
DAVID DOMINGUEZ*

Legal Education and the Ecology of Cultural Justice: How Affirmative Action Can Become Race-Neutral by 2028

INTRODUCTION

In this Article, I offer a provocative perspective on the future of affirmative action in higher education.¹ Given the revolutionary opinions of the U.S. Supreme Court in *Brown v. Board of Education*² and *Hernandez v. Texas*,³ and more recent Court rulings such as *Grutter v. Bollinger (Grutter)*,⁴ *Parents Involved in Community Schools v. Seattle School District No. 1*, and *Meredith v. Jefferson County Board of Education* (collectively *Parents Involved*),⁵ I take issue with both sides in the current debate. End or defend? Neither side is facing reality.

For those holding out for using race⁶ as a lawful consideration in admission and student assignment policies based on notions of

* Professor of Law, J. Reuben Clark Law School, Brigham Young University. I would like to dedicate this Article in loving memory to John B. Stevens and Marcia Stevens.

¹ I do not address the role of affirmative action in employment, government contracts, or any other field in this Article.

² 347 U.S. 483 (1954).

³ 347 U.S. 475 (1954).

⁴ 539 U.S. 306 (2003).

⁵ 551 U.S. 701 (2007).

⁶ In the interest of not repeating a long litany of group identifiers throughout this Article, I use “race” to signify not only skin color, other outward physical characteristics, accented voice, nationality, and ethnic background but also to signify gender, age, disability, sexual orientation, and any other group signifier used to abbreviate our humanity.

distributive/corrective justice or other remedial justifications,⁷ today's legal reality makes it plain that there is no life left in that defense.⁸ For those looking to bury affirmative action altogether,⁹ all other realities—political, social, business, international, etc.—make it crystal clear that we, as a nation, dare not pretend that we have resolved the pernicious effects of four hundred years of invidious racial discrimination and cultural isolation.¹⁰

So how do I propose to satisfy both legal demands under the U.S. Constitution while responding honestly to rampant, systemic racism in this country? I argue that affirmative action has lost its way and must return to its true meaning and purpose; indeed, affirmative action is the only hope we have of returning to a path that is both acceptable by law and supportable by a vast majority of Americans. The way back is the way forward: allow every applicant who otherwise would not be admitted by the “numbers” to apply for special consideration in the admissions process based on a proven commitment to complete a clinical curriculum in law and integration studies. Now is not the time to either end or defend affirmative action in K-12 or higher education, but instead to extend its benefits to all of the students prepared to help America honor its pledge of liberty and justice for all. By extending the opportunity of exceptional educational training to every applicant ready and willing to advance progressive public policy negotiation and broad-based, community problem solving, affirmative action returns to its original purpose of healing America of racist wounds.

⁷ See, e.g., Rhonda V. Magee Andrews, *Affirmative Action After Grutter: Reflections on a Tortured Death, Imagining a Humanity—Affirming Reincarnation*, 63 LA. L. REV. 705, 705–07 (2003).

⁸ Chief Justice Roberts opined in *Parents Involved*, “In design and operation, the [student assignment] plans are directed only to racial balance . . . an objective this Court has repeatedly condemned as illegitimate.” *Parents Involved*, 551 U.S. at 704 (2007).

⁹ E.g., L. Darnell Weeden, *After Grutter v. Bollinger Higher Education Must Keep Its Eyes on the Tainted Diversity Prize Legacy*, 19 BYU J. PUB. L. 161, 161 (2004).

¹⁰ In the words of Justice O'Connor in *Grutter*, “[There is a] unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.” *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). Therefore, “student body diversity . . . better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals . . . [T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Id.* at 330 (internal quotation marks omitted).

My support for affirmative action, therefore, is race-neutral.¹¹ It does not matter whether the applicant is a poor Chicano¹² from the toughest streets of Los Angeles, like me, or a rich and privileged white male, such as Bobby Kennedy, Jr. The only question is whether applicants applying for affirmative action slots understand and seek to further the truth that many Americans—women and men, old and young, black, brown, red, yellow, and white—marched throughout the land to open the eyes of this country to grievous injury, both personal and systemic. Affirmative action needs, more than ever, to recruit today’s marchers from all walks and stations of life, joining forces and fighting full-out, while demanding a new chance for all Americans to live free of bigotry and prejudice.¹³ Are today’s applicants under affirmative action, as has been the case for generations of past protestors, prepared to learn and do everything necessary to integrate American society, even if it results in the sacrifice of jobs, freedom, and, at times, their lives for the noble cause of a unified nation?¹⁴

The goal of street protests, legal challenges, and other strategies to end racial discrimination—what I call the March for Freedom—has never been that applicants would someday check off an ill-fitting box on an application indicating racial background and, on that basis alone, would qualify for preferential admissions or placement policies.¹⁵ Rather than this stunted version of the agenda, civil rights activists sought true inclusion and the building of a new nation.

¹¹ See generally Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1 (2001) (arguing for a race-neutral approach to affirmative action that investigates the applicant’s experience with racial discrimination, the likelihood that the applicant would contribute an underrepresented viewpoint on race issues, and whether the applicant would provide resources to underserved communities).

¹² “Chicano” is a chosen term of self-identification. For me, it denotes a community activist of Mexican-American ethnic lineage with a progressive political agenda of eradicating oppression and promoting inclusion.

¹³ Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN’S L. REV. 253, 255 (2005) (“The civil rights movement ultimately succeeded not only because it had moral force, but also because [of] a powerful, well-organized grassroots effort . . .”).

¹⁴ As Justice O’Connor wrote in *Grutter*, “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.” *Grutter*, 539 U.S. at 332.

¹⁵ Today’s applicant is increasingly of mixed race, a product of various ethnic bloodlines. So what does it mean to an admissions committee that an applicant checks the box “Chicano/Latino” when that ethnicity is one ethnicity among many others, including forebears of European descent? What does it mean that an applicant checks “African American” but has skin pigmentation causing the student to appear white?

Looking at closed doors and separate facilities, the activists demanded integration. But they also had a vision: someday the rhetoric of the twentieth-century civil rights movement would translate into the civic inclusion movement of the twenty-first century.¹⁶ They looked forward to students of all colors being admitted to school and being prepared to work together to push the agenda of complete racial and gender equality.

Thus, my argument is that affirmative action in admissions and placement policies must be strengthened, not weakened. But for affirmative action to be once again legally and politically acceptable, it must be used to recruit and admit applicants of color, women, white males, and anyone else ready to take America to the next step of racial and gender harmony. This next step necessitates an admissions policy that legally recruits affirmative action applicants whose scores and grade point averages may be too low for admission but who are prepared to redeem all aspects of their training and life experience as they fulfill a clinical curriculum in racial integration studies and practice.¹⁷ Such a policy would be consistent with the current treatment of athletes who are disproportionately of color and are recruited even if their test scores and grade point averages would otherwise not result in admission, admitted legacy students who are predominately white, musicians and thespians who are increasingly of all ethnic backgrounds, and so on.¹⁸

I have another, still more powerful reason to neither defend nor end, but extend, affirmative action to all applicants. Affirmative action, understood as described below—public policy negotiation and community problem solving, satisfies a compelling state interest as required by the U.S. Constitution.¹⁹ When affirmative action is

¹⁶ See, e.g., MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 62 (1967) (“I cannot see how the Negro will be totally liberated from the crushing weight of poor education, squalid housing and economic strangulation until he is integrated, with power, into every level of American life. . . . [L]iberation must come through integration.”).

¹⁷ These clinical courses—a number of which would be new, others that would be a reworking of current offerings—would be open to all students. This would remove the so-called “stigmatizing” effect of affirmative action since no one would know whether white, black, brown, or any other classmates were affirmative action admits or not.

¹⁸ It is expected that these admitted students will remain accountable and fulfill the basis of the admission decision, such as maintaining their participation in athletics or the performing arts.

¹⁹ See KING, JR., *supra* note 16, at 100–01 (“[T]he final goal which we seek to realize [is] genuine intergroup and interpersonal living . . . [and] an end to fears, prejudice, pride and irrationality, which are the barriers to a truly integrated society.”); see also *id.* at 132

extended, it recruits and enrolls students from all backgrounds committed to removing every remnant and vestige of racism and sexism that remains in our society. But the role of the students does not stop there. Not only do clinical courses in law and integration equip affirmative action students to heal the nation's racial and gender wounds, this form of legal education prepares them to work with a cross-section of Americans on even larger questions and struggles.²⁰ These students turn their scholarship and problem-solving skills into a template for collaboration and extend that pattern to more pressing, encompassing issues facing the nation and humanity as a whole.²¹

Today's students, both in class and out in the field, are far more attuned to organic, holistic applications of their knowledge than previous generations. Today's students want to solve the immediate problem in their own backyard in such a way that it prepares them to solve for global patterns. Baby Boomers audaciously claimed, "back in the day," that they knew the one right answer to race and gender issues (and everything else). Today's students came of age as contributors to the accelerating worldwide conversation on the internet and are keenly aware of worldwide refugees and terrorism, international trade, and global warming. More and more of today's students are choosing interracial marriages²² and are actively promoting emerging connections between all members of the human family.²³ More than attending the latest seminar on multicultural

("A final challenge that we face as a result of our great dilemma [of racial injustice] is to be ever mindful of enlarging the whole society, and giving it a new sense of values as we seek to solve our particular problem.").

²⁰ See Bryan Walsh, *Bring Eco-Power to the People*, TIME, Dec. 3, 2007, at 95 (reporting on the effort of Van Jones, founder of the Ella Baker Center for Human Rights, to redefine race struggles expansively as a community effort in energy conservation, thus creating employment and other economic gains for people of color).

²¹ See generally MARGARET J. WHEATLEY, LEADERSHIP AND THE NEW SCIENCE: LEARNING ABOUT ORGANIZATION FROM AN ORDERLY UNIVERSE (1992) (describing forces, such as the "butterfly effect," that are at work in small changes that have an impact far beyond what could have been predicted).

²² See, e.g., Associated Press, *After 40 Years, Interracial Marriage Flourishing*, MSNBC, Apr. 15, 2007, <http://www.msnbc.msn.com/id/18090277>. What was offensive to my Latino parents—marrying outside my race—is ho-hum stuff today. I married a woman from India. Our mixed-race daughter married a Scandinavian. And who knows what partner will interest our grandkids?

²³ I like to joke with my students that when I was in law school in the late 1970s we used yellow legal pads to jot down notes—there was no internet, no personal computers, no electronic retrieval systems, no Facebook, no MySpace, and no Twitter. I explain that the way we performed legal research was to take our human bodies to the shelves of the library and physically consult, one by one, books of a reporter series or other research

sensitivity, today's students want to practice a skill set that develops proactive hospitality and mutual accountability among strangers and enemies. What they seek, therefore, is not simply the absence of racism or the presence of cultural diversity, but rather the ecology of cultural justice. This, more than anything else, is what the nation needs and why affirmative action constitutes a compelling state interest.

In Part II of this Article, I describe the impact of *Brown v. Board of Education* on my own search for emergence as an American. This is my post-*Brown* narrative: I am racialized. I am Chicano. I was born the same year that *Brown* ended legal segregation. I was raised trying to survive drugs, gangs, and gunfire in a tough Los Angeles ghetto. I had no hope that my story would be any different from millions of other impoverished children of immigrants. But my life story changed dramatically and gained American texture through higher education at Yale University, legal training at the University of California, Berkeley, and a career as a law professor—all thanks to affirmative action.²⁴

In Part III, I examine the U.S. Supreme Court's rulings in *Grutter* and *Parents Involved*. As will be seen, I agree in large part with the teachings of Justice O'Connor's plurality opinion in *Grutter*: affirmative action serves the nation when it points forward, not backward, and prepares us all for even more difficult domestic and international challenges. As explained below, affirmative action in the twenty-first century is no longer a remedy for past and present societal discrimination inflicted on certain groups, but rather it is a needed template for negotiating public policy, growing local communities, building the nation, and unifying the world.

With regard to *Parents Involved*, I point out that the Supreme Court squandered the promise of *Grutter*. Instead of following *Grutter*'s lead and promoting cultural diversity as a forward-thinking goal—anticipating the ecology of cultural justice—the Court in *Parents Involved* returned to old ways of thinking and perceiving. The Court reduced cultural diversity to divisive, zero-sum constructions of race disputes. Rather than focus on race relations as a needed template for progressive, mutually advantageous negotiation, the Court fixated on static race classifications and win-

tomes, ever careful to check the back flap of the book for the latest updated supplement (which we all knew was already outdated). They are aghast!

²⁴ I am proud to say that I am a product of affirmative action. Stigma? I wear the badge with honor.

lose confrontations. Not surprisingly, the Court held that the only way that someone of color could take advantage of affirmative action is at a white person's expense.

Finally, in Part IV, I pose the question: What, then, will become of America's post-*Brown* narrative? I tie the two recent U.S. Supreme Court rulings and my life story to my clinical development of an alternative construction of affirmative action. I show that America's major legal, political, and social objections to affirmative action are twofold. First, affirmative action has come to mean a search for cultural diversity that is perceived as un-American: discriminatory, restrictive, and exclusive. Only a small number of people with the right skin pigmentation qualify for the extraordinary benefit of preferred treatment in admissions. Second, the goal of cultural diversity has been reduced to body counts and numerical targets, regardless of whether relationships improve among all racial groups. America is not satisfied with the minimalist goal of legal desegregation; America seeks cultural integration.

But then I show how these two objections can be overcome. I argue that cultural diversity must be understood as too limited a goal. Cultural diversity benefits target racial classifications and, thus, represent a crude substantive agenda for increasing the number of individual success stories of people of color. In practice, it restricts affirmative action to race per se, a list of mutually exclusive boxes to be checked. Then I describe how the substantive agenda of affirmative action can and must expand its mission to cultural justice for all. The ecology of cultural justice widens the focus from race per se to race relations—i.e., everyone's opportunity and responsibility to build a new community of racial integration among all Americans. Cultural justice shifts the emphasis from the static assembly of a desired number of representatives of various racial groups (cultural diversity) to a dynamic interchange of group accountability and group recognition among all participants—i.e., mutually beneficial collaboration and optimal relational processes across racial and gender lines (the ecology of cultural justice).²⁵

²⁵ In the words of the *Grutter* opinion, "the Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (internal quotation marks and brackets omitted); see also Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991).

Rather than develop my arguments in the abstract for moving beyond substance-driven goals to process-driven affirmative action, I report below on a clinical law school case study on the ecology of cultural justice. This example, which examines the connection between K-12 education and the juvenile justice system, illuminates stages and principles of integrationist studies and practice that inform and guide the ecology of cultural justice.²⁶ I also sketch and explain how well-designed clinical efforts in integration studies and practice follow a public policy negotiation strategy of integrative bargaining. This approach to affirmative action is comprised of three stages of community problem solving, the last of which completes the cycle and loops back to the first stage.

I

AFFIRMATIVE ACTION AND THE QUEST FOR INTEGRATIVE BARGAINING

I have been a legal educator for twenty years. One key focus of my pedagogy is to call upon law students to use their education to promote civic inclusion, to increase the opportunity for all Americans, and to participate meaningfully in the building of our nation. To this end, I challenge the whole class throughout the semester, through academic exercises and field work, to turn affirmative action into the ambitious quest of integrative bargaining. This quest, I explain, takes shape through three steps: (1) integrate the voices, (2) integrate the issues, and, finally, (3) integrate the community.

A. Integrate the Voices: Who Else Is at Risk?

The first stage of integrative bargaining brings together diverse voices, even oppositional viewpoints, to exchange strategies on the best way to define the presented issue in its widest context, as part of a cluster of related concerns affecting the community at large.²⁷ There will never be enough legal talent to teach society how to

²⁶ By no means am I suggesting that my clinical approach to integrationist studies and practices is the only, or best, method to either achieve racial integration or make affirmative action legally and politically acceptable. But I have found time and again that this method is very effective and reflects experimentation with clinical instruction in the law school classroom for the past twenty years and both public policy negotiation and community problem solving over the last thirty years.

²⁷ See William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 472-74, 476-77 (1994).

integrate voices or build a healthy community, but there will always be enough ordinary folk, especially poor people, to help each other better understand their web of life. Many of these unassuming, everyday neighbors have tremendous problem-solving skill that is going untapped.²⁸

With this thought in mind, my law students and I embark on integrative bargaining by posing a foundational question among ourselves and community members: “Beyond those who obviously have a stake in how the dispute is currently sized up, who else needs to be at the negotiation table to enlarge the ‘pie’ and to optimize the division of the ‘slices’—i.e., who else can help us redefine the problem so that we achieve more gains both in relational process and substantive result? Who else can help us situate the racial dispute in its broadest community context, generating excellent dialogue from a spectrum of views?”

The “who else” question provides a template because it sheds light on a deeply entrenched structural problem underlying racial conflicts. Poor people in general and ethnic minorities in particular are largely relegated to pernicious labels and then dismissed and silenced by institutional decision making. The “who else” query also keeps us mindful that settlement of racial disputes will be nothing more than stopgap measures, mere Band-Aids, unless we intentionally forge deeper connections, improve working relationships among insiders and outsiders to institutional decision making, and eradicate prejudicial stereotypes. As applied below to disciplinary policies in K-12 public education and the incarceration of juveniles, disparaging and racist labels applied by the community to Latino youth—“truants,” “drop-outs,” and “gang bangers”—are proven false as these youngsters learn to speak out as advocates for their actual roles in the community: peer teachers, peer court judges, and peer leaders.

B. Integrate the Issues: What More Is at Stake?

The second stage of integrative bargaining strengthens the template by raising a different question: “What more is at stake as we place the present issue in the three timeframes of immediate results, short-term

²⁸ Gerald P. López, *The Work We Know So Little About*, reprinted in *THE LATINO/A CONDITION: A CRITICAL READER* 339, 345 (Richard Delgado & Jean Stefancic eds., 1998) (“[Low-income women of color] simply find themselves drawn to those informal strategies more within their control and less threatening than subjecting the little they have to the invasive experience and uncertain outcomes of the legal culture.”).

gain, and long-range direction?”²⁹ When proceeding in this way, efforts to resolve the immediate race conflict expand to a host of other short-term and long-range issues of importance for many more parties, including sustaining goodwill and contributing needed resources over the long haul.³⁰ Best of all, my students and I have found that, when we press parties to engage in integrative bargaining over a longer timeline, the improvements in race relations benefit all people but result in a disproportionate positive difference for people of color. For example, as discussed in Part IV below, our clinical intervention in school disciplinary policies and juvenile-detention practices was designed to help all affected children, but the lion’s share of the benefit has already been enjoyed by children of color and will inure even more to their benefit as their high school graduation rates increase in years to come—and juvenile delinquency rates decrease.

C. Integrate the Community: Where Do We Go Next to Extend the Ecology of Cultural Justice?

The third question of integrative bargaining both completes and renews the template of affirmative action as a method of public policy negotiation by asking: “Where do we go next to extend the ecology of cultural justice?” By remaining mindful of the “where next” question, my students and I take greater advantage of our bold experiment in community problem solving. We keep an eye on the next application of our work: Where should we spread the news and broadcast the findings? Who needs to hear our progress report? We return to our original question with renewed conviction: “Who else is at risk?” And our answer is that neighborhood groups, sports leagues, professional associations, city councils, school districts, legislatures, and other public entities are looking for better approaches to chronic and simmering racial inequities.

When my students and I distill our local voices into a colorful story and offer our account as a template of community problem solving for others to consider, we engage in a form of activist mediation that I call public interest mediation. Knowing how important it is to pass along a tale of progress, we take seriously our responsibility to

²⁹ See David Dominguez, *Getting Beyond Yes to Collaborative Justice: The Role of Negotiation in Community Lawyering*, 12 GEO. J. ON POVERTY L. & POL’Y 55, 58 (2005).

³⁰ See generally, e.g., ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

publicize our story at public meetings, calling for new audiences to begin their own wider inquiry into racial conflict. This results in bringing the effort full circle and inviting a greater cross-section to ask their own question: “Who else is at risk?” As applied below to school discipline and juvenile detention, integrative bargaining prompted my students and me to tell our story to a countywide resolution board. This board, representing a full cross-section of community and county leaders, in turn enlisted the help of a public regional university, Utah Valley University, to sponsor Challenge Day, a national program that empowers school children to build an integrated student body among themselves.³¹ Challenge Day turned into Challenge Days, three days of intense training in integration studies and practice. Combining large group presentations with small group activity and other forms of intervention, Challenge Days took an alternative high school with three-hundred at-risk students on the journey to the new American community. This, in turn, inspired my law school students to fashion large group presentations and small group discussions for at-risk children incarcerated at the local juvenile detention center. My students and I have been teaching these children both how best to prepare for impending hearings as well as how to restore relationships in the home and at school. Finally, after three years of working inside the detention center, we have joined forces with community leaders to make the public aware of how the juvenile justice system is sweeping up too many children, especially children of color, and increasingly becoming a carbon copy of the adult criminal justice system.

II

MY LIFE IN SEARCH OF A POST-*BROWN* NARRATIVE

A. *Los Angeles, Yale, UC Berkeley, and BYU*

I was raised in, at the time, one of the toughest sections of Los Angeles in the vicinity of the University of Southern California campus. There was no way I was supposed to reach my eighteenth year, let alone attend Yale University, receive legal training at the University of California, Berkeley, then move to Utah to join the law faculty at Brigham Young University, where I have been teaching for twenty years.

³¹ See generally Challenge Day, How it Works, <http://www.challengeday.org/law-program/how-it-works.html> (last visited Nov. 9, 2009).

In 1978, I marched in the streets of San Francisco alongside radical student groups to protest the threat of the *Bakke*³² decision ending affirmative action in higher education. More recently, in 2004, I marched in Washington, D.C., with fellow SALT³³ law professors to engage in a similar protest against the *Grutter* decision. I relish progressive, community legal work in the reddest of red counties, Utah County,³⁴ in the reddest of red states, Utah.³⁵ But I am getting ahead of my story.

B. 1954

In 1954, all nine Justices of the U.S. Supreme Court spoke with one voice in *Brown v. Board of Education*.³⁶ Henceforth, America would be a land where all children would get equal opportunity to excel academically. No longer would children be robbed of their educational promise on account of skin color. A new nation was truly born in 1954, and the unanimity among nine quite diverse Supreme Court Justices was striking. Of one accord, they issued a challenge to all Americans to do whatever was necessary, as quickly as necessary, to take the printed words of a legal opinion and turn them into a full-fledged reality of educational equity and racial harmony.

In 1954, my story began as well. I, the newest member of the Dominguez family, was the fourth child, the oldest being five years of age at the time. Even though this would mean six people scratching out a living in a tiny ramshackle “cottage” in one of the scariest sections of inner-city Los Angeles, there was unanimity of joy and celebration in the household. Let the new story begin!

³² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

³³ See Society of American Law Teachers, Background Information For the Media, Aug. 18, 2009, http://www.saltlaw.org/userfiles/file/SALT_PDF_Documents_/8-18-09Background_Information_For_the_Media.pdf (“In 2003, SALT was active in organizing and participating in a march in Washington in support of affirmative action.”).

³⁴ Funny how, while incubating the ecology of cultural justice in Provo, Utah, the lyrics of “New York, New York” often come to mind: “If I can make it there, I’ll make it anywhere. It’s up to you.” FRANK SINATRA, *New York, New York*, on TRILOGY: PAST PRESENT FUTURE (Reprise Records 1980).

³⁵ *The Princeton Review of Colleges and Universities* has ranked Brigham Young University as the top school in the category “Stone-Cold Sober” for 12 years in a row. See Marc Haddock, *BYU is Soberest in Nation—Again*, DESERET NEWS (Utah), July 27, 2009, at B01, available at <http://www.deseretnews.com/article/705319503/BYU-is-soberest-in-nation-2-again.html>.

³⁶ 347 U.S. 483 (1954).

Both for *Brown* and for the new brown child, the legal and social reality of racial discrimination in 1954 America meant lean times lay ahead. No matter how happy my father was at my birth, it did not increase employment opportunities or the size of the paycheck for a naturalized Mexican who immigrated with hopes of achieving the American dream. He worked very hard but wound up with very little except bitter experiences of being told, “No Mexicans need apply,” or the ubiquitous sign, “No dogs or Mexicans allowed.”

In 1962, when President Kennedy was forced to send federal marshals to assist in the enforcement of *Brown*, I did not know, as a boy of eight, that there was anything odd or amiss with the ethnic makeup of my predominately Black and Latino neighborhood that included a smattering of virtually all other ethnic minorities. It did not faze me that the student population of my school included very few whites.

As every kid could testify growing up during my years in the killing fields of downtown and South Central Los Angeles, the chances of surviving childhood in one piece were not good. If gangs, drugs, and gunfire did not claim us, sexually-transmitted diseases would. If somehow I made it to my eighteenth birthday, Vietnam was waiting to send me to a new killing field far, far away—most likely to come back home in a pine box.³⁷ Prospects were dim, to say the least, that *Brown* would ever mean anything to brown and black children.

C. Jail

When I was ten or eleven, a bunch of children, including me, gathered on the playground. Since it was a Sunday, the playground was closed, and there was nothing to do. Bored and restless, someone suggested we break into the equipment room of the school and “liberate” the sports gear. Before the suggestion was complete, we were jimmying the lock into the facility. Once inside, we remembered that the best stuff was secured in a second-story closet. We climbed the steel ladder that led up to the closet and broke the lock. All inside, we marveled at the gloves, helmets, and baseball

³⁷ See LEA YBARRA, VIETNAM VETERANOS: CHICANOS RECALL THE WAR 5 (2004) (“Mexican Americans accounted for approximately 20 percent of U.S. casualties in Vietnam, although they made up only 10 percent of this country’s population at the time.”).

bats. One of the older guys blurted out, “Hey, we can fetch good coin for these items. I know where we can pawn this stuff.”

I was horrified. Breaking and entering to use the equipment struck me as worthwhile, even resourceful, but I had no desire to steal. I liked the playground director and could not bear the thought of him seeing me as a thief. So I started to back out of the room, saying to the others that I wanted no part of their plan. As my feet reached the threshold of the door, however, my heel caught on the lip of the threshold, and I started to fall straight back through the door. My knees buckled, and I fell headfirst from the second-story closet onto solid concrete. My body twitched uncontrollably, and then I froze.

I later learned from the other guys that they figured I had killed myself and that they would be blamed for causing the death. They immediately replaced all the sports equipment, ran away from the playground, and left me there sprawled out on the concrete, bleeding from my head.

We were all on our way to the jail at the juvenile detention center when the playground director, piecing together the story of how we almost stole the baseball gear, intervened. You might say he went to bat for me, and I was removed from the group headed for lockup. Apparently, it was decided that the night spent at the county psych ward and the baseball-size lump on the side of my head was punishment enough.

D. Yale

Then 1972 happened. I was seventeen and looking to graduate from high school that year. I had enjoyed the party life of high school and was prepared to join the workforce. I had no thought of going to college the day I was summoned to meet with the high school counselor. Mrs. MacKenzie, the lead counselor, wasted no time: “Have you heard of Yale?”³⁸ “No,” I replied. “Do you know where New Haven, Connecticut is?” Again I replied that I had no idea of what she was talking about. She reached back to a large rolled-up map of the United States, placed it on her desk, unrolled it, and asked: “Do you know where Los Angeles is on the map?” I placed my finger on the large dot signifying the City of Angels, and Mrs. MacKenzie then lifted my finger and placed it back down on the extreme other side of the map: “Here is New Haven.” She carefully

³⁸ For a second, I thought she pronounced the name as “jail,” producing flashbacks and freaking me out.

explained that there was a group of illustrious universities on the East Coast known as the “Ivy League,” and Yale, in particular, was aggressively pursuing a radical social and educational experiment called “affirmative action.” Yale was asking Mrs. MacKenzie to identify one graduating senior who possessed the raw academic talent and boundless temerity to take his place in the 1972 entering class. “I immediately thought of you, David.”

So the *Brown* decision, helped mightily by explosive riots in major cities, as well as ongoing street protests and public demonstrations around the country, found a way to deliver on its promise to me in 1972. “But why was I picked?” I wondered. I had done nothing to deserve the radical new trajectory of my life story.

It was soon painfully obvious to everyone that I did not merit an admissions spot in the Yale freshman class. I had no credentials to stack up against the academic prowess, amazing accomplishments, and cultural sophistication of my fellow “Elis.” And this fact became abundantly clear when the first essay I wrote in English was returned to me covered in red ink with a note appended to the grade of “0.” The professor wrote: “I would have given this paper an F, but that would be giving it too much credit.”

Things went from bad to worse that first semester of freshman year. Consequently, I decided that I would bide my time until the Christmas break rolled around, fly home, and never return. While pondering this plan over lunch one day in late November, a very pretty coed, Catie Stevens, asked what I was planning to do during the upcoming Thanksgiving weekend. When I said I’d be hanging around campus, she invited me to spend the weekend at her family estate in Wallingford. Mind you, the Stevens family, led by the father, John B. Stevens (J.B.), was truly the upper-crust of East Coast society, and here I was, a low-class thug for all intents and purposes, being asked to join in their traditional, family Thanksgiving dinner. I leapt at the chance!

That Thanksgiving the whole Stevens family made me feel completely at home despite the extreme cultural chasm between us. Catie’s act at the dining hall of going well out of her way to show kindness was, I soon learned, a common trait of the Stevens family. Early the next morning, J.B. asked me to join him along a favorite footpath. As we walked along the snowy fields of the Stevens estate, J.B. inquired about my experience so far at Yale. I was so grateful for his love and comfort—and already impressed that Yale meant so much to his family with many generations of “Old Blues”—that I

could not bring myself to answer his question honestly. I still felt the acute sting of that “0” on my first English essay.

J.B. could see disconsolation written all over me. After I mumbled something similar to “Yale is a great place, but, maybe, I am just too far behind academically to ever catch up,” he looked straight at me and asked if I was leaving something out, namely what I offered to the education of my Yale classmates. “Me?” I answered, incredulous at his suggestion. I thought to myself, the biggest “major” at my downtown Los Angeles high school was English as a second language! There is nothing I bring to the table at Yale except glaring, woeful deficiencies. I am totally out of my element, and there is no way I’ll ever fit in. Yep, I am going to quit. Despite the hopes of *Brown*, the “affirmative action” experiment failed.

J.B. could see the wheels spinning in my mind and took it upon himself to forever change my life with his challenge. He said:

Let’s assume that it will take you working as hard as you ever have, day and night, for you to catch up to your classmates. Yes, it will be difficult, maybe even painful at times. But it can be done, and you can do it or else Yale would not have asked you to join the freshman class. Now let’s consider this from the other side of the fence. What would it take for them to catch up to lessons you have learned growing up the way you did? How long do you think your classmates would last if they were dropped suddenly into your neighborhood?

I remember smiling broadly inside, perhaps laughing out loud, at the thought of my preppy classmates trying to make it alive through even one day in the ‘hood. J.B. said:

You see, you can catch up with their book learning. But can they catch up to your street smarts? How? They will not grasp what life is like for poor people in the inner city unless someone like you teaches them the lessons you learned the hard way. So go back and teach them. What you offer Yale is as important as what Yale offers you.

That morning walk and conversation with J.B. turned my life around. It was so wholly improbable that a top executive of a major international company would take a long walk with me. Why did Catie, then her dad and the rest of her family, go out of their way to help me?

I returned to Yale after Thanksgiving determined to make my voice speak for my family and the people of my background. It hit me full force that I needed to stick up for the guardian angels of my boyhood—devoted parents, teachers, playground leaders, and church

folk—who did what they could to give me a second chance. To make a long story short, I brought my grades to respectable marks during my freshman year and, then, proceeded to excel for my remaining years.

But more to the point, I took the lesson of that Stevens Family Thanksgiving to another level. I realized how few inner-city kids would ever learn the lesson J.B. taught me: what we have to teach the powerful is as important as anything they have to teach us.³⁹

III

AMERICA'S STRUGGLE FOR A POST-BROWN NARRATIVE: *GRUTTER* OR *PARENTS INVOLVED*?

In this section, I explain how *Grutter* and *Parents Involved* compete to provide America with its post-Brown narrative for the twenty-first century. Each opinion retells the story of affirmative action to serve its own ends and paints a distinctly different picture of the multicultural American people that the Court would like us to become. Below, I show how each opinion accentuates one of two key aspects of the narrative, either race as a fixed and static label that is mutually exclusive (race per se) or race as a catalytic opportunity for flexible, adaptive, and civic inclusion (race relations). The Court in *Parents Involved* favored the former interpretation and, thus, turned the narrative into a eulogy. It tried its best to preside over the burial of affirmative action as a pernicious tale of skin pigmentation being the basis of racial discrimination and preferential treatment. Conversely, in *Grutter*, the Supreme Court used terms such as “diversity factors besides race,”⁴⁰ “critical mass,”⁴¹ and even proposed a deadline of 2028 to shift the emphasis of affirmative action away from hostile, zero-sum constructions and toward advantages for all Americans.⁴²

³⁹ I have taken J.B.'s wisdom to heart ever since. At Yale, I started a service organization that called upon fellow Yalies to hang around poor Puerto Rican children living in New Haven so each side could communicate in new ways with the other. During law school at UC Berkeley, I co-founded the Minority Pre-Law Coalition on the undergraduate campus, which highlighted the exceptional leadership and scholastic abilities of students of color and grew to three-hundred college students, mostly of color, but including college classmates from all backgrounds. During my years as a law professor, I have applied J.B.'s teaching to many community struggles for freedom and justice.

⁴⁰ *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).

⁴¹ *Id.* at 333.

⁴² *See id.* at 343.

The *Grutter* opinion offers the better view because its reasoning turns on the distinction between race per se and race relations. This differentiation is founded on a well-established distinction in integrative bargaining, namely the difference between substantive outcome (race per se) and process gains (race relations). Although *Grutter* does not go far enough to make the case for moving beyond race per se to race relations, it opens the door to a progressive and inclusive version of affirmative action that extends its benefits to everyone.

Before proceeding, the stage must be set by explaining the crucial distinction between substantive outcome and relational process and how differing emphases in *Grutter* and *Parents Involved* led to rival post-*Brown* accounts of affirmative action.

A. *Substantive Outcome, Relational Process, and Legal Problem Solving*

Legal education demands attention to after-the-fact analysis of legal disputes and the importance of securing a satisfactory substantive outcome in settlement of a legal claim. A lawyer is trained to deliver a remedial result that brings acceptable closure and finality to the case at hand. I agree that lawyers are duty-bound to obtain the very best substantive outcome for their clients. But legal problem solving cannot achieve optimal substantive results without the precondition of far-reaching process gains and relational enrichment.⁴³

By relational process, I refer to the professional skill set that elicits the best input and proposals from interested parties not only on current disputes *but also in anticipation of recurring problems*.⁴⁴ Relational process creates new value from a variety of perspectives and agendas, distributes the value fairly to settle the matter at hand,

⁴³ For more information, see books published by the Harvard Negotiation Project, including: ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991) [hereinafter *GETTING TO YES*]; DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* (1986); and MNOOKIN ET AL., *supra* note 30. These texts are foundational to the field of negotiation theory and practice.

⁴⁴ See Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 965 (2001) (“Transformative politics requires looking beyond winning or losing the particular legal dispute or political battle and asking how one’s actions serve to reinforce people’s awareness of our interdependence and mutual responsibility as members of the human family.”).

and then requests ongoing relationships among individuals and agencies to better anticipate and prevent inchoate legal claims.⁴⁵

Let us take a closer look at this distinction between substantive outcome and relational process by applying it to the example of school desegregation in *Brown*. The law was changed to declare that “separate but equal” was unconstitutional.⁴⁶ The U.S. Supreme Court banned segregation in public schools.⁴⁷ No one questions that denouncing segregation in public education as illegal was a major substantive gain. But the law and lawyers cannot deliver the ultimate relational process gain of integration—the interpersonal commitment needed to form a unified American community.⁴⁸ Integration requires legal problem solvers to teach themselves and requires other community leaders to be vigilant, to speak out against vestiges and remnants of racism and cultural insensitivity, and to pursue goodwill and mutual trust as much as they pursue outward structural improvement. Desired substantive legal reform (e.g., desegregation) is an excellent start, but such reform must be sustained by relational process among people who strive for dynamic infusion of diverse ideals and pluralistic ambitions (e.g., integration). Absent attention to continuous process gains and social harmony, we risk that the substantive outcome will, at best, produce a hollow and illusory victory and, at worst, provide the “cure” that kills the patient—i.e., white flight and resegregation.

B. Applying the Substance/Process Distinction to Grutter and Parents Involved

In 2003, a sharply divided U.S. Supreme Court held in *Grutter v. Bollinger* that the University of Michigan Law School could lawfully consider the racial classification of an applicant so long as it did so as part of an individualized, holistic review process applied equally to all

⁴⁵ I teach my students that there can be no breakthrough on cultural justice unless the ongoing community relationships among the privileged and disadvantaged are turned upside down and the wealthy learn to say to the poor: “We need you.”

⁴⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

⁴⁷ *Id.*

⁴⁸ Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 1–2 (1996) (“[W]hat seems remarkable is not how *much* litigation there is, but how *little*. For example, most members of society suffer harms, inconveniences, and injustices that infringe on their legal rights and could be, if they chose, grounds for legal action.” (footnote omitted) (emphasis in original)).

applicants.⁴⁹ Justice O'Connor, writing for the plurality, agreed that the goal of cultural diversity in the law school student body justified the program under the law,⁵⁰ but the plurality was plainly troubled by what it faced. The plurality opinion in *Grutter* and Justice O'Connor's concurrence in *Grutter's* companion case, *Gratz v. Bollinger*, made clear that she opposed affirmative action as a zero-sum concept, created by giving an admissions slot to one applicant of color at the expense of a white applicant solely on the basis of skin color.⁵¹ Justice O'Connor further argued that, consistent with *Bakke*, race as a component of affirmative action admissions can be, in some circumstances, a legally justifiable consideration when it serves to remedy provable acts of illegal racial discrimination committed by the educational institution in question.⁵² The use of race as a component of admissions cannot be justified as a social engineering tool used by higher education in an effort to reverse or repair America's history of racial inequality.

C. "Cultural Diversity": Integrate the Voices

Interestingly, the *Grutter* plurality did not take issue with the dissenters' point that it is artificial, if not disingenuous, to assemble a certain number of people representing different ethnic backgrounds and call that assembly "cultural diversity."⁵³ Justice O'Connor's plurality opinion parted ways with the dissent, however, in the understanding that cultural diversity is not a dead-end calculation that

⁴⁹ *Grutter v. Bollinger*, 539 U.S. 306, 336–39 (2003).

⁵⁰ *Id.* at 337–38.

⁵¹ *Id.* at 336–39; *Gratz v. Bollinger*, 539 U.S. 244, 276–77 (2003) (O'Connor, J., concurring). In *Gratz*, the Court ruled that the University of Michigan's undergraduate admissions process was unconstitutional because it considered race as a factor but did so as part of a system that reserved a certain amount of points for only those from certain racial backgrounds. *Id.* at 270 (finding the University's policy not narrowly-tailored). The Court held the undergraduate system unlawful because it did not permit all applicants to compete equally for all available seats. *Id.* at 270–71.

⁵² See *Grutter*, 539 U.S. at 328.

⁵³ Justice Thomas points out in his opinion, dissenting in part:

"[D]iversity," for all its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue. Because the Equal Protection Clause renders the color of one's skin constitutionally irrelevant to the Law School's mission, I refer to the Law School's interest as an "aesthetic." That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.

Id. at 354–55 n.3 (Thomas, J., concurring in part and dissenting in part).

remains fixed once admissions decisions are made and the entering class is seated.⁵⁴ Cultural diversity does not consist of flat and static numbers, e.g., having twenty-five Latinos in the entering class; it only starts to take shape at that point. Cultural diversity is supposed to change over time depending on the quality of interaction among law students and faculty. *Grutter* thus opens up a new dialogue on affirmative action as an expression of integrative bargaining, emphasizing that cultural diversity is not a function of race per se but of race relations that are by nature inchoate and emergent. Justice O'Connor's opinion expects higher education to understand that affirmative action is no longer to be viewed as a one-time snapshot factor during the initial stage of admissions decisions, but rather as an ongoing, educational resource among law students, lawyers, and the larger American community.

Although the *Grutter* opinion never explicitly refers to negotiation theory and practice, Justice O'Connor's use of cultural diversity is consistent with the teachings of integrative bargaining. She calls the nation to move beyond race per se to race relations, to turn affirmative action in higher education into a flexible, adaptive, mutually beneficial opportunity for all Americans: "Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."⁵⁵

D. "Critical Mass": Integrate the Issues

The use of "critical mass" in *Grutter* challenged law schools to not only address one substantive issue—increasing the representation of minorities in legal education—but to aim for a higher goal. Why not use this effort in affirmative action as a template to fix legal education as a whole? Indeed, "critical mass" signifies a student body that exceeds a token, nonthreatening window dressing, or a negligible smattering of color, and gathers enough outspoken, multicultural Americans precisely to make a real *critical* difference in law school pedagogy and law practice. "Critical mass" calls for learning conditions that allow all students to engage in bold experimentation, through clinical exercises, in public policy negotiation to offer a

⁵⁴ See *id.* at 308–09 (plurality opinion).

⁵⁵ *Id.* at 332–33.

startling, *critical* perspective on what must be changed in America to provide equal opportunities.⁵⁶ Thus, we will reach a critical mass when there is ongoing effort by the law school administration, faculty, and student body to abandon conventional “talking head” instruction and solitary learning in favor of collaboration on a new priority in legal education: clinical curriculum that equips the affirmative action admits and interested classmates to master integrationist studies and practice.⁵⁷ These new courses, and the reworking of current offerings, must provide ample practice in building an emergent community among diverse, mutually respected classmates.⁵⁸ Why do this? Because it is *critical* to the future of legal education, law practice, and America’s standing in the world that affirmative action be understood as a template for public policy negotiation.⁵⁹ In the words of Justice O’Connor, critical mass is the precondition that “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”⁶⁰ “[T]he skills needed in today’s increasingly global marketplace can only be

⁵⁶ In praising the benefits of cultural diversity in the classroom, the *Grutter* plurality stated: “[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.” *Id.* at 330 (internal quotation marks omitted). But this begs the question: if it is not acceptable to look backward at past societal discrimination as justification for race-preferential admissions policies, why is it acceptable to look backward at conventional pedagogy dominated by white males? Why is there no insistence that a corresponding duty of the law school is to look forward with its instructional methods and prove that it is experimenting with clinical courses in integrationist studies and practice?

⁵⁷ Justice Scalia, writing in dissent in *Grutter*, scolds the law school for putting so much effort into cosmetic, political expediency rather than pursuing the much harder work of improving pedagogy for the betterment of a diverse American society. *Id.* at 347–48 (Scalia, J., concurring in part and dissenting in part). He argues that the plurality opinion will spawn more lawsuits precisely to “challenge the bona fides of the institution’s expressed commitment to the educational benefits of diversity . . . (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism . . . but walk the walk of tribalism and racial segregation . . .).” *Id.* at 349.

⁵⁸ “[D]iminishing the force of such [racial] stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students.” *Id.* at 333 (plurality opinion).

⁵⁹ Wendell Berry, in his powerful essay *Solving for Pattern*, argues that unless we solve particular gardening and agricultural problems with an understanding of the larger ecosystem surrounding those problems, we are bound to make matters worse in the long run, even if we “end” the immediate problem for the time being. WENDELL BERRY, *Solving For Pattern*, THE NEW FARM, reprinted in THE GIFT OF GOOD LAND: FURTHER ESSAYS CULTURAL AND AGRICULTURAL 134 (1981). Berry extrapolates powerful teachings from his work as a farmer and his love of the land. Those lessons apply forcefully to legal education when understood as an ecology of justice. See *id.* at 134–45.

⁶⁰ *Grutter*, 539 U.S. at 330 (plurality opinion) (internal quotation marks omitted).

developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”⁶¹

E. 2028: Integrate the Community

Finally, the Court’s imposition of a deadline of 2028 must be considered through the lens of the substance/process distinction. The Court found in *Grutter* that the law school’s race-sensitive admission decisions met constitutional muster in those particular circumstances but, then, went on to impose a deadline on how much longer such affirmative action practices would be deemed lawful, namely until 2028. “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”⁶²

Hence, the Court’s approval of race consideration in *Grutter* was intended as an intermediate provision, a “holding pattern” as it were, giving higher education an opportunity to design and implement admission policies making racial background irrelevant. To insure that interested parties pursued a post-*Grutter* world with urgency, the Court granted affirmative action a stay of execution for only twenty-five years, for one more generation of college students and graduate students.

The Court’s use of a deadline accomplished two objectives. First, in the short term, the deadline impressed a blunt message upon all Americans concerned with race relations: “Don’t waste time! Communicate now on various interests, exploring and testing alternatives to the polarizing, divisive policy of affirmative action! Redouble the effort to shift the emphasis in affirmative action away from race as fixed substance to fluid, process-driven experiments in building inclusive communities.” *Grutter*’s long-term goal of declaring a final year for affirmative action, however, was far more ambitious. The Court suggested that the more serious Americans are about relational process and the more we understand how improvement of race relations is the primary function, if not essential purpose, of affirmative action, the more advantage we will take of race relations as a template to prepare us for even greater national and

⁶¹ *Id.*

⁶² *Id.* at 343.

worldwide struggles, thus incubating the ecology of cultural justice for future generations.⁶³

F. Parents Involved: *Squandering Grutter's Promising Approach to Affirmative Action*

In its 2007 decision in *Parents Involved*, the U.S. Supreme Court published the latest chapter on the law governing the use of race as a factor in deciding which school children could be placed in various schools.⁶⁴ In *Parents Involved*, which dealt with the use of race in admission to high school and K-12 public education, the Court deemed unconstitutional the use of race in specific placement programs employed by both the Seattle and the Louisville school districts.⁶⁵

The plurality opinion of the Court, written by Chief Justice Roberts, looked back to the Court's watershed decision in *Brown v. Board of Education* and reasoned that America's post-*Brown* narrative had no place for racially discriminatory systems in these contexts, even if motivated by benign purposes.⁶⁶ The opinion argued that both placement programs were, in effect, substance-driven, zero-sum games that focused on race as a fixed reality.⁶⁷ By merely checking a box indicating membership in one of the favored racial groups, a student jumped to the head of the line over those not belonging to those groups.

⁶³ See Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 81 (2002) ("The empowerment element of transformative mediation does not encourage individuals to obtain power to pursue selfish ends. Rather, it encourages them to take control over their lives, shed dependency and self-absorption, and exercise responsibility over their decisions and actions.").

⁶⁴ Chief Justice Roberts, writing for the majority in *Parents Involved*, wrote: "However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled 'racial diversity' or anything else." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 753 (2007) (plurality opinion). Further, he wrote, "*Grutter* itself recognized that using race simply to achieve racial balance would be 'patently unconstitutional.'" *Id.* at 740 (citation omitted). Justice Breyer wrote in dissent that "[b]oth [school] districts sought greater racial integration for educational and democratic, as well as for remedial, reasons." *Id.* at 820 (Breyer, J., dissenting).

⁶⁵ *Id.* at 747-48 (plurality opinion).

⁶⁶ *Id.* at 746-48. In a line that will surely become famous or infamous, depending on the reader's viewpoint, Chief Justice Roberts stated, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 748.

⁶⁷ *Id.* at 734-35.

Justice Breyer wrote in his dissent that America's post-*Brown* narrative can tolerate further judicial promotion of racial targets such as those advanced by the schools' placement policies because the goal of those programs is so important.⁶⁸ Justice Breyer argued that *Brown* still stands for the proposition that American justice will never wipe away permanent stains of racism, no matter how hard it scrubs, unless and until people of color are represented in colleges and professions in numbers reflecting their numbers in the general population.⁶⁹

The Court did not use this occasion to disturb or otherwise explicitly question its holding or rationale in *Grutter*. Indeed, one way to look at the *Parents Involved* decision is to say that it does not do anything to expand or limit the *Grutter* opinion. Another way to look at *Parents Involved*, however, is that both the plurality and the dissent failed miserably to build on *Grutter*'s effort to de-emphasize race as an unchangeable substance in favor of dynamic race relations. These eight Justices returned to an old question that *Grutter* ruled is no longer applicable: When is it permissible to both size up fellow Americans based on obvious, outward racial indicators and use those measurements to grant or deny educational benefits?

Justice Kennedy wrote separately in *Parents Involved* and developed a post-*Brown* narrative that avoids the trap of construing and weighing race crudely—as mere substance.⁷⁰ Kennedy's opinion instead calls upon the educational community to pursue creative efforts toward building an integrated community,⁷¹ which is to say that his rationale and decision followed the teachings of *Grutter*. On the one hand, Justice Kennedy joined the plurality of four Justices in deciding, five to four, that the placement systems before the Court were unconstitutional because they restricted public school benefits to favored racial groups lucky enough to have the right ("non-white") skin color.⁷²

On the other hand, Justice Kennedy made it clear that he could not sign the plurality opinion because it tried to recast America's post-

⁶⁸ *Id.* at 838–45 (Breyer, J., dissenting).

⁶⁹ *See id.* at 866–68.

⁷⁰ *Id.* at 792–98 (Kennedy, J., concurring).

⁷¹ *Id.* at 787–89.

⁷² *Id.* at 786 (“[The school district] has failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as ‘white,’ it has employed the crude racial categories of ‘white’ and ‘non-white’ as the basis for its assignment decisions.”).

Brown narrative as a simplistic tale of rejecting racially exclusionary practices.⁷³ Picking up where *Grutter* left off, Justice Kennedy's concurring opinion honestly sought to account for race relations in America as an epic saga of twisted, tortured moves and countermoves. While he agreed with the plurality that race programs were forbidden when based on nothing more than skin color, he concluded that affirmative action as a process-driven inclusion practice could be acceptable under the Constitution.⁷⁴ In short, Justice Kennedy insisted that the story line remains true not only to the theme of rejecting exclusion but also furthering inclusion.⁷⁵ Hence, he wrote separately to insist that the ruling in *Parents Involved* not be taken as backtracking on the nation's commitment to healing race divisions.⁷⁶ Instead, Justice Kennedy argued that America was duty-bound to encourage experimentation and creative alternatives that would bring all races together.⁷⁷ In keeping with the spirit of *Grutter*, he suggested practical strategies and initiatives for ending racial isolation and self-segregation in K-12 education.⁷⁸

IV

A LAW SCHOOL CLINIC TURNING CULTURAL DIVERSITY INTO THE ECOLOGY OF CULTURAL JUSTICE: AFFIRMATIVE ACTION AS INTEGRATIVE BARGAINING

I have argued so far that there is a substance/process distinction embedded in *Grutter*'s plurality opinion that presents an opportunity to refashion the post-*Brown* narrative of affirmative action as a process-based alternative, one that emphasizes race relations among all students. How far might *Grutter* take us in this direction? Were

⁷³ *Id.* at 787–88. Justice Kennedy contended:

The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. . . . To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

Id.

⁷⁴ *Id.* at 786–91.

⁷⁵ *Id.* at 797 (“This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”).

⁷⁶ *Id.* at 797–98.

⁷⁷ *Id.*

⁷⁸ *Id.* at 788–90.

we to capture the full promise of *Grutter* by 2028, what would affirmative action look like reformatted as an expression of integrative bargaining?⁷⁹

In this section, I give the process-driven form of affirmative action a name: the ecology of cultural justice. The quest is to move beyond cultural diversity as a strategy that focuses too narrowly on race per se. Instead, the new mission is one of cultural justice, forging community bonds between and among both those who honor and respect historical race classifications and those who celebrate the emerging polyglot American resident as a world citizen. Cultural justice looks to everyone to do their part for improving public health and safety for all Americans and holds everyone accountable through well-designed opportunities for collaboration and service.

After the *Grutter* ruling in 2003, I designed a multi-year curriculum combining in-class academics with clinical application to put the full promise of *Grutter* to the test. To what degree was *Grutter* prescient in foreseeing that affirmative action could become a process-driven quest to incubate the ecology of cultural justice by 2028?⁸⁰ The following case study presents my ongoing attempt since 2004 to offer law school courses in integrationist studies and practice at Brigham Young University Law School. Using this curriculum, I have taught students from their first through third year of law school to examine the connection between K-12 public education and the juvenile justice system from the perspective of law and social policy. Specifically, these students have been engaging in legal analysis of, and clinical intervention into, questions and practices such as these: When is a schoolhouse too much like a jailhouse, turning K-12 education into a satellite system of juvenile justice without the requisite legal due process?⁸¹ At what point do schools pursue

⁷⁹ See generally Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75 (2002) (describing the limitations that the traditional law school teaching style and learning environment imposes on students, in part, by diminishing student enthusiasm and empathy).

⁸⁰ These courses include a first-year course in Problem Solving for Equal Justice and a second- and third-year course in Community Lawyering.

⁸¹ According to a recent study by the Office of Juvenile Justice and Delinquency Prevention, the number of delinquency cases involving detention increased eleven percent between 1990 and 1999. James Austin, Kelly Dedel Johnson & Ronald Weitzer, *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, JUV. JUST. BULL. (U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Programs, Wash., D.C.), Sept. 2005, at 2, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf>. Another highly reputable nationwide study conducted by the Annie E. Casey Foundation, called the Juvenile Detention Alternatives Initiative (JDAI), found that between 1985 and

correctional policies at the expense of their educational mission? When is it fair to recast truants and, later, school drop-outs, as school “push-outs” because of a school’s overly zealous enforcement of No Child Left Behind, zero-tolerance policies, and other pernicious public policies?⁸² Assuming schools refer push-outs to a juvenile detention facility, how will those youth, along with their families, learn of the federal right to public education and the statutory and constitutional protections that safeguard liberty interests and custodial rights of parents?⁸³

A. *The Ecology of Cultural Justice: Who Else Is at Risk?*

As one may realize from the foregoing description of my clinical intervention into K-12 public education and juvenile detention practices, there is no mention of correcting either overt or subtle discrimination against any racial groups in particular. It is tempting to do so since youth of color make up a vastly disproportionate

1995 the number of youth placed in secure confinement on an average day increased by seventy-four percent. ROCHELLE STANFIELD, ANNIE E. CASEY FOUND., *THE JDAI STORY: BUILDING A BETTER JUVENILE DETENTION SYSTEM* 6 (1999), available at <http://www.aecf.org/upload/PublicationFiles/jdai%20story.pdf>. The JDAI also found that less than one-third of juvenile offenders were detained for committing a violent crime. *Id.*

⁸² When I first learned of these cases regarding allegations of misdemeanors, stacked charges, and referral to detention, I could not understand why school-based discipline, such as suspension, was not an intermediate step until evidence could be gathered and weighed and the determination made whether any punishment was justified. If the child presents no threat of physical harm or violence at school, why even resort to a short-term suspension, let alone impose the ultimate form of restraint, especially when we educate children that, under our system of justice, we are innocent until proven guilty? Has the criminal law enforcement paradigm become so integrated in public schooling that it has corrupted the education paradigm? See generally ADVANCEMENT PROJECT, *EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK* (2005); AUGUSTINA H. REYES, *DISCIPLINE, ACHIEVEMENT, AND RACE: IS ZERO TOLERANCE THE ANSWER?* (2006); Marilyn Elias, *At Schools, Less Tolerance for ‘Zero Tolerance,’* USA TODAY, Aug. 10, 2006, at 6D, available at http://www.usatoday.com/news/education/2006-08-09-zero-tolerance_x.htm.

⁸³ For further discussion of the problem, see Bart Lubow, Senior Assoc., Annie E. Casey Found., *Reducing Inappropriate Detention: A Focus on the Role of Defense Attorneys*, Remarks at the 10th Annual Juvenile Law and Education Seminar (June 24, 2005), in 11 JUV. JUST. UPDATE, Aug./Sept. 2005, at 1 (Civic Research Institute, New York, N.Y.). Although juvenile delinquency hearings need not conform with all the requirements of a criminal trial, “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). “The standard provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’” *Id.* at 363.

percentage of truants, drop-outs, push-outs, and juvenile delinquents.⁸⁴ Instead, our clinical focus is on protecting and improving the welfare of all youth. My students and I get as many different parties to ask themselves to what degree they are impacted when educational or correctional polices deny any student a fair chance at a quality education, graduating from high school, perhaps pursuing college, and growing into a contributing member of society.

The broad-based inquiry of “who else is at risk” elicits voices from all segments of the local population, particularly those who have been silent and ignored, and makes the most of their input and suggestions. Children and parents who have not otherwise been given a true opportunity to be heard are placed in the role of community teachers. For example, poorer families have made it known that they cannot afford to take their children to the doctor to get a formal medical note to excuse an absence as required by a school’s truancy policy. Encouraged by other parents who are similarly unable to satisfy the requirement of a doctor’s note, these families have pressed for a simple review process maintained by a group of parents to determine the legitimacy of the family’s petition for a medical excuse.

By asking “who else,” one also enlists help from a full cross-section of community members, including a wide variety of powerful “movers and shakers,” making more resources available to increase graduation rates and decrease truancy. An illustration of this is internships and apprenticeships from employers willing to give career guidance to poor children. In this way, affirmative action does not dwell on which race classifications ought to be given extra assistance, but rather becomes an exercise of community-based problem solving. The expansive focus on race relations is everyone’s concern and, thus, it promotes positive, sustainable relationships among diverse people—i.e., the ecology of cultural justice—and not just another

⁸⁴ See Juvenile Def. Network, Disproportionate Minority Contact (DMC), <http://www.youthadvocacyproject.org/JDN%20DMC.htm> (last visited Sept. 19, 2009) (“In Massachusetts, children of color represent just 28 percent of the youth population. Yet minorities comprise 56 percent of those committed to [detention], 62 percent of those excluded from school, 73 percent of those charged as adults in juvenile court, and an alarming 77 percent of those confined to secure residential facilities.”); Juvenile Rehab. Admin., Wash. State Dep’t of Soc. & Health Servs., Disproportionate Minority Confinement, <http://www1.dshs.wa.gov/jra/facts/minority.shtml> (last visited Nov. 9, 2009) (“[In the State of Washington,] youth of color account for approximately 45% of [detention] population [on any given day]. This is almost twice the proportion of youth of color in Washington State.”). See generally Office of Juvenile Justice and Delinquency Prevention, Disproportionate Minority Contact: About DMC, <http://ojjdp.ncjrs.gov/dmc/about.html> (last visited Nov. 9, 2009).

“coalition” to force outward substantive change.⁸⁵ This newfound collaboration fulfills the true agenda of affirmative action: it redounds to the benefit of all youth but especially helps children who are immigrant, poor, and of color.

It is worth noting that an aspect of this bargaining strategy, called interest convergence, has been questioned and, at times, excoriated by various commentators, including legal scholars of color that I highly esteem, notably Professors Derrick Bell⁸⁶ and Richard Delgado.⁸⁷ They and others are skeptical about the benefits of this community-negotiation principle, arguing that those in power can employ it as a manipulative, convenient tool, whether intentionally or not, to keep the “natives happy.”⁸⁸ These scholars contend that the white power establishment exploits interest convergence to strike a public bargain—say, the rulings in *Brown* or *Hernandez v. Texas*⁸⁹—that appears to improve the welfare of minority people when it actually does far more to reinforce their subjugation and prop up the reigning imbalance of power.⁹⁰

My view is that interest convergence has been given a “bad rap” by these scholars because they focus narrowly on when and how interest convergence is used. Interest convergence is not an end in itself and certainly not the final stage of progressive public policy negotiation. It is merely the first step of integrative bargaining, an attempt to reveal and sort out diverse interests and competing post-*Brown* narratives. Interest convergence encompasses an initial stage of deliberately listening to those who have been silent and then constructing dialogue among those who have not enjoyed productive exchange of views. When it is consciously and optimally employed

⁸⁵ One of the worst-kept secrets is the rampant mistrust between and among minority communities and their organizations when forming coalitions. See NEW AMERICA MEDIA, DEEP DIVISIONS, SHARED DESTINY: A POLL OF BLACK, HISPANIC, AND ASIAN AMERICANS ON RACE RELATIONS (2007), http://news.newamericamedia.org/news/view_article.html?article_id=28501933d0e5c5344b21f9640dc13754.

⁸⁶ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”).

⁸⁷ See Richard Delgado, *Rodrigo’s Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23 (2006).

⁸⁸ See George H. Taylor, *Racism as “The Nation’s Crucial Sin”: Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269, 277 (2004) (“Whites deal with racial issues by ultimately protecting their property right in Whiteness: they act not out of altruism or morality but in self-interest.”).

⁸⁹ 347 U.S. 475 (1954).

⁹⁰ Bell, Jr., *supra* note 86.

in anticipation of a series of developments, interest convergence is the opportunity for diverse Americans to head off in a new direction. So long as it is understood and used as a transition, there is no reason to deny that everyone, including those in power, wants to improve their position relative to others and take greater advantage of available resources.

For that reason, when my law students and I attend various community and public meetings to recruit new community partners for integrative bargaining, we engender a relational process that appeals to a wide variety of interests. For some in the audience, the key consideration is a cost-benefit analysis, a cold calculation of saving money that taxpayers will otherwise have to waste on truants, push-outs, or juvenile delinquents. But for others, the driving concern is the quality of K-12 education for their own children or, more generally, the negative impact of troubled youth and gangs on public health and safety. For others, it is the noble dream of dignifying and redeeming every young life. Whatever the initial motivation for joining the campaign, my students and I make it clear that our goal is not simply helping certain targeted racial groups (cultural diversity), but the all-embracing cause of public health and public safety (cultural justice).

Thus, whether interest convergence is seen nobly, as a way to improve and develop the human family, or as one more tool to satisfy selfish, unmitigated greed, it is a starting point for integrative bargaining that honestly accounts for the human impulse to get more return from the effort we currently expend.⁹¹

B. The Ecology of Cultural Justice: "What More Is at Stake?"

In the K-12 clinical intervention, my students and I do not listen just for the easiest, fastest way to settle the immediate dispute over a child's suspension, expulsion, or placement in a juvenile detention facility. Instead, we ask, "What more is at stake?" This second stage of integrative bargaining has forged a plan of action that solves problems not only as constructed in the immediate timeframe, but also with a view toward solving the trend or larger pattern of

⁹¹ See Charles B. Craver, *The Negotiation Process*, 27 AM. J. TRIAL ADVOC. 271 (2003) (Professor Craver has long taught that we should expect parties to act opportunistically, looking to exploit perceived advantages in bargaining power, skills, timing, and so on. The better we understand and account for the psychology of the negotiator's starting point, the more room we create to negotiate better outcomes for all parties.).

problems in the short- and long-term. Beyond deriving a satisfactory substantive settlement on the presenting issue, the community also strives to sustain the development of relational process by making sure that we learn from the present issue how to treat a cluster of related concerns. In short, my students and I used integrative bargaining to deal with immediate, obvious issues—truancy remediation and reform of juvenile-detention practices—to teach affected parties how to prepare for even greater difficulties in the short- and long-term.

An example of the second stage of integrative bargaining involves a community's investigation of chronic, systemic conditions giving rise to episodes of truancy and juvenile delinquency. The immediate problem appeared to be nothing more than isolated cases of absenteeism, with a number of these cases resulting in placement in a juvenile detention facility.⁹² But no sooner did the parties try to "fix" the problem with, for example, new school schedules, alarm clocks, and written contracts than they saw how truancy is often connected to deeper issues, namely a child's fear of both being physically assaulted at school and racial isolation and self-segregation in the form of cliques, gangs, drug use, curfew violations, and other juvenile status offenses.⁹³

To solve for this pattern in the short-term, the community came together and decided to experiment.⁹⁴ My students and I, in partnership with the regional public university, appealed to a countywide organization dedicated to dispute resolution to arrange for an event that would impress upon high-risk students their need to accept responsibility in creating a spirit of inclusion at school and in society. To this end, Challenge Day was invited to stage its one-day

⁹² See David Dominguez, *Equal Justice from a New Perspective: The Need for a First-Year Clinical Course on Public Interest Mediation*, 2006 UTAH L. REV. 995, 998–1001 (2006) (describing truancy intervention in the Provo School District, Provo, Utah).

⁹³ See *id.* at 1009.

⁹⁴ Notably, the Provo City Police Department has been very supportive of a broad-based community effort including the business and educational sectors, explaining:

[Solving such problems as truancy and gangs] involves everyone.

....

... I have seen the racial tensions in school. There needs to be a way of educating kids to be tolerant of other people and if there is a serious problem that cannot be tolerated, the students need to know how to resolve their conflicts without resorting to violence.

Letter from Chet Whatcott, Police Officer, Provo City Police Dep't (on file with author).

program for the entire student body at an alternative high school, but, instead of the customary one-day effort, Challenge Day was extended to three “Challenge Days” so that all the teenagers could participate. Our message to these high school students was not limited to the hardship faced by certain students of particular racial classifications who were struggling with isolation and discriminatory practices. Instead, our message was that they were all needed to incubate the ecology of cultural justice among all students.

Challenge Day opened the eyes of the students to see that they were all responsible for group accountability and group recognition. They possessed the power to end bullying, belittling, isolation, and any other injurious behavior that makes life at school unsafe and unwelcoming. The event resulted in healing and transformation among three hundred high school students, which comprised the entire student body. These young people forgave, asked to be forgiven, and resolved to create healthy, inclusive, and life-affirming interactions at school.

To solve for this pattern in the long-term, my students and I turned our eyes to an untapped resource for growing the ecology of cultural justice among all children at risk: the detention staff at the juvenile correctional center. For over three years, I have led teams of law students into the juvenile jailhouse to correct the improper and inordinate use of detention for preadjudicated youth. Our goal, as far as micro application, has been to intervene in specific cases with the intention of reporting our experiences to each other, interested parties, and public audiences, and thereby engage the community in a new effort to improve the public policy and institutional decision making that governs juvenile detention practices. For example, when does it make sense, legally and practically, to lock up a child based on accusations of low-level juvenile status offenses and minor juvenile infractions—e.g., truancy, smoking, curfew violations, loud music, or pushing and shoving at school?⁹⁵

⁹⁵ For a full account of this clinical effort, see David Dominguez, *Community Lawyering in the Juvenile Cellblock: Creative Uses of Legal Problem Solving to Reconcile Competing Narratives on Prosecutorial Abuse, Juvenile Criminality, and Public Safety*, 2007 J. DISP. RESOL. 387 (2007). The clinic has achieved appropriate short-term outcomes in particular situations, helping specific kids and their families with their legal cases in the detention phase of the juvenile justice system. Law students have helped detention judges vindicate the U.S. Constitution, the Utah Constitution, and state codes and statutes that govern detention practice and policy—e.g., legal protections of children’s liberty interests and parents’ custodial rights. See *id.* at 395–96.

At the macro level, our long-term objective has been to improve public policy and institutional decision making concerning detention practices. To this end, my students and I are training detention staff to make the most of their professional role before, during, and after detention hearings. We are helping them pursue needed structural reform that ensures appropriate use of, and legal justification for, extended stays in secure confinement.

As was true for the intense interactive sessions of Challenge Day, we too use a mix of large group presentations, called “Youth and the Law” seminars, with small group discussions on how detainees can help each other advocate for their release. These children in detention, representing all races, but predominately poor and disproportionately Latino, learn that unless they work together to develop the best case for release and reentry into family and school, they will be unlikely to make the most of their time in detention or before the judge. This very practical lesson in collaboration among diverse children instills the lasting importance of reaching across the cultural divide to succeed in America—the same message of Challenge Day.⁹⁶

With regard to interest convergence, the detention staff sees this new, collaborative approach as furthering institutional interests in maintaining order, control, and safety. To this end, during the large and small group activities, staff members deeply impress upon residents the importance of following rules, respecting persons and property, etc. For the children, greater attention and sustained engagement by staff means that the staff is accountable for informed recommendations to the detention judge on whether a detainee is making progress on the unit and demonstrating suitability for release.

The ambitious goal of this partnership is to legally empower detention staff to eliminate unnecessary stays in detention by immediately resolving minor, front-end cases through nonjudicial closure, without the need for an official detention hearing. Staff would be given discretion to release certain detainees based in part on certification of the child’s satisfactory participation in the large group presentation and small group activities. In harder cases, staff would, at minimum, be included in the disposition of the matter and asked for

⁹⁶ Thus, as a strategy for pursuing integration of the issues (“What more is at stake?”), Challenge Day has given rise to Challenge Year (short-term developments, such as direct services to children in detention) and planning for Challenge Decade (long-range reconstruction of the role of detention staff at the juvenile detention facility).

their input on whether a particular placement or diversionary program would be a good fit for a particular resident.

The goal of our collaboration, therefore, is both to serve residents (the micro application) and to engage in systemic reform by capitalizing on the problem-solving resource of detention staff, encouraging them to use their 24/7 access to residents as a key resource in affording legal due process throughout the system (the macro application).

C. The Ecology of Cultural Justice: Activist Storytelling and Public Interest Mediation

I have argued that the treatment of race issues must serve as a training ground to prepare Americans for even more difficult, pervasive public concerns. With this in mind, our emerging partnerships with detention staff are not restricted to collaboration on providing legal due process for all detainees. Rather, our focus is gearing up to address a matter of even graver concern nationwide: the juvenile justice system is becoming so much like the adult criminal justice system that it is losing its justification as a separate entity. Growing numbers of youth, some who are only fourteen, are waived into adult criminal court, and the judge has limited discretion as to whether that is in the best interest of the child.⁹⁷ Other youth, as young as five, are getting arrested at school and placed in detention, in accordance with mandatory school rules, for carrying water squirt guns or scratching words on their desks.⁹⁸ As counterproductive as those policies are, the worst part is that, while more children are being apprehended and punished as though they are in mature command of what is right and wrong, they are not provided bail, trial by jury, and

⁹⁷ See Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 FUTURE CHILD. 81, 83, 87 tbl.2 (2008), available at http://futureofchildren.org/futureofchildren/publications/docs/18_02_05.pdf. In states, such as Utah, where there is a Serious Youth Offender Act, the law eliminates judicial discretion altogether in certain circumstances and requires that the accused youth offender be placed in the adult system for trial and punishment if charged with very serious criminal conduct. UTAH CODE ANN. § 78-6-702 (West 2009). A current Utah case is challenging the constitutionality of the Serious Youth Offender Act as a fundamental denial of legal due process, basically denying the child the opportunity to demonstrate the unfairness of being placed in the adult criminal justice system. See Stephen Hunt, *Teen Murder Suspect Can Be Tried as Adult, Judge Rules*, SALT LAKE TRIB., June 15, 2009, available at http://www.sltrib.com/news/ci_12595714?source=rss.

⁹⁸ David Goodman, *Hard Time Out*, MOTHER JONES, July/Aug. 2008, at 59, available at <http://www.motherjones.com/politics/2008/07/hard-time-out>.

other protections afforded to adults under the U.S. Constitution. Plainly, the evaporating boundary between adult criminal court and juvenile justice results in the children getting the worst of both worlds. This is a matter deserving activist storytelling and public interest mediation before the widest audience.

And who better to broadcast that story than those most affected, school children in general and youth of color in particular? The most ambitious aim of our partnership with detention staff is that detainees see themselves cast in a new role as peer teachers while in detention and then, upon returning to school, will prove they are promoting integration through group accountability. For example, with cooperation from school administration, detainees will be expected to reenact sections of the large group “Youth and Law” presentation, the small group activity that they helped conduct while in detention, or both. To increase the incentive for the returning student to satisfy these expectations, there would be a provision that pending charges will either be dismissed altogether, held in abeyance, or classified in less severe posture—e.g., the charge would be dismissed altogether or reduced, pending completion of probation. In effect, detainees would be offered a new sentencing matrix that is dependent on how well they learn their group-accountability lessons in detention and fulfill the “back-at-school” component of their probation conditions.

The demand of this new public campaign cannot be stated strongly enough: the boundary between the adult and the juvenile justice systems must be restored. Children must be given a second chance whenever possible. While adults spend time in jail as punishment for their crime, children must be able to use their time in detention not only to “do the time,” but also to develop both new training and skills in integrative practices and new competency regarding positive collaboration—i.e., the very purpose of a separate juvenile justice system. As concerned activists avail themselves of all resources in this campaign to restore the proper boundary, among the principal advocates must be the children themselves, notably children of color.

CONCLUSION

This Article reflects an American parable where the professional—negotiation theory and the law governing race and race relations—meets the personal—the post-*Brown* narrative arc of my life. Combining the two, I have offered a grand strategy for reformatting affirmative action: a strategy combining integrative bargaining in general and the merits of the process/substance distinction in

particular. For affirmative action to be legally and politically viable, it must be race-neutral, admitting and training law students from all backgrounds. It must provide law school clinical courses in integrationist studies and practices that teach students how to negotiate among culturally diverse parties to reach substantive goals while also growing in relational understanding and appreciation of pluralism in America.

Yet most law schools are in denial and refuse to accept the impending legal reality that affirmative action must be race-neutral by 2028. Too many actors in legal education are hoping that, in the next twenty years, the “plus factor” rationale of *Bakke* will somehow regain vitality through the appointment of new Justices to the U.S. Supreme Court. This is wishful thinking. It is better for law schools to accept the legal, political, and social reality that race preference is coming to an end. Doing so will force law teachers to pursue a twenty-first century curriculum that turns cultural diversity from static numbers of minority students sitting in classrooms into the interactive ecology of cultural justice. America needs an educational policy that meets head-on the impending legal deadline on affirmative action as we know it. More than teaching abstract law on desegregation, law schools must offer clinical courses that train students from all backgrounds to build an inclusive, integrated American society.

I have tried to show how important it is for law schools to stop taking sides in the end/defend debate and instead choose to extend affirmative action to all applicants who are ready and willing to complete law school clinical courses in integrationist studies and practice. Specifically, I have explained how my students have tested this approach to affirmative action in relation to school truancy policies and juvenile detention practices. My students and I have motivated parties, often erstwhile strangers, to collaborate in their care for all youth. The welfare of children has presented an opportunity where all parties’ needs and concerns converge, and, thus, a new dialogue and exploration of agreements occurs that leaves everyone better off.

But this Article is more than a thought piece on racial inclusion; it is a call for immediate action in legal education. Legal educators, law students, and all others concerned with the future of affirmative action dare not dither as we compare macro theories or grand constructs. We need to get busy, stepping up our commitment to engage law students in thousands of mini-exchanges as multicultural Americans.

We need to increase their availability to each other in clinical courses, not just develop more academic strategies.

And it is urgent that we do so. There is not much time left to design a race-neutral approach to affirmative action that is acceptable to the Constitution and the nation as a whole. As Justice O'Connor stated in *Grutter*, "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."⁹⁹

Indeed, students of all ages, especially children, deserve the best education we can give toward improving race relations in America. They deserve a learning environment with a pervasive commitment to integrationist studies and practice, one that is keenly aware of the need in the twenty-first century to reach across cultural divides. K-12 and higher education must teach the next generation the real story and interpersonal skills to craft the most inclusive possible version of the post-*Brown* narrative.

Are we proceeding with all deliberate speed?

⁹⁹ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).