are a black person in this country. And it is not designed for you to be that way. Especially if you say anything that might be considered a little bit controversial and you are a black person, they will come out and jump on you. Can I get a witness from the panel down there?

MS. JILL HICKSON: There a discussion on it. I was more interested in the teaching in the law schools.

PROFESSOR DAVID OPPENHEIMER: Well, you know, the thing about the law school classroom is that it tends to be dominated by the person standing at the front of the room, most of whom still look a lot like me, and most of whom do not have an agenda of wanting to talk about equality. Now, that is not uniformly true. For one thing, there are certainly many more women and many more people of color teaching law today than there were ten years ago. And there is an ongoing discussion within the legal teaching profession about how issues of equality, issues of diversity, issues of rethinking merit should be a part of what is happening in the law school classroom.

The Society of American Law Teachers, for example, is an organization of progressive law professors who have annual or sometimes twice-annual teaching conferences, many of which are directed at how our teaching can reflect our social values and how we can effectively raise these issues in the classroom. Some of us write about the ways in which we might reexamine cases which are a part of the canon and yet are taught without any discussion of their political context, their historical context, often of their race context. One of the criticisms of the classroom is that it has been de-raced as well as lacking discussions of equality.

So the discussions are going on within a group within the legal teaching profession. You are likely to see that reflected from time to time in classes when the people teaching those classes have that commitment. But institutionally there are only a few schools that have made the institutional commitment to that kind of a curriculum. And they have not always been successful.

PROFESSOR JACK KNIGHT: I might just add that it is really not that

surprising that the dominant discourse in the law school classroom is going to reflect the dominant discourse in society generally. And that extends beyond law schools. I teach in the college of arts and sciences, courses in political theory and political philosophy. And in those courses the discussion will often reflect the dominant beliefs, dominant values.

In political theory one of the most promising ways now I think to get at some of the issues you are concerned about in terms of economic equality is to approach political equality the way Professor Guinier was suggesting in some of her earlier comments. In terms of thinking about the relationship there and arguing rather that if you are really committed to issues of political equality, then they may have implications in the other spheres.

PROFESSOR LANI GUINIER: Well, I would just add perhaps both a cynical and an optimistic response. The cynical response is the reason we do not talk about equality in law school is we are not interested in the issue of equality because we do not think that law is about equality. We think law is about freedom, about maximizing individual choice that really is not premised on ensuring everyone equal access to the same resources. Alternatively, law is about equality of opportunity but not equality, not the substantive equality that people refer to when learning about the South African Constitution. So equality doesn't interest some lawyers. I think that was David's point.

But secondly, other people who are interested in issues of equality think we have solved that problem. We have formal equality because the law now says you must treat everyone the same and since the notion or definition of equality is sameness, there is not a lot to talk about. That, too, is the cynical note.

The optimistic perspective is that there is a lot to talk about and that we can interrogate the concept of equality and try to think about equality because if other people are not talking about it, that leaves space for us. And so I think that is the, the symbol or the resonance of the Chinese character for crisis which is the combination of two characters, the character for danger and the character for opportunity and within every dangerous situation there is an opportunity.

One of the things that was so hopeful about this conference is the notion that even when we don't agree with other people's notions of equality, we can learn from them and we can use their struggle with equality to enrich our own thinking about the concept so that we can start putting forward a richer notion of equality that is not just about formal legal sanctions and not just about treating everyone the same.

And that is where I think affirmative action becomes again what I have been calling the miner's canary, that it is a way of signaling more important

and systemic dysfunction in the mines, not just involving the canary. So that the goal is not to treat all canaries alike nor is it to treat the canary like the miners. The canary gives way, its respiratory system is more fragile when the atmosphere in the mine becomes toxic. So the canary is cueing us that there is a larger problem yet we have been thinking about equality simply as an effort to make sure the canary has the same rights as the miners to breathe toxic air.

I think there is an opportunity here to get the miners to listen to the canary in order to understand that there is a problem affecting all of us.

PROFESSOR KAREN TOKARZ: If I could add one comment. My reactions are very similar, although maybe not as eloquent as Professor Guinier's that there is a cynical response and then there is a more optimistic response to the current state of equality and affirmative action. I think about when Amon was here as a student and when Jill was here as a student (I have been here almost twenty years) and there were three women and only one person of color on the faculty during that time. Things have changed since then. We now have twelve women faculty out of thirty-six and four people of color, and as opposed to one or two classes in which this issue is part of the dialogue, now there are probably six or eight. And, whereas we would never have had a conference like this fifteen years ago, now we do. Whereas there was not a law school like C.U.N.Y or D.C. School of Law, now there is.

I do think that we can take some heart that things are changing. I think now, in a very exciting way, we are even to the kind of point that Lani is making of using the margin as the vehicle of revisioning the mainstream issues. Dick, you had a question?

PROFESSOR DICK KUHNS: Dick Kuhns. I am on the law faculty. Actually, it is a point I would like to make and you may not want to pursue it at all but I do not think the conference on equality at Washington University will abide without it. The point being made in some respect and it is that Washington University is a good laboratory for trying to do some of the things you have been talking about.

Washington University is the biggest user of construction services in the whole metropolitan St. Louis area. The university purports to be committed to providing economic opportunities for women and minorities. This building that you are in was built almost exclusively by white males.

The university reports now that it has on its construction sites between 15 and 20% minorities working there. That appears to be largely the result of job owning contractors to make sure they bring over minorities and women in the existing work force to this work site so it will look like they are doing a good job. In fact, the university does virtually nothing to make the reality match its rudder.

PROFESSOR KAREN TOKARZ: Professor Kuhns' point is very well taken. That is an issue that a number of the law faculty belatedly raised with the central administration a year ago, and people like Professor Kuhns have continued to push the issue. And it is certainly a concern.

MR. KEVIN JOY: Yes, my name is Kevin Joy, from the business school. I guess I applaud the law school for hosting this event. I am troubled a bit by the fact there has been very little discussion about fiscal and business implications of some of the policies that you are discussing and we over at the business school have no discussion of racial politics relative to business and the role it plays.

PROFESSOR KAREN TOKARZ: Excellent point.

PROFESSOR DAVID OPPENHEIMER: You know, there was some discussion of this topic yesterday. Linda Krieger spoke about diversity in the corporate world and the way in which diversity has become almost a slogan of many corporations for marketing purposes. Sometimes diversity is embraced for internal morale purposes, depending on the communities in which those corporations operate. This is an area where affirmative action is being pursued without governmental regulation or governmental compulsion.

Some companies see it advantageous as a matter of efficiency, or morale or marketing to either "celebrate" diversity, as they often refer to it, or encourage diversity. There is such a movement within corporations and within the academic literature on business management.

There are more and more articles appearing about managing diversity, and about promoting diversity outside an area where it is compelled by law. How much it is a matter of discussion here at Washington University, I obviously cannot speak to, but in many business schools, in many parts of the country it is very much a part of the discussion.

PROFESSOR KAREN TOKARZ: There is no question that it has to be part of the discussion about the academy, but also part of the larger discussion of the question. There were some economists invited to the conference. It did not turn out that very many of them were here.

In terms of what goes on here at Washington University, many of us regret that, despite the fact that the business school is right cross the yard here, the dialogue between the law school and the business school is fairly nonexistent. Hopefully, you will raise that issue within the business school. I will certainly pass the comment onto Professor Cunningham who put together the conference. It needs to happen.

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11:15 a.m. Session I

PANEL MEMBERS:

Professor Virginia Dominguez

Professor M.N. Srinivas

Professor Karen Porter

PROFESSOR M.N. SRINIVAS: It is obvious that the United States, South Africa, and India are vastly different from each other in a variety of ways, and that affirmative action programs in each country have grown out of its historical experience, and of the need to redress the specific inequalities in each. What is common to the three countries, however, is a constitutional commitment to democracy and equality, and at the same time, the existence of hereditary groups which have been historically disadvantaged, exploited, and oppressed, and the need to ensure that the latter are enabled to overcome their disabilities and acquire equal access to education, employment, and other scarce resources. It is essential to keep our eyes focused on the future, and on the goal of building a democratic, egalitarian, and humane social order. In order to achieve this goal, and to translate formal equality into substantive equality, affirmative action should target disadvantaged groups. But such a program of redressal is bound to strengthen group identities, and further, is bound to be used by politicians to keep themselves in power. This problem is not an academic one: India, for instance, faces the reality of carrying affirmative action benefits to 3743 Backward Castes among Hindus alone (more than 80% of the population), excluding the "Scheduled Castes" and Tribes who are entitled to more comprehensive benefits. There are also demands from minority religious groups and women that they be made eligible for the benefits of affirmative action.

The disadvantaged groups in India are extraordinarily heterogeneous. In the first place, two of the most disadvantaged sections of the population are the former "Untouchables" ("Scheduled Castes") constituting 18% and tribes ("Scheduled Tribes") constituting 5%. The "Scheduled Castes" were historically exploited, humiliated and excluded from the main Hindu population, while the tribes who inhabited the forests suffered from isolation, and their forest wealth was plundered by the advanced individuals hailing from the plains. The Constitution places both these sections on a higher footing than the others as far as affirmative action is concerned. Both are entitled to representation in all legislatures in proportion to their numbers, and jobs in the government, and admission to educational institutions, both at the central government and the States. Priority is accorded them over the

“Other Backward Classes” (“OBCs”) in accessing other benefits such as housing sites in urban areas, surplus arable land, bank loans etc. The “Scheduled Castes” and “Scheduled Tribes” lists are maintained by the central government while the OBC lists are maintained by the States. Finally the Constitution bans the practice of untouchability in any form, and makes its practice in any form an offense (through the Civil Rights Act of 1955).

The next category of people who are entitled to affirmative action benefits are the OBCs, all of whom collectively enjoy 27% reservation of government jobs, and admission to educational institutions. It was only in August 1990 that reservation of jobs became mandatory both in the central government and the States; prior to that such reservation was accorded only in a few states in south India. For instance, in Karnataka reservation exceeds 70% while in Tamil Nadu it stands at 69% with the result that only 30% of jobs and admissions are available for competition on a merit basis. However, in November 1992, the Supreme Court decided that reservation should in no case exceed 50% of the total.

The courts have consistently interpreted backward “classes” as “castes” to the dismay of sociologists and anthropologists. And as mentioned, the OBCs are not a homogeneous category. At one end are the dominant, landowning castes who enjoy strength of numbers, own a sizable amount of land available locally, are politically influential, and are represented increasingly in government service and the professions, while at the other end are numerically small artisanal, labouring and servicing castes, just above the *dalits* (former untouchable groups), and more entitled to the benefits and concessions which the dominant costs are largely receiving. This reality has been recognized by the governments, and attempts have been made to reach out to the poor in each section by splitting the OBC category into several subdivisions. But reaching the needy in each has been made extremely difficult as a result of two factors: 1) the benefits of affirmative action tend to be appropriated by the influential in each section; 2) and further, every caste is divided into higher and lower groups, and the latter everywhere feel that they are being deprived of their legitimate share of the benefits. The Supreme Court in November 1992, while affirming caste as the unit for affirmative action, excluded the “creamy layer” among the OBCs from eligibility for affirmative action benefits. The term “creamy layer” has been used in the Mandal judgement to refer to wealthy and influential families in each OBC, but the decision to exclude them has evoked strong opposition from the leaders of the OBCs.

Affirmative action in India has had considerable success both symbolically and substantively. For instance, the President of India, Mr. K.R. Narayanan, is a *dalit*, though he has other impressive qualifications and

experience to occupy that high office, and the speaker of the Lok Sabha,³¹ Mr. Sangma, is a member of the matrilineal Garo tribe from northeastern India. More impressively, political power in India has moved both at the central government and the States, from the urban and westernized middle classes to rural people, in particular to dominant castes among the *dalits*, tribals and the OBCs. In other words, in the course of fifty years, India has experienced a social and political revolution thanks to democracy and affirmative action.

But affirmative action has its negative side. First of all, there has been too much reliance on "reservation" *per se*, and it has not been supplemented by attempts to train the targeted beneficiaries to actually benefit from access. Even more importantly, the failure to universalize primary education, in spite of the existence of a constitutional directive to achieve it, has had all kinds of negative effects including stigmatizing the beneficiary groups. Reservation has become a *mantra*, demanded by minority religious groups, women, and the *dalits* converted earlier to Christianity. If the tendency to enlarge the quantum of reservation is not halted, it will eat up the equality principle, fundamental to the Constitution. Further, any discussion of imposing a time limit to reservation has become very difficult in the context of demands from new groups and women for including them among the beneficiaries.

Another and extremely serious paradox is the perpetuation of group identities and the creation of vested interests in them, with the goal of creating a "casteless" society. This has led to widespread cynicism among the middle classes. Thoughtful citizens are concerned at the divisions in the social body it is creating, and the fear that it may provoke a fundamentalist backlash.

While caste as a system is breaking down, individual castes are becoming bigger and stronger, breaking down sub-caste barriers in order to compete more effectively with other similar caste combinations for access to such secular benefits as education, government jobs and political power. The caste label remains but the reality underlying it has changed and the goals have also changed. Hierarchical ideas have been challenged and weakened, particularly, in the cities. Further, society has undergone considerable secularization, the ideas of purity and impurity becoming weaker, particularly in the public domain. The linkage between caste and occupation has also become very weak. Under the circumstances, the question arises whether castes, excluding the *dalits* and tribals, ought to continue to be the

31. The Lok Sabha is the lower house of Parliament equivalent to the House of Commons in England.

basis for affirmative action.

Finally, it is obvious that any society which utilizes only the moral and intellectual resources of 10% or 20% of its citizens is guilty of wasting the talents of the majority, a phenomenon which is as unintelligent as it is immoral. The problem before India, and I venture to think, also the United States and South Africa, is to devise "neutral" indices which target individuals who suffer from such backwardness and poverty as beneficiaries, and to which exclude those in the "creamy layer." Affirmative action is necessary but perhaps as important are measures to wipe out mass poverty. It is more unlikely that the elimination of acute poverty and all that it entails may help in the long run to render affirmative action unnecessary.

PROFESSOR VIRGINIA DOMINGUEZ: I am Virginia Dominguez. I am trained as an anthropologist. I sometimes think of myself as a historian and sometimes even as a philosopher of language. But I wear various hats. One of the things I direct at the present time is something we have at the University of Iowa called the International Forum for U.S. Studies.

In the interest of not repeating what many other people have said this morning, I thought I would share with you five mottos or slogans that have occurred to me between yesterday and today. These capture both my reservations about what affirmative action in this country has apparently increasingly become in the 1990s, and what I would rather see.

Let me say two things by way of preparatory remarks before I quickly go through these five "motto." Over the last eight or ten years, unfortunately, I have become quite skeptical of what affirmative action has become in this country, and it was with that attitude that I came here. My skepticism stems from two things. One is that affirmative action programs and the entire affirmative action policy in this country have been too limited. I think that affirmative action in the United States has been based on a notion that what we need are more people who look different from the types of bodies that have been much more visible in a variety of institutions, and the presumption supposedly is that, once we change that, we change all sorts of things and we become a gentler and kinder society. We all know that these hopes have really not materialized.

But I have another reason for the skepticism that I have apparently developed over the last few years and that is, frankly, that I have watched many institutions *consume* affirmative action in a way that is much more to the benefit, and in the interest, of those institutions, not just legally but socially. Universities are probably the institutions I know best. Universities and other professional institutions have often very genuinely wanted to "diversify" but, in the process of doing that, they have in fact largely fought apparently to protect themselves, not just from legal repercussions but

probably more importantly from bad public relations. Nobody wants to be an institution that supposedly is part of the old guard. That is good but, in the process, many things have been done that make these institutions look better than they really are. And that really leads me to a position of skepticism not about what affirmative action programs or policies could be or should be, but what I am afraid I think they often are right now.

The second preparatory remark that will explain why I have settled on these five mottos at least for me and that I would love to promote is that I think it is very useful to look comparatively. I think that while there is nothing perfect about either the Indian system or the South African situation right now, they do provide us with a useful reminder that "equality" and "diversity" are not the only possible goals. Both of those countries are really frontally struggling with and trying to promote things not simply captured by the notions of "equality" or "democracy." Both of these I find very problematic terms in this country in the casual ways in which they are used. The South African and Indian cases actually stress social justice and issues of substantive equality, not equality in a nice, rhetorical way that does not produce the socioeconomic political effects that I would like to see.

So, my criticisms really have to do not with affirmative action being too liberal for me. I am not coming at it from the right, but actually from farther to the left. Most affirmative action programs change too little in my opinion, at least in this country. People who have promoted it have great intentions but without many other changes, much more radical changes, much more systemic changes, I do not think that they have gotten us very far. So, to me the problem is they are too liberal, by which I actually mean conservative. So where do I stand? Here are these things that I think have been largely reinforced in my opinion as a result of reading and thinking and talking about the South African efforts and India's experiences. These are slogans or "guidelines" of sorts. I will read them in the hope that we can talk about them.

Instead of just representation or the notion of representative democracy, I would like to propose that we say "No to Representation Without Redistribution." I am playing with certain old U.S. history notions. Instead of "No taxation without representation," I propose "No Representation (electoral or otherwise) Without Redistribution" of major resources. To have one without the other is, to me, too conservative.

Two, I would like to see a strong commitment to unsettling our habitual ways of thinking that basically says, "No Reproduction of Cognitive and Social Categories." We have inherited and we habitually continue to use such categories whether they are "castes" in India or "races" in this country, or color or race in South Africa—without experimentation. We cannot be

absurd and think we can just forget everything very quickly, but I think that we should not just reproduce these categories without at least trying to upset the apple cart in some way. We might actually introduce an element like class that does not quite fit into the logic. That might be useful, not because it would solve everything, but because it would always remind us that we also need to figure out ways to undermine the particular hierarchical system of oppression that has historically been in place and with which we continue to operate in each of our countries.

The third motto I would like to promote is "No Invocation of Color Blindness without Major Institutional Societal Change." Many promoters of affirmative action in this country are correct to be extremely nervous whenever somebody says, "Well, let us just be color blind." To me "color-blind" is a suspect category, just like "caste-blind." In societies that have structured themselves for so very long in those terms, to assume that we can just somehow start fresh is to be, frankly, socially, psychologically, and culturally quite naive. We have got to accept this message, but I would still like to argue that whatever system of categorization we use needs to be accompanied by something that makes it unstable, something that makes us not so comfortable, something that may not even appear consistent.

Fourth, "No Identity Politics Without Ideological Politics." Note that I am not opposing "identity politics" to "ideological politics," but rather combining them. One of the things that happened yesterday that was very exciting was a discussion, an exercise that some of us participated in, a kind of thought experiment. We asked ourselves what would happen if the U.S. currently adopted India actual reservation system, the kind of quota system India has at various levels of the bureaucracy, in Congress, and in city councils. We came up with figures that were quite astonishing in some ways. We decided the House of Representatives in this country would have sixty African-Americans. It might have more; but by definition it would have no fewer. It might have about twenty Chicanos/Mexican-Americans and possibly eight Asian-Americans. The Senate would have no fewer than fourteen African-Americans, probably at least four Mexican-Americans, and a couple of Asian-Americans. The President would probably still be "a white guy," the term we put on the blackboard, so I will use it here. The Vice-President would likely be an African-American man. Among governors and ministers of various things, about a third would be nonwhite. In city councils, 30% would automatically be women, possibly more. These are all based on census quotas. I bring this thought experiment up, apropos of my preference for "No Identity Politics Without Ideological Politics." For, after figuring out what our political institutions would look like, our next question obviously was, "What real difference would it make?" What real difference would it

make in terms of policies? What real changes would this bring about in our society? We decided that there would be significantly different kinds of people participating at higher and higher levels of government, and there might be a decent chance that certain kind of policies would change. But it became obvious to us that if all we did was to introduce these quotas, there would not be sufficient change, for it would really be too easy for those newly in power to get co-opted. There would not be the effort, the move towards much more social justice or substantive equality. So that is why I say "No Identity Politics Without Ideological Politics." It is not the shape of the bodies that should matter automatically; it matters only if really coupled with a much higher level of citizenship, of active participation and involvement that would make this country much more like many other countries in which people are far more involved politically.

And last, but not least, I would like to urge "No More Talk of Diversity." Now, this may sound very surprising. I think diversity has been co-opted by these same liberal kinds of rhetorics that lead people to think, "Well, our goal should be diversity." I do not think our goal should be diversity. That is too limiting. Our goal really needs to be more redistribution of resources. Diversity is also easily co-opted by a kind of myth of individualism in this country that assumes that all individuals really need to be represented. John Bowen mentioned *e pluribus unum* earlier today, and the problem with that motto is that it almost suggests we are going to create a whole out of diverse individuals. The fact of the matter is that this country deludes itself, into thinking that it is not a society organized into groups. Individual life chances, social chances, economic chances, political chances in this country have a great deal to do with whether you are in the white category or whether you are part of any one of these other groups. All of this diversity talk that we are "into," in fact, is problematic because it is too easy to mishear it, too easy to think only in individual terms, to think that that will actually lead us to change the system. It is too easy to think that this is not a group-based society. If we are in fact going to take something out of the South African and Indian experiences, it needs to be the issue of the larger goal, which has got to be something other than this very soft notion of affirmative action that we have had in place that has just not changed the society or its institutions or its structure as much as I think we ought to.

PROFESSOR KAREN PORTER: My name is Karen Porter and I am an Associate Professor at Washington University School of Law. I wanted to start my remarks by picking up on a point that Dr. Srinivas made and that is that in conceptualizing affirmative action we must look to the future. This is a very important starting point for us as we end this conference: we must begin to really try to envision the future. In attempting to do so, we would be

well advised to take to heart the title of this conference “rethinking equality” and to make use of the opportunity to re-envision, to rethink, what we mean by equality.

One of the most troubling aspects of the civil rights struggle in the United States has been, as you have rightly pointed out Professor Dominguez, our inability to be able to sustain a shared and meaningful vision of equality. I take it that your skepticism does not derive from theoretical or formal notions of affirmative action, nor from the particular starting point of our struggle with this issue—although we have seen examples both in South Africa and India of very different starting points that are provocative and may, in fact, in the end be more promising than our own starting point in this country. The main problem has been our inability to both sustain and fulfill our particular vision of equality, whether through the use of tools like affirmative action or other tools. The challenge that we have in common at this point with India and South Africa is the task of trying to sustain a collective vision of equality that is much more than rhetoric, that is much more than hope, that is rather a system of equality that has some real grounding in the lives of ordinary people.

More so than ever it is important for us to assess the tools that are available to us, and not merely take up those tools that are ready to hand. We must be willing to really investigate the authenticity of those tools, and to insure that they are appropriately applied to the purposes we have set out. This raises the issue of the importance of our goals, of identifying very clearly and reminding ourselves of just what our goals are. For those of us who attended the conference, it was very striking to hear a different articulation of the goals of equality, particularly in the context of South Africa. I was very interested to hear Professor Govender stress that the goal at the core of the South African Constitution—and I take it that this very much is the case in India, too—is for everyone to have a stake in society. This vision of equality that embraces inclusiveness as a core ideal is something we have lost sight of in our current struggle to achieve equality for all. The comparison between the United States, India, and South Africa raises very important issues about how we define life in the public sphere; what the life of an ordinary citizen is to be; what notions of citizenship are to be championed in a society that is truly equal.

My own conclusions from the conference are that in a sense it is too early to have conclusions. For many of us, we have only recently awakened to the potential of comparative studies—of looking at what India and South Africa have to offer us in the United States as we try to rethink issues of equality. Many of us are just at the beginning point of learning. In order to choose our tools well and put them to appropriate use we need to learn more before we

can feel comfortable with the notion of conclusions. After a long struggle, we are still at such an early stage.

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1:15 p.m. Closing Plenary

PANEL MEMBERS:

Professor Clark Cunningham

Professor N. R. Madhava Menon

Professor Marc Galanter

PROFESSOR N. R. MADHAVA MENON: Good afternoon, ladies and gentlemen. Personally speaking, this three-day conference has been a very rewarding learning experience for me and, as I heard the speakers in the morning, for each of the participants as well. In fact, Professor Cunningham can take legitimate pride for having organized such a wonderful conference, bringing people from different disciplines and to get feedback in a way that we did not think about it before.

And this indeed is the right way of looking at what we are doing, analyzing the social issues that are now being discussed with serious implications to our respective disciplines. Therefore it seems to me that what we have accomplished is a breakthrough in looking at challenges before our societies with particular reference, of course, to equality and affirmative action.

I must start by giving an incident which appealed to me very much in the morning session. It was the second session where a young student intervened to ask a question. She asked, "When you are discussing elaborately on equality with reference to affirmative action, its significance in social ordering, why is it that your curriculum, what you teach in the law school, does not reflect that concern? The subject is discussed, maybe in constitutional law or the civil rights courses; but what about equality in tax or labor or family?"

This question was followed by one from a gentleman from the business school who said, "I did not realize that this is so important a topic. Why, in the business school, there is not much discussion about this important theme in fiscal and monetary policies or other subjects which we study in the business school, and why is there very little interaction in this regard between the business school and the law school though we are located close to each other?"

It struck me that this younger generation of people do realize the limited focus that the equality debate has assumed in the American scene. I was a little puzzled by the response of the panelists also. To put it briefly, one response was that, "Well, law in this country is more about freedom and individual choices, how to maximize individual choices and you are talking

about equality. And the extent to which law is concerned with equality, it is the question of sameness, equality among equals and that is about it. What the South Africans talked about—substantive equality in Article 9 of their constitution—is not a part of the agenda.”

Another response was, “Well, what happens in an average classroom, in a law school in America reflects what is the dominant theme in the social discourse. And therefore, to the extent that equality is reflected in the societal discourses, to that extent it will come into the law school curriculum also.”

That exchange between the elder and younger generation Americans gave me an insight into why equality has not been such an important subject for analyzing the activities of the government and its various agencies. However, I must say I had a different impression about the importance of equality when I read the American Constitution.

During the three days that we have spent together, we have been compelled by different perceptions of people with diverse backgrounds to reexamine and revisit our own perception of equality, whether in law, in society, in politics, whatever. And while doing that, we have prioritized the issues and have emphasized different dimensions of the equality debate. Some people emphasized on the social justice dimension of equality. Some others have emphasized the sameness or the formal equality dimension: which law or legal systems have been advancing and how far or how well it is organized or not.

Some others have looked at it as a moral imperative of a democratic social order and in one of the sessions traced it over to our own cultural backgrounds. In India, it is very much rooted in the concept of *dharma* in Indian society. It is there in *ubuntu* in the African social order, and in the concept of *fairness* that the American society has been cultivating. It is nothing but equality in its philosophical roots in different cultures.

So we have realized that equality is fairness, equality is justice, equality is fair treatment. It dawned on us that you may not be able to prioritize the different fundamental freedoms but cannot conceive of freedom or liberty without equal application of mind to equality; otherwise, it will not be a balanced view of the basic societal goals and aspirations.

In determining goals in relation to affirmative action and equality, we have benefitted a great deal by looking at what other systems are trying to do.

In the morning panel session, while making a critical evaluation of the law school admission tests or other tests which you have in this country in terms of what it is purportedly telling us, I heard the panelists say that it does not convey what it claims to convey. It is a fraudulent merit test and is a proxy for some other thing.

I realize that we have got to question established practices which we took

as merit and therefore acceptable. That itself is an important milestone, an important achievement, because the empirical evidence that was placed by the panelists in the morning session is enough to explode the myth that some of these formalized tests indicate merit, that they truly reflect either the potential or the performance of the candidate whom we admit or reject.

That understanding would not have dawned on us had the panelists not given the critique from the social science perspectives. If the lawyers were not sharing their ideas with the psychologists, or the sociologists or the anthropologists, it would not have dawned on them also that what they are assuming is not what is intended by the laws.

This realization is a great accomplishment. If that sort of a realization dawns on the judges of the U.S. Supreme Court, what a great change will take place in American society and jurisprudence! But, who would communicate this and how it will be communicated is very critical, because how ideas are communicated, we are told, makes a world of difference. After coming here I read the *New York Times* report that the entire difference in the voting on affirmative action programs in California as compared to Texas is because how the questions or propositions were structured and the language used. If it that is that simple, it is not difficult for us to achieve the goal in a proper way; lawyers are good at that.

We spent a lot of time—and it was very revealing indeed for the Indian group—on the debate on the question of not only merit determination, but identification of beneficiaries. I have the impression that if we are successful in producing a formula to give the benefits of affirmative action to individuals or groups, determined not on the basis of race but on other acceptable (race-neutral) criteria, the American society as well as the American Supreme Court would be persuaded to accept it in the interest of social justice and equal opportunity.

That means the challenge before the academic community is, can you produce a method of identifying the deserving people for affirmative action programs which is not caste-specific, or race-specific? This is something which I am going to work on because I would like such a caste-neutral test in India also. In fact, I had critiqued the opinion of Justice Jeevan Reddy along with his brother judges on the Indian Supreme Court in accepting the Mandal Commission recommendation, giving legitimacy to caste as one of the dominant criterion for determining the beneficiaries of affirmative action. To my mind, it reinforces the caste division of society and perpetuates that sort of differentiation or grouping. Perhaps this may result from the way the lawyers argued the case before the Indian Supreme Court; they could not put it to the court in the manner we have been discussing in this Conference. Otherwise, I would imagine that the court might not have declared caste as

such an important factor in determining beneficiaries of affirmative action. I say this because caste today in India is not the caste that we know of in the 1950s when the Constitution was enacted. The Constitution specifically said that these programs are to be given only to other backward *classes* and not backward *castes*; but in effect what the Mandal judgment has done is to substitute caste for class, which is a disaster according to me.

I hope, therefore, as and when this issue comes before the U.S. Supreme Court in America, the academics and lawyers here will gather insights from the experiences from other jurisdictions for finding legal solutions to equality problems. We did not have time to also learn from the experiences of Malaysia, Israel, and other multicultural democratic societies, which are attempting to achieve equality through affirmative action programs. Equality is a continuing challenge in all societies, and the rule of law demands that the legal system re-structure societies to offer equal opportunity to all.

If we can learn to keep caste or race aside and develop a formula for reasonable classification for conferring preferences on the "unequals," such an approach should be acceptable even within the Fourteenth Amendment of the Constitution. This Conference is a good beginning in the search for such strategies, which will give meaning and content to the equality guarantee without undermining liberty and other freedoms.

Thank you very much for giving me this wonderful opportunity to interact with scholars from all over the world. I look forward to another meeting like this maybe in India, maybe in South Africa. But it seems to me that if you want to give a push in the direction of equality to our respective societies and do our job responsibly, we need to educate ourselves constantly, consistently on issues bearing on equality. We need to inform the concerned decision makers including the media and political parties. In this debate time and again the point was made that when there is a conflict between freedom and equality, freedom should prevail. The question is not that we must subjugate one freedom over the other to be able to organize a just and fair society; the question is how do you reconcile apparent conflicts and how it can be presented in a manner so that society will accept it. That is where we need to further think and put our heads together. This is where comparative learning, meeting of different disciplines, interactions between different legal systems sharing the same type of legal culture is important. I think that with the type of interest and commitment that Clark and others have developed in this subject, Washington University is going to be a key player in evolving a world view of equality. I hope more and more members of the faculty of this campus will be contributing to this debate which will definitely impact on the national and the international scene.

PROFESSOR MARC GALANTER: I also would like to pay tribute to

Professor Cunningham for his initiative and enterprise and tremendous energy in organizing us and keeping us on our toes. It has really been a very interesting and quite unprecedented gathering and I share Menon's hope that there will be more of such meetings.

It is hard to think of anything that has not already been said but I will do my best. Affirmative action proceeds from the insight that social inequalities are deeply embedded in the fabric of society and cumulative in nature and that therefore we cannot apply remedies only at the individual level but we must dig deep into institutions. We have to confront the enduring communal structures of society in order to get some leverage.

The whole three days have been very much shaped by this insight and I want to supplement by noting that this effort should not lead us to neglect other dynamic forces that are flowing through our global society. Certainly equality is one and with it the great tide of rising expectations that is found all over the world.

But also I think we should mention individualism, that is, the notion that individuals have a right to cultivate their talents and to reap benefits from them, to gain recognition for who they are. This also seems to me is a very powerful current flowing through the whole world.

We see it in its somewhat less attractive forms in the formation of a global consumer culture but it is enormously powerful. It is shaping the way people think all over the world. Another side of this notion of individual self-realization is liberation from group control.

We have heard here, particularly from the Indian setting, but there are intimations from elsewhere, too, about change in the relation of individuals to groups. There is a great seismic shift in the character of groups; that is, the groups that people belong to are less and less ascribed and less and less controlling and more and more malleable and more and more voluntary in their character.

We see before our eyes something like the shift that Tonnies predicted over a century ago from *Gemeinschaft* to *Gesellschaft*, not in exactly the way he or the great sociologists at the turn of the century thought, but it certainly is happening. As people concerned about equality through affirmative action we should not allow ourselves to be painted into the corner of being opponents of this individualistic current.

I think we should see the surge of individualism as a kindred effort to the drive for equality, the thrust of both being to release energy, to release the energy and imagination of individuals that has been suppressed or underutilized by society. Professor Srinivas said eloquently before that we are used to societies where 10% or 15% of the talent gets encouraged and developed. We are moving into an era in which there is more realization that

there is great untapped value out there for the society to be realized and in which where people are just not willing to tolerate any longer the kind of arbitrary limitations that they accepted in the past.

I see this tide of individualism impacting the affirmative action enterprises in many ways. Not least, in every place where these programs are established, there tends to be a deflection of attention and energy away from broad-based benefits to lots and lots of very deprived people toward higher echelon kinds of preference to smaller numbers of individuals who already have fairly substantial amounts of human capital.

This is a somewhat abstract way of talking about the “creamy layer” but the “creamy layer” problem is not peculiar to India. India may present a peculiar location but it is a universal problem. It is the problem of what these programs are for, who should be the direct beneficiaries of them, who are the indirect beneficiaries, and who should pay the costs.

We ought to look at these programs and ask how affirmative action can accommodate the great tide of individualism rather than try to hem it in and contain it. One problem that we have not had a chance to talk about but that should concern us is who pays the cost. To the extent that these are redistributive measures, they are not free. The job or the scholarship that somebody gets is something that somebody else does not get. It is nice of course to expand the pie but if we expand one pie, it is often at the cost of taking away from somewhere else.

So we have to think about ways of spreading the cost of these programs rather than let them fall on particular individuals. The dilemma is dramatically illustrated in the Sharon Taxman case in Piscataway Township in New Jersey now before the Supreme Court, where one of two “equally qualified” teachers was chosen to lose her job.³²

It is one thing for an affirmative action program to say this beneficiary really deserves this job, but it is something entirely different to say that that person should pay the entire price. We have not thought enough about ways of cost spreading in these programs to disable the cost-focusing powerful engine of resentment that is generated by inattention to cost-focusing.

I do not want to paint individualism as a willing handmaiden of affirmative action, for this same individualism seems to me to be connected with declining trust in government and other public institutions, and with reluctance to invest in public goods. This is particularly pronounced in the United States but clearly it is spreading throughout much of the world.

32. The case was subsequently settled. See *Piscataway Township Bd. of Educ. v Taxman*, 91 F.3d 1547 (3d Cr. 196), cert. granted 117 S. Ct. 2506 (1997).

It is important for us to place our concerns about equality and opportunity for the most deprived in the context of these other great changes that are going on. This conference embodies the insight that we cannot look at this through one set of disciplinary lenses. And we cannot treat this problem in isolation from the other transformations of society.

I want to close by thanking all of you. It has been a great opportunity to be here and to encounter so many new thoughts about these questions. I hope that there will be a chance to continue.

PROFESSOR CLARK CUNNINGHAM: The title for my concluding remarks is *Contact* or perhaps "Marc Galanter As Played by Jodi Foster." Karen Porter commented this morning that affirmative action needed to look to the future, so perhaps you will forgive me from borrowing from science fiction. *Contact*, one of the most popular movies of the past summer, was based on a best-selling novel by one of our foremost astronomers, Carl Sagan, who was professionally involved in the search for extraterrestrial life.³³ Very briefly, Jodi Foster plays the role of Ellen ("Ellie") Arrowway, a young idealistic radio astronomer who is obsessed with the idea of using the techniques of radio astronomy to search for signals coming from outer space that would indicate intelligent life.

The early plot tension is set up when her former mentor, who has become the head of the National Science Foundation, shuts down the funding for her project, saying: "I am doing you a favor. You will never get tenure doing this kind of research. It is the end of your professional career to be looking for radio signals of intelligent life. There is nothing out there but gas."

She persists and scrapes up money from various different places and leads a lonely vigil out in the New Mexico desert until about ten years later one night a striking regularity is heard over the radio telescopes. They rule out all the possible false signals and discover that the signals are coming in the sequence of prime numbers, repeated over and over again. These signals cannot be an accident.

Arrowway and her team work on the signal more and find a television signal. They unscramble it and find that it is a broadcast of Hitler announcing the Olympics in 1936, which was the first television broadcast of sufficient power to reach outside the solar system. Someone out there picked up that broadcast, realized we were here, and sent it back.

The scientists work on the signal more and realize that the television image is only a way to get our attention; in between the television images is a message of enormous complexity, something like a hundred and fifty

33. CARL SAGAN, *CONTACT* (1985).

thousand pages of technical diagrams for building a vehicle which it appears would take people to the stars.

After a number of plot turns, Arroway becomes the person who gets to ride that vehicle. She experiences a trip to beyond the edges of the galaxy, comes back to tell about it, and is told nothing happened: "The space ship did not go anywhere. It just dropped into the water. You were out of radio contact for a second but you did not go anywhere. It must have been some kind of illusion."

The movie concludes with a Senate hearing at which she insists that she cannot prove it but she has had a vision of something remarkable.

How does this connect to Marc Galanter sitting next to me? Until not too long ago it was perfectly obvious to everyone on this planet that the earth was the center of the universe, that everything revolved around the earth, that the sun existed to warm us, the moon existed to light up our night, and the stars were there for decoration and to create pictures to accompany our mythology.

It required an enormous feat of imagination to overcome this obvious "truth" and to persuade humanity that we were not the center of the universe. We finally have become persuaded of that fact.

We are still somewhere around a thousand B.C. when it comes to U.S. legal scholarship because the U.S. legal system is drastically nation-centric. The implicit assumption is that the rest of the world revolves around the U.S. legal system.

U.S. citizens seem to notice the rest of the world primarily the way one might look at constellations if you happen to glance up at night. For example, one usually sees India mentioned in the newspaper if some large number of people died at the same time, in a bus accident or a train accident. The mass toxic gas disaster at Bhopal seems to be the only thing that appeared on the American consciousness about India and that is because a huge number of people died at the same time.³⁴

There is really not much more in the media about South Africa, again mostly about bad things happening there. The tendency of United States citizens is to pay attention to other countries primarily if there is evidence to reassure us that we all live in the very finest country that ever existed on the face of the earth; are not we glad we do not live someplace where terrible things like Bhopal and apartheid happen?

34. Marc Galanter eloquently criticized the U.S. legal academy for ignoring India in an address to the Annual Meeting of the Association of American Law Scholars (AALS) in 1986. *See When Legal Worlds Collide: Reflections on Bhopal, The Good Lawyer and the American Lawyer*, 36 J. LEGAL ED. 292 (1986).

The idea that the United States could learn from other countries has been forced on us in some areas, for example automobile technology. But we certainly have not begun to think that the legal system could learn anything, even from Canada, to say nothing of another continent.

Well, in 1957, risking his future academic career, Marc Galanter got into a vehicle, voyaged over to India, saw great things, came back with a vision, persistently talked about it and has received much the same reception that Ellen Arroway received when she came back from her trip.

I would like to think that this conference has expanded the group that shares Marc's experience and vision. I will conclude by telling how I think this conference relates to the plot conclusion of the movie *Contact*. The idea from the movie of "re-broadcasting" is an appealing metaphor to me. There have been a number of articles written with titles like "The U.S. Constitution, Our Most Important Export." Indeed if one thinks about intellectual influence on the world, the U.S. Constitution has had a significant influence, though I rather appreciated the comment that Karthy Govender made this morning, that when they were drafting the South African Constitution, they looked to the countries north to learn from their mistakes. At first I thought he was talking about countries immediately north, in the continent of Africa, and then I realized that virtually all the world is to the north of South Africa. Thus he was also talking not only about India but also about the United States in terms of learning from the mistakes of other countries in designing a brand new constitutional order.

There is a kind of broadcast coming back to this country from the rest of the world that might superficially look like the bouncing back of the Hitler television broadcast. It looks like something we sent out, and it is bouncing back at us. We still need to do the first thing the radio astronomers did: put up our antennae and adjust the dial so we can hear the signals coming. If we do not do that, we will not even catch the rebroadcast. But this conference shows that we need to look past the initial signal that grabs our attention.

The fact that there are obvious areas of comparison with South Africa and India—they use English to write their constitutions and have similar foundations in the common law—at least gives us a signal to draw our attention. But if we read between the lines, I think we will find a message of far greater richness and complexity that may enable us to do and build wonderful things.

As I mentioned on Saturday evening, we chose to have a gospel choir concert before dinner in part because we wanted to offer something wonderful from St. Louis to share with our guests. But I also personally feel that gospel music is another powerful metaphor for the theme I have been using *Contact* to illustrate. The gospel music that we heard on Saturday night

has roots in the musical traditions in Africa and in the experience of slavery, but it also draws from Christianity, the religion of the people who captured, oppressed, and enslaved the people who created the music. And yet remarkably enough, we heard something with a voice distinctively African-American, a voice so loud that it virtually blasted us out of our seats on Saturday night with a message of extraordinary hope and joy coming from some of the most tragic experiences of the last 200 years: a re-broadcast of enormous power, which shows what can happen when cultures come together.

What are the re-broadcasts revealed at this conference? We could have entirely spoken in the last three days of the more obvious points of comparison and we have done that somewhat. For example, we could focus on the “creamy layer” test that India has developed to apply economic means tests in addition to group affiliation as a way of distributing benefits, an approach that has not been seriously attempted in this country.

Or we could have talked at length about the point that Dr. Menon and I have discussed in our paper for the conference: the use of social science methods to determine which groups should receive preferential treatment. Or we could have spent our time at the more abstract, foundational level, examining how the South African constitutional text offers seemingly new resources for talking about these questions. As we learned in the last three days, you can begin by talking about affirmative action under the terminology of the South African Constitution as measures to promote equality which are not discrimination, but that even if a program is described as discrimination, it can only be prohibited if it is *unfair* discrimination, a phrase that we do not have in our legal discourse in the United States. And the South African Constitution can take us to a further layer of analysis because Article 33 says that even unfair discrimination which violates the equality provision may be permitted by a law of general application that is reasonable, justifiable in an open and democratic society, based on freedom and equality, and does not negate the essential content of the right. How differently we would be talking about affirmative action in this country if these were the standards for our discourse. Our constitutional discourse seems impoverished by comparison.

But having spent the morning listening to the panel commentary, it seems to me that much of the commentary went even deeper than the examples I have just given: for example, the fact that in both India and South Africa, within the lifetimes of people here at this conference, the entire nation has been involved in constitution building and constitution writing, and that, therefore, their so-called affirmative action programs came out of a deeply democratic participatory process that was part of creating the nation. The

commentary contrasted the lack of anything like that process in this country around affirmative action, which has frequently been developed and implemented through highly decentralized, eclectic, basically nondemocratic processes.

Or the larger question of what *law* even means, that the notion of law as duty and responsibility is central in both South Africa and India because of cultures in which talk is more about duty than rights.

Linda Krieger said that she feels a sort of desperation about the phrase frequently used by U.S. courts that “societal discrimination is not a compelling state interest for affirmative action.” If societal discrimination exists (and one would have to be blind to say it does not), what more compelling state interest is there than trying to deal with it?

Which brings us to the recurring point in the commentary about how there seems to be a loss of social memory in the United States, a social memory that India and South Africa are struggling to keep alive as they move to a new order.

Commentators repeatedly said we do not have answers today, just questions: we are just beginning to think and hope for more new meetings. I conclude with my favorite line from the movie *Contact*—remember it is called *Contact*, just “*Contact*”; not “*Exploration*”, not “*A New Frontier*.” Just “*Contact*” which is perhaps what we have achieved in these three days.

The movie begins with Ellen Arroway as a child learning to operate a short-wave radio. She is thrilled when from Wisconsin she is able to get a signal from all the way down in Florida. The signal is faint and keeps fading out. Her father says “Small moves, Ellie, small moves: move that dial just a little bit.” Then the signal comes in clearly.

Her father’s advice becomes the climax of the movie. How does she experience the aliens who broadcast the signal, sent the plan, and brought her beyond the edge of the galaxy? One of the aliens appears in the guise of her deceased father to communicate with her. When she learns that she is going to be popped back into the vessel and sent back with no proof of anything, anticipating what is going to happen, she says, “Is that all there is?” And the alien in the guise of her father says, “Well, there will be others to follow you . . . Small moves, Ellie, small moves.”

That is the sense I have coming out of these three days. And so I say to Marc Galanter beside me: “Small moves, small moves. Small moves will take us far enough.”

CONFERENCE CONCLUDED.